2007

The Use and Misuse of Secret Evidence in Immigration Cases: A Comparative Study of the United States, Canada, and the United Kingdom

Stephen Townley

Follow this and additional works at: http://digitalcommons.law.yale.edu/yjil

Part of the Law Commons

Recommended Citation

Available at: http://digitalcommons.law.yale.edu/yjil/vol32/iss1/6

This Article is brought to you for free and open access by Yale Law School Legal Scholarship Repository. It has been accepted for inclusion in Yale Journal of International Law by an authorized administrator of Yale Law School Legal Scholarship Repository. For more information, please contact julian.aiken@yale.edu.
Note

The Use and Misuse of Secret Evidence in Immigration Cases: A Comparative Study of the United States, Canada, and the United Kingdom

Stephen Townley†

I. INTRODUCTION ........................................................................................................................... 219

II. THE COMPARISON: THE USE OF SECRET EVIDENCE IN IMMIGRATION CASES IN THE UNITED STATES, CANADA, AND THE UNITED KINGDOM ........................................................................ 223
   A. Criminal Law .................................................................................................................. 223
      1. Anonymous Witnesses ................................................................................................. 223
      2. Information Withheld ................................................................................................... 225
   B. Immigration Law ............................................................................................................ 227
      1. Removing Legal Aliens ................................................................................................. 227
      2. Illegal Aliens ................................................................................................................ 229
   C. Conclusions ..................................................................................................................... 232

III. MOTIVE ANALYSIS ...................................................................................................................... 234
   A. Policing the Civil-Criminal Line in the United States, Canada, and the United Kingdom. ........................................................................................................ 235
   B. Attending to—and Ignoring—Motive .............................................................................. 236
   C. Explanations for the Difference ..................................................................................... 239
      1. History and Current Events ........................................................................................ 240
      2. Structure of Government ............................................................................................. 241
      3. International Law ........................................................................................................ 243
      4. Conclusion ................................................................................................................... 244

IV. NEW WAYS TO GOVERN SECRET EVIDENCE ............................................................................ 244
   A. Two Solutions to the Secret Evidence Problem .............................................................. 245
      1. Motive Analysis ......................................................................................................... 245
      2. A Legislative Fix ......................................................................................................... 247
   B. The Weakness of the Due Process Clause Argument ...................................................... 249
      1. Legal Weakness ........................................................................................................... 249
      2. Normative Weakness ................................................................................................. 251

V. CONCLUSION ................................................................................................................................ 253

I. INTRODUCTION

Secrecy is a hot topic.1 In particular, scholars and pundits have begun to fill the pages of law reviews and newspapers with their arguments about the

† Yale Law School, J.D. 2006. Yale College, B.A. 2002. Thanks to Professors Alec Stone Sweet and Jim Whitman for their help and guidance. Special thanks to Professor Peter Schuck for all his assistance in developing this Note, from outline to final product. Many thanks also to the staff of The Yale Journal of International Law, especially Kate Fletcher, for their editorial suggestions. Finally, as always, I am grateful to and for my family and Amanda Aikman.
extent to which the government should use secret evidence in legal proceedings. On the one hand, the government's conduct of the Combatant Status Review Tribunals and the rules of procedure it has promulgated for the military commissions at Guantanamo Bay have provoked complaints, as did the government's refusal to permit Zacarias Moussaoui access to certain terrorist witnesses detained abroad. On the other hand, many accept that the government may adduce secret evidence to justify blocking the assets of a charity that supports terrorism.

For several reasons, the propriety of using secret evidence in immigration cases has been a subject of particular dispute. First, the press has disclosed that some number of immigration cases have gone awry because the government relied on inaccurate secret evidence. Second, when and how the immigration services use secret evidence is well known. Third, courts assessing the legality of secret evidence in other contexts often reason by

---


2. I define secret evidence as: "evidence used to prove the Government's case ... [that is not] disclosed to the individual." Greaney v. McElroy, 360 U.S. 474, 496 (1959). Within that category I include both "confidential" and "national security" information. By "national security" information, I mean any information that is properly classified as SECRET or TOP SECRET. See Exec. Order No. 13,292, 3 C.F.R. 196, 196-97 (2003).

3. For a summary of the ways in which the government has sought to use secret evidence since the attacks of September 11, see Philip B. Heymann & Juliette N. Kayyem, Protecting Liberty in an Age of Terror (2005); Tracy L. Conn, The Use of Secret Evidence by Government Lawyers: Balancing Defendants' Rights with National Security Concerns, 52 CLEV. ST. L. REV. 571 (2004); Ellen Yaroshefsky, Secret Evidence is Slowly Eroding the Adversary System: CIPA and FISA in the Courts, 34 HOFSTRA L. REV. 1063 (2006); Note, Secret Evidence in the War on Terror, 118 HARV. L. REV. 1962 (2005).


7. See 50 U.S.C. § 1702(c) (Supp. I 2001); Holy Land Found. for Relief & Dev. v. Ashcroft, 333 F.3d 156, 164 (D.C. Cir. 2003); Global Relief Found. v. O'Neill, 315 F.3d 748, 754 (7th Cir. 2002). Many also believe that the government may use secret evidence to justify denying certain passengers the right to board commercial aircraft. See, e.g., Justin Florence, Note, Making the No Fly List Fly: A Due Process Model for Terrorist Watchlists, 115 YALE L.J. 2148, 2167-71 (2006) (suggesting that the government provide a traveler whom it wishes to add to the terrorist watchlist with compensatory counsel able to see the secret evidence adduced against the traveler).


analogies to immigration practice. Finally, and most importantly, because immigration law has become an antiterrorism tool, the government relies most often on secret evidence in immigration cases. Indeed, in the words of the U.N. Security Council, the United States believes that "effective border controls" may prevent terrorism.

I offer a fresh perspective on this running argument. While others have either excoriated or praised the government's use of secret evidence in immigration cases, no one has asked my question: Regardless of whether or not such use of secret evidence is "fair" or "unfair" in the abstract, to what extent is immigration procedure in tension with criminal procedure—that is, how broad has the gap between immigration law and criminal law become? To answer this question, I examine comparable Canadian and United Kingdom rules governing both immigration cases and criminal cases. From

10. See Note, supra note 3, at 1967-71. Indeed, the justifications the government has offered for its reliance on secret evidence before the Guantanamo military commissions—the President's authority over foreign affairs and the legal inability of certain groups to claim the protections of our Constitution—are quite familiar from immigration law. Compare Brief for the Respondents in Opposition to Certiorari at 19 n.11, Hamdan v. Rumsfeld, No. 05-184 (S. Ct. 2005), available at http://www.law.georgetown.edu/faculty/nkk/documents/HamdanBrief.opp.pdf with Landon v. Plascencia, 459 U.S. 21, 34 (1982), and Fong Yue Ting v. United States, 149 U.S. 698, 734 (1893).


12. See infra text accompanying notes 127-129.


an impressionistic survey of those rules, I tentatively conclude that Canada and the United Kingdom, nations less committed, in the abstract, to procedural due process than the United States, 18 and hence usually less willing to require disclosure of secret evidence to criminal defendants, 19 nevertheless circumscribe and monitor the use of secret evidence in immigration cases comparatively thoroughly. In other words, there is a tighter proportional relationship between the rules governing immigration cases and the rules governing criminal cases in Canada and the United Kingdom than there is in the United States. I also offer an explanation for this difference: The U.S. rules governing secret evidence in immigration cases diverge so dramatically from their criminal equivalents because U.S. courts, unlike their Canadian and U.K. counterparts, have not asked whether the government is invoking immigration law as a pretext, as a way to justify detention and interrogation without having to make its case in court. 20 Although they are adept at ‘smoking out’ illegitimate motives, 21 U.S. courts have refused to ask whether the government may be concealing evidence from defendants for inappropriate reasons, 22 and this refusal has permitted the gap between immigration law and criminal law to grow comparatively wide.

This Note proceeds in four parts. In Part II, I present my puzzle: Canadian and U.K. courts are at once more tolerant of secret evidence in criminal cases than are U.S. courts, and yet they are more willing to let non-citizens see such evidence in immigration cases than are courts in the United States. I also offer an explanation: The United States is using immigration law as a pretext. It has not had to develop rules for trying terrorists because it has

---


19. See infra Part II.B.


been able to use the secret evidence permitted by immigration law to justify suspected terrorists' detention and interrogation. By contrast, Canada and the United Kingdom have promulgated laws and developed legal doctrines to govern the incarceration and investigation of terrorists. In Part III, I explore how this came to pass. I argue that although courts in the United States, Canada, and the United Kingdom all distinguish civil (and immigration) law enforcement from criminal law enforcement, U.S. courts appear to have elided this distinction when it comes to the treatment of immigrant-terrorists. In Part III, I also present and assess three theories that might plausibly explain why Canadian and U.K. courts better police the line between immigration law and criminal law than U.S. courts do. Although I find none of the three theories fully persuasive, I draw upon them in Part IV to suggest a new strategy for those who wish U.S. courts to impose greater procedural constraints on the U.S. government. In that Part, I first describe a set of judicial and congressional solutions to the problems the use of secret evidence poses, and then highlight why my solutions are more feasible than is the current approach—claiming that the use of secret evidence in immigration proceedings violates the Due Process Clause. In Part V, I offer a brief conclusion.

II. THE COMPARISON: THE USE OF SECRET EVIDENCE IN IMMIGRATION CASES IN THE UNITED STATES, CANADA, AND THE UNITED KINGDOM

A. Criminal Law

1. Anonymous Witnesses

Courts in both Canada and the United Kingdom permit the government to call anonymous witnesses. Sometimes informants (and, in the United Kingdom, members of the intelligence agency MI5) testify from behind...
screens or using voice scramblers. On other occasions, the government may present affidavits at trial, with the names of the affiants redacted.

By contrast, in the United States, the use of screens or scramblers is nearly always forbidden. As the Supreme Court explained in United States v. Smith, "[t]he witness’ name and address open countless avenues of in-court examination . . . . To forbid this most rudimentary inquiry . . . is effectively to emasculate the right of cross-examination itself." The only substantial exception is for children bringing abuse charges. Indeed, the government has conceded in at least one recent case that it may not be able to protect the identity of valuable, confidential informants at trial.

Moreover, in Canada and the United Kingdom, if the government does not wish to use an informant’s testimony in court, the defendant can rarely discover his identity (even if, for instance, knowing the informant’s identity might help him impeach the credibility of other government witnesses). On the other hand, in the United States, where an informant’s identity might be “relevant and helpful” to a defendant, the Supreme Court requires its disclosure. As one U.S. court has noted, “the defendant is generally able to establish a right to disclosure . . . .”

This same pattern holds when the government wishes to use informants to persuade a court to deny bail or discretionary relief from extradition. For instance, in R. ex parte Al-Fawwaz v. Governor of Brixton Prison, a British court found, “CS/1 [a confidential informant] claims to have been directly involved in the conspiracy and to be in mortal fear by reason of his cooperation with the authorities. He needs anonymity at this stage.”

30. See Maryland v. Craig, 497 U.S. 836 (1990); cf. Alison Harvison Young, Child Sexual Abuse and the Law of Evidence: Some Current Canadian Issues, 11 CAN. J. FAM. L. 11, 30 n.57 (1992) ("[C]anadian courts are less willing to see these provisions [permitting the government to rely on secret evidence during sexual abuse trials] as constituting violations of the accused’s constitutional rights than their American counterparts . . . .").
31. See Reply Memorandum of Points and Authorities in Support of Motion to Compel Production of Discovery at 1-2, United States v. Lindh, 212 F. Supp. 2d 541 (E.D. Va. 2002) (CR no. 02-37-A) (accepting that Confidential Source 1 “may be required to testify under [his] true name . . . .”).
34. United States v. Saa, 859 F.2d 1067, 1073 (2d Cir. 1988) (emphasis added); see also United States v. Smith, 780 F.2d 1102, 1107 (4th Cir. 1985).
2. Information Withheld

Courts in both Canada and the United Kingdom permit the government to use secret, documentary evidence in two ways. First, it may use it offensively—to prove its case-in-chief. In Canada, for instance, the government may certify that it believes, on the basis of secret information, that a charity has engaged in terrorist activity. A judge must then review the evidence on which the government has relied, but that judge need only provide the charity and its representatives “with a reasonable opportunity to be heard” and need not disclose the information the government has presented in camera (it only need provide a “statement summarizing the information”).

By contrast, in the United States, the comparable law has been interpreted by the D.C. Circuit to require affording charities suspected of terrorist activity a fuller opportunity to present evidence.

Likewise, the government may use secret evidence to buttress its position in disputes ancillary to the main course of the criminal trial. For instance, courts in Canada and the United Kingdom permit the use of secret evidence during inquests by coroners or at committal hearings. Yet in the United States, it is only occasionally and with considerable reluctance that courts allow the government to introduce confidential information during bail hearings.

Second, Canadian and U.K. courts also permit the government to use secret evidence defensively by denying defendants access to potentially exculpatory secret, documentary evidence. Both Canada and the United Kingdom have analogues to the Brady rule, which requires the government to hand over any exculpatory evidence it may possess. Yet prosecutors in both countries may withhold evidence, both under statute and by claiming “public concern.”

---


37. Id. at 328-29.


41. See, e.g., United States v. Abuhamra, 389 F.3d 309, 314 (2d Cir. 2004); see also United States v. Accetturo, 783 F.2d 382, 391 (3d Cir. 1986); United States v. Wind, 527 F.2d 672, 676 (6th Cir. 1975).


interest immunity," a common law privilege against disclosure. In both Canada and the United Kingdom, the Crown may claim public interest immunity for entire classes of documents, and the prosecution team need not always disclose evidence held by other branches of government. By contrast, in the United States, the prosecution may not rely on blanket assertions of privilege nor shirk its duty to disclose if the information sought is held by other agencies.

To give one example, in R v. H., a U.K. court considered how to respond to "defence requests that the Crown provide evidence that the appropriate authorities had been obtained . . . for . . . surveillance." The Crown claimed public interest immunity. In a similar Canadian case, the court refused to permit the defense full access to the evidence the government had relied upon to obtain permission to engage in surveillance. By contrast, in the United States, the government must disclose to a defendant whether he has been subject to electronic surveillance, and, if the defendant makes a motion to suppress evidence gleaned from that surveillance, he may be entitled to further information and to a full-blown adversary hearing.

Likewise, although Canada and the United Kingdom have analogues to the Compulsory Process Clause of the Sixth Amendment, in Canada (Attorney General) v. Ribic a Canadian court refused, for national security reasons, to allow a defendant to subpoena two witnesses whose testimony might have been useful to him. By contrast, in the United States, "a defendant [is] entitled to disclosure of classified information upon a showing that the information 'is relevant and helpful . . .'." Indeed, the Classified Information Procedures Act (CIPA) requires that a defendant be given

47. Indeed, in 1998, the then-Associate General Counsel of the CIA went so far as to say that "when intelligence activities produce information that may be relevant . . . [to] the defense[], t]he failure to disclose intelligence information in specific cases may jeopardize . . . the[re] discovery rights . . . ." Jonathan M. Fredman, Intelligence Agencies, Law Enforcement, and the Prosecution Team, 16 YALE L. & POL'Y REV. 331, 338 (1998); see, e.g., Kyles v. Whitley, 514 U.S. 419, 438 (1995); see also Mark D. Villaverde, Note, Structuring the Prosecutor's Duty to Search the Intelligence Community for Brady Material, 88 CORNELL L. REV. 1471, 1475 (2003).
49. Id.; see also Tom Rees & D.C. Ormerod, Case & Commentary, R. v. Lawrence, 2001 Crim. L.R. 584, 587.
52. United States v. Belfield, 692 F.2d 141, 146 (D.C. Cir. 1982) ("[A] criminal defendant may claim that he has been the victim of an illegal surveillance and seek discovery of the logs of the overhears.").
substantially the same ability to litigate his cause as he would were he requesting public information.\footnote{56}

**B. Immigration Law**

1. **Removing Legal Aliens**

In the United States, if the Immigration and Naturalization Service (INS), now the Bureau of Immigration and Customs Enforcement (ICE),\footnote{57} suspects a Lawful Permanent Resident (LPR) of terrorist activity,\footnote{58} it may use the Alien Terrorist Removal Court (ATRC) to remove\footnote{59} him.\footnote{60} First, an ATRC judge assesses the government’s evidence. The ATRC convenes if the judge determines that there is probable cause to believe the LPR may be a terrorist and if the judge concludes that the government could not feasibly remove him by other means.\footnote{61} Although the government may adduce secret evidence before the ATRC, it must try insofar as possible to summarize that evidence for the non-citizen. LPRs are entitled to a government-paid attorney who has the requisite security clearance to see any classified information upon which the government wishes to rely.\footnote{62}

Although subject to removal before the ATRC, the INS may not refuse an LPR entry at the border solely on the basis of secret evidence. In *Rafeedie v. INS*, the D.C. Circuit explained, “Congress . . . clearly envisioned that the procedures [that permit the use of secret evidence to exclude non-citizens] . . . would be applied to ‘aliens seeking admission to the United States,’ who have no constitutional rights to any prescribed process,”\footnote{63} not to LPRs. The D.C. Circuit is on sound footing; the Supreme Court has repeatedly hinted that permanent residents returning from abroad are entitled to more process at the border than first-time applicants seeking admission.\footnote{64}

Canada, like the United States, has long permitted the government to rely on secret evidence to remove LPRs.\footnote{65} The government may file a


59. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) “changed the vocabulary of immigration proceedings, recharacterizing actions that had been referred to as ‘deportation’ and ‘exclusion’ as ‘removal.’” *Zhang v. INS*, 386 F.3d 66, 67 (2d Cir. 2004). Throughout this Note, I occasionally employ some pre-IIRIRA vocabulary.


62. Id. § 1534(e)(3)(E)-(F); see also Snyder, supra note 14, at 470 (“The law provides additional protections for permanent resident aliens.”).


65. Canada does not distinguish between removal of non-citizens at the border and removal of those within Canada. For consistency with U.S. terminology, I use the word “removal” indifferently to mean both.
certificate alleging that a non-citizen is a suspected terrorist. A federal judge assesses the evidentiary basis for this certificate—which is often secret. The non-citizen may contest the legitimacy of the certificate, but he may not see any secret evidence upon which the government has relied, nor is he entitled to counsel who can. Nevertheless, the federal judge is expected to scrutinize strictly the evidence underlying the certificate. As one court of appeals has noted, the non-citizen “is assisted . . . by the designated judge who has the heavy responsibility of maintaining a balance between the parties . . . .” The judges charged with reviewing certificates have taken their job seriously and have declassified and turned over substantial amounts of information to the non-citizens named in security certificates.

In the United Kingdom, as in Canada and the United States, the government may use secret evidence to justify removal. The Special Immigration Appeals Commission Act of 1997 and the Anti-terrorism, Crime and Security Act of 2001 (ATCSA) explicitly permit the government to remove a non-citizen on the basis of secret evidence. Moreover, the Secretary of State has long had the authority to exclude those whom she is satisfied are “concerned in the commission, preparation or instigation of acts of terrorism . . . .” Even those otherwise entitled to enter (because they are LPRs or citizens of Ireland) can be excluded.

However, in all cases, the Special Immigration Appeals Commission (SIAC) reviews the government’s evidence. When it does so, it may order the

66. See Immigration and Refugee Protection Act, 2001 S.C., ch. 27, § 77(1) (Can.) [hereinafter IRPA] (“The Minister and the Solicitor General of Canada shall sign a certificate stating that a permanent resident or a foreign national is inadmissible on grounds of security . . . .”).
70. See, e.g., id. paras. 17-18.
74. See ACS, supra note 73, § 22(2)(a) (explaining that the Special Immigration Appeals Commission Act of 1997 applies to decisions “refusing leave to enter or remain in the United Kingdom”).
76. Indeed, the most notorious use of this power “occurred in December 1982, when Gerry Adams . . . w[as] confined to Northern Ireland.” CLIVE WALKER, THE PREVENTION OF TERRORISM IN BRITISH LAW 85 (2d ed. 1992).
defendant removed from the courtroom. But if it does, "[a] security-cleared 'special advocate' appointed by the [Special Immigration Appeals] commission represents the detainee." SIAC's review is reasonably stringent. It has refused to approve a removal order sought by the government on at least one occasion. In that case, M. v. Secretary of State for the Home Department, SIAC found that it was unreasonable for the Secretary of State to suspect "M" of terrorist activity. In part, its determination was based on doubt about the "material relied on by the Secretary of State."

2. Illegal Aliens

The INS may also use secret evidence—more readily—to remove non-citizens who have not achieved lawful-permanent-resident status. They may remove a non-citizen who has entered without inspection (EWI) or deny a non-citizen admission at the border. An INS official must simply be "'satisfied on the basis of confidential information' that the alien falls under the inadmissibility provision[s]." Courts have approved this practice.

Yet the INS most often uses secret evidence to deny such aliens (removable either because they have entered without inspection or simply inadmissible)—as well as LPRs—discretionary relief. Section 240(b)(4)(B) of the Immigration and Nationality Act (INA) explicitly permits the INS to use secret evidence under such circumstances. Most courts and agencies to

78. Tom Parker, Appendix, Counterterrorism Policies in the United Kingdom, in HEYMANN &. KAYYEM, supra note 3, app. A, at 130; see also Roach & Trotter, supra note 3, at 1007. For one court's account of the special counsel provisions of SIAC, see Secretary of State for the Home Department v. M., [2004] EWCA (Civ) 324, [13] (Eng.): "[A] special advocate can play an important role in protecting an appellant's interests before SIAC. He can seek further information. He can ensure that evidence before SIAC is tested on behalf of the appellant. He can object to evidence and other information being unnecessarily kept from the appellant."
79. Secretary of State for the Home Department v. Rehman, [2001] UKHL 47, [54] (U.K.) (noting that SIAC is expected to test "the factual basis for the executive's opinion that deportation would be in the interests of national security [is] established by evidence").
81. See id. at [26].
84. Hall, supra note 14, at 519.
consider the question have assumed that this use of secret evidence is permissible. For instance, in *United States ex rel. Barbour v. District Director*, the Fifth Circuit concluded, "release on bail . . . may be denied on the basis of confidential information."87 Likewise, the Board of Immigration Appeals (BIA)—the appellate body charged with supervising the work of immigration judges—has held, "it [is] permissible to consider evidence of a confidential nature in deciding whether discretionary relief should be granted."88

This use of secret evidence is not uncontroversial. In *Kiareldeen v. Reno*, for instance, the court held that "the decision of the BIA to detain [a non-citizen], without the right to bond, primarily on the basis of [secret evidence] . . . violates his Fifth Amendment right to procedural due process."89 One other district court agrees with this analysis.90 But Congress may have settled the dispute. Under Section 412 of the USA PATRIOT Act,91 the Attorney General may certify that a non-citizen is both dangerous and inadmissible and order him detained until removed,92 and he may rely on secret evidence in deciding whether to certify the non-citizen. His certification cuts off any discretionary relief for which the non-citizen might otherwise have been eligible.93 Moreover, the government has recently begun to use secret evidence to preclude entire classes of removable non-citizens from applying for bail.94 Indeed, the United States has ordered the mandatory detention of groups of "high interest" non-citizens—mostly "Arab-Muslim men."95 Many of these "high-interest" detainees have not been informed of the reasons for the government's interest.96

In Canada, like the United States, the government may use secret evidence to justify denying a non-citizen discretionary relief once he is deemed removable.97 For instance, the government may issue a warrant for the arrest and detention of an LPR named in a certificate “if they have reasonable grounds to believe that the permanent resident is a danger to national security or to the safety of any person or is unlikely to appear at a

---

87. United States *ex rel.* Barbour v. District Director, 491 F.2d 573, 578 (5th Cir. 1974). The Second Circuit concurs. See United States *ex rel.* Dolenz v. Shaughnessy, 206 F.2d 392, 394 (2d Cir. 1953) ("[U]se by the Commissioner of confidential information undisclosed to the appellant would not be in violation of procedural due process.").
93. Id. § 1226a(a)(2)-(3)(b) (Supp. I. 2001). Although any non-citizen detained under Section 412 is entitled to file a petition for a writ of habeas corpus, non-citizens may not be able to contest issues of fact (e.g. whether a particular non-citizen is in fact a terrorist). See INS v. St. Cyr, 533 U.S. 289, 306 (2001).
96. See generally id.
97. Immigration and Refugee Protection Act, 2001 S.C., ch. 27, §§ 78, 83 (1) (Can.).
The Use and Misuse of Secret Evidence

proceeding for removal." Likewise, the Minister of Public Safety and Emergency Preparedness (PSEP) may issue a “danger” opinion based on secret evidence that permits him to remove a non-citizen who might otherwise be eligible for asylum. The secret evidence is disclosed to the non-citizen only under limited circumstances, for instance if she can make out a prima facie case that she might face torture were she returned whence she came.

Again, however, those refused discretionary relief are entitled to judicial review of their cases. As the Canadian Federal Court of Appeal recently explained in *Almrei v. Canada (Minister of Citizenship & Immigration)*, “a review of [an] order maintaining detention may require review of the secret evidence . . . .” Likewise, although Article 33(2) of the Refugee Convention “authorizes a host government to divest itself of its particularized protective responsibilities” under certain circumstances—specifically, when a refugee threatens national security—Canadian courts carefully scrutinize the secret evidence underlying any determination that a removable non-citizen may be ineligible for asylum.

Finally, it bears mention that the Supreme Court of Canada seems likely to strike down some of these rules when it decides *Charkaoui v. Canada (Minister of Citizenship & Immigration)* later this fall.

In the United Kingdom, as in Canada, the government may use secret evidence to oppose applications for bail or asylum. Yet here again SIAC plays a role. The House of Lords recently affirmed that “anyone deprived of his liberty by arrest . . . [may challenge] the lawfulness of his detention . . .

98. *Id.* § 82. In fact, as one author notes, “[i]ronically, since the Supreme Court of Canada’s decision in *R. v. Hall*, [2002] 3 S.C.R. 309, grounds for detaining a permanent resident under the IRPA are narrower than those to detain an accused under the Criminal Code.” Berger, supra note 67, at 107 n.28 (internal citation omitted). Non-permanent-residents named in a certificate are automatically detained. *Id.* at 107. However, after 120 days, if they have not been removed, a judge may order them released. [CANADIAN SECURITY INTELLIGENCE SERVICE, BACKGROUNDER NO. 14, CERTIFICATES UNDER THE IMMIGRATION AND REFUGEE PROTECTION ACT (2005),](http://www.csis-scrs.gc.ca/en/newsroom/backgrounders/backgrounder I4.asp)


100. *Ahani v. Canada (Minister of Citizenship & Immigration),* (2002) 1 S.C.R. 72, 82.


Not only may SIAC order release on bond, but it may also force the government to grant a non-citizen asylum. Although under both domestic law and the Refugee Convention, the United Kingdom can refuse a dangerous non-citizen asylum, such non-citizens may petition SIAC for relief.107

C. Conclusions

While Canada and the United Kingdom impose substantial restrictions on defendants’ access to secret evidence during criminal trials, those nations have steadily relaxed the rules governing immigration cases. For instance, under the prior version of Canada’s immigration law, all non-citizens named in security certificates were subject to mandatory detention.108 But under the Immigration and Refugee Protection Act of 2001,109 Canada’s most recent comprehensive revision of its immigration laws, non-citizens may apply to a federal judge for release on bail.110 Likewise, prior to the decision of the European Court of Human Rights (ECHR) in Chahal v. United Kingdom,111 not only could the U.K. Secretary of State order a non-citizen deported on the basis of secret evidence,112 but he also could use that same evidence to justify detention or refoulement.113 The only recourse permitted a non-citizen at the time was appeal to an advisory panel which did not even have to inspect the secret evidence upon which the government had relied.114 After Chahal, SIAC was established. The United States has taken the opposite tack: It has affirmed its commitment to confrontation in criminal cases while reducing the protections it affords non-citizens. Indeed, federal judges have emphasized that the attacks of September 11 wrought changes to immigration law—one

---


107. WALKER, supra note 18, at 236 (“[T]he Secretary of State may certify that a person is excluded from refugee status . . . [but] the SIAC must . . . deliberat[e] upon the asylum appeal.”).

108. Immigration Act, R.S.C., ch. 1-2 (1985), amended by 1988 S.C., ch. 36, § 40.1(7)(b) (Can.) (“[T]he person named in the certificate shall . . . continue to be detained until the person is removed from Canada.”).

109. See Catherine Dauvergne, Evaluating Canada’s New Immigration and Refugee Protection Act in Its Global Context, 41 ALBERTA L. REV. 7255 (2003), for a discussion of the changes wrought by IRPA.

110. See supra note 98 and accompanying text. Likewise, under the prior law the government could rely on secret evidence to cut off the appeal rights of entire groups of non-citizens. See Law v. Canada (Solicitor General) (1983) 2 F.C. 181 (Can.).


112. See, e.g., R. v. Secretary of State for Home Affairs ex parte Hosenball, (1977) 1 W.L.R. 766; Clive Walker, Constitutional Governance and Special Powers Against Terrorism: Lessons from the United Kingdom’s Prevention of Terrorism Acts, 35 COLUM. J. TRANSNAT’L L. 19, 19-20 (1997) (citing R. v. Secretary of State for Home Affairs ex parte Stitt for the proposition that “there is some judicial support for the view that any decision by a Secretary of State to exclude may be treated as non-justiciable”).


114. Statement of Immigration Rules for Control after Entry, 1973, H.C. 82, rule 42, quoted in R v. Home Secretary ex parte Hosenball, (1977) 1 W.L.R. 766, 774-75 (D.C.) (Eng.) (“Nor is there a right of appeal . . . where a deportation order is made on the ground that the Secretary of State deems the person’s deportation to be . . . in the interests of national security . . . ”).
court admitted, "[w]e are not inclined to impede investigators"—and courts have grown steadily less solicitous of the confrontation rights of non-citizens.

This distinction should not be overdrawn. Nevertheless, I believe two structural differences between the United States, on the one hand, and Canada and the United Kingdom, on the other, are noteworthy. First, although in criminal cases involving secret evidence U.S. judges exercise considerably greater responsibility than do their Canadian and U.K. counterparts, in immigration cases the reverse is true. In criminal cases, U.S. judges have arrogated to themselves the primary responsibility for assessing the merit of any claim to secrecy the government makes. Whether under the Roviaro standard—which dictates when the government must provide a criminal defendant with the name of the government’s informant—or under CIPA, it is for the judge to decide the admissibility of evidence. By contrast, in Canadian and U.K. criminal cases, judges often take the word of police officers or government officials, rather than determining on their own the relevance of evidence and the security threat its disclosure might pose. For instance, in Re Gougen, a Canadian trial court accepted a public interest certificate filed by the Deputy Solicitor-General without inspecting the material for which he sought the privilege. As Ian Leigh has explained, "in Canada...it has been noticeable that the courts have refused to inspect unless the defence demonstrates relevance to a high degree." Yet in immigration cases, the opposite is true. In Canada and the United Kingdom, judges control the evidence. As the court noted in Re Harakat, the Canadian Parliament chose not to permit non-citizens (or their attorneys) access to secret evidence in part because judges were expected to test the government’s secret evidence on their behalf. By contrast, in the United States, judges and administrators do not always carefully inspect the secret evidence on which the government relies. For instance, in In re Haddam, one BIA judge noted that the Immigration Judge who had first handled the case had not adequately “examine[d] [secret] evidence.”

Second, although in criminal cases the U.S. Congress has sharply distinguished rules governing confidential information from those that apply to national security information, in immigration cases, it has been the Canadian and U.K. Parliaments that have engaged in such fine-grained law-

120. (2005) 2 F.C. 416, 443 (Can.).
121. 2000 BIA LEXIS 20, at *118 (BIA) (Hurwitz, J., concurring in part and dissenting in part).
making. For instance, CIPA was designed to deal with the particular problems attendant on the use of national security information in criminal cases.\(^{122}\) By contrast, in Canada and the United Kingdom, public interest immunity covers both the mundane and the dangerous. Yet with respect to immigration law, Canadian and U.K. Parliaments have distinguished national security information from confidential information. For instance, in Canada, only those who are suspected of terrorism or serious criminality may be named in security certificates.\(^{123}\) And Parliament and the Canadian courts have taken great pains to define the meanings of "terrorism" and "criminality."\(^{124}\) By contrast, although Congress has promulgated particular rules to govern the use of national security information,\(^{125}\) the INS and courts have disdained that process. Instead, they have invoked the laws governing confidential information.\(^{126}\)

### III. MOTIVE ANALYSIS

I believe these practical and structural differences can be simply explained: The United States has begun to invoke immigration law as pretext to justify the detention and interrogation of suspicious non-citizens. If the United States arrests a non-citizen for a minor immigration violation, it may rely on secret evidence to justify incarceration or investigation. By contrast, if it arrests the same non-citizen as a criminal terrorist, it cannot rely on that evidence. As the Attorney General has said of suspected terrorists, "[i]f [they] overstay [their] visas even by one day,"\(^ {127}\) they will be arrested on immigration charges. Likewise, a report filed by the Office of the Inspector General concludes that the Federal Bureau of Investigation (FBI) and the INS in New York City made little attempt to distinguish between aliens who were legitimate subjects of the post-9/11 investigation and those whose illegal immigration status the FBI discovered coincidentally.\(^ {128}\) As Philip Heymann has argued, it is hard to escape the conclusion that the government is using immigration law as a tool of investigative or preventive detention.\(^ {129}\)


\(^{123}\) Immigration and Refugee Protection Act, 2001 S.C., ch. 27, § 77 (Can.).

\(^{124}\) See Audrey Macklin, Borderline Security, in THE SECURITY OF FREEDOM, supra note 17, at 383.

\(^{125}\) See supra note 59 and accompanying text.

\(^{126}\) See Tom Brune, U.S. Evades Curbs in Terror Law, NEWSDAY, Apr. 26, 2002, at A17 (noting that the U.S. has never convened the ATRC).


\(^{128}\) THE SEPTEMBER 11 DETAINEES, supra note 8, at 196.

\(^{129}\) PHILIP B. HEYMANN, TERRORISM, FREEDOM, AND SECURITY: WINNING WITHOUT WAR 92 (2003) ("There are about 20 million aliens ... a high percentage of whom are at least technically in violation of one or another visa regulation. But that fact is now being used as a device . . . for purposes of interrogation or incapacitation."); see also MINORITY STAFF SPECIAL INVESTIGATIONS DIVISION OF THE HOUSE COMMITTEE ON GOVERNMENT REFORM 108TH CONG., REPORT ON SECRECY IN THE BUSH ADMINISTRATION 65-69 (2004), available at http://www_democrats reform house gov/Documents/20050317180908-35215.pdf; Raquel Aldana, The September 11 Immigration Detentions and Unconstitutional Executive Legislation, 29 S. ILL. U. L.J. 5, 5 (2005).
If it is true that the United States has used immigration law as a pretext since September 11 to justify ready recourse to secret evidence, the central puzzle of Part II—why the United States treats secret evidence in criminal cases so differently than it does similar information in immigration cases—has an easy explanation. Canada and the United Kingdom have to prosecute terrorists. They have, therefore, developed effective ways of conducting such trials. By contrast, in the United States there has been little need to develop such rules, since the United States has been able to rely on immigration law to justify the detention and interrogation of suspected terrorists.

A. Policing the Civil-Criminal Line in the United States, Canada, and the United Kingdom

In the United States, Canada, and the United Kingdom, courts and legislatures distinguish "civil" police action from law enforcement. In the United States, for instance, although police must have probable cause to search or detain a suspect, they need only have reasonable suspicion to respond to an emergency. U.S. courts enforce these distinctions, as do their Canadian and U.K. counterparts. In Canada and the United Kingdom, detention pending investigation is of dubious legal status. And "investigative hearings" may seldom be used to generate evidence. In general, police officers in all three nations are expected either to investigate, arrest, and charge, or to confine and care for; they cannot do both simultaneously. As the U.S. Supreme Court has observed, police may not "use an interrogating process at police headquarters in order to determine whom...


131. For instance, in Jackson v. Indiana, the Court found unconstitutional a scheme that permitted the indefinite detention of those temporarily unable to stand trial. 406 U.S. 715 (1972).

132. See Terrorism Act, 2000, c. 11, § 29(1), sched. 8 (U.K.); R. v. Precourt, (1976) 18 O.R.2d 714; Gary T. Trotter, The Anti-Terrorism Bill and Preventative Restraints on Liberty, in THE SECURITY OF FREEDOM, supra note 17, at 239, 243-43 (noting that Bill C-36 permits “at least 72 hours detention prior to a bail hearing” but requires that “once an individual has been brought before a justice of the peace . . . the individual should not be returned to the local police lock-up for further interrogation”); J.J. Rowe, The Terrorism Act 2000, 2001 Crim. L.R. 527, 533-34.

133. See Martin L. Friedland, Police Powers in Bill C-36, in THE SECURITY OF FREEDOM, supra note 17, at 269, 277-78 (“There is, of course, a danger that the hearing will be used against a prime suspect . . . . If the proceedings are being used to compel testimony from a prime suspect, then the proceedings . . . [they] can be challenged under the existing law.”); see also British Columbia (Securities Commission) v. Branch, (1995) 2 S.C.R. 3.
they should charge."134 "The distinction between a civil penalty and a criminal penalty is of some constitutional import."135

In all three nations, immigration laws are civil, not criminal.136 In the United States, for instance, courts permit immigration officers to ignore certain procedural strictures,137 but only because removal (and detention pending removal) are prospective, non-punitive remedies.138 One might therefore expect that courts in all three nations would test the legitimacy of claims to immigration authority. But as I demonstrate in the next section, that is only true of Canada and the United Kingdom.

B. Attending to—and Ignoring—Motive

As Peter Schuck noted twenty years ago, "[i]mmigration has long been a maverick."139 U.S. courts do not enforce the line between "civil" and "criminal" in immigration cases.140 For instance, in Abel v. United States,141 the government admitted that it had arrested Abel, a non-citizen, on immigration charges because it lacked the evidence necessary to bring espionage charges against him but hoped to glean such evidence after taking him into custody.142 The Supreme Court, although it was at pains to emphasize that "[t]he deliberate use by the Government of an [immigration] warrant for the purpose of gathering evidence in a criminal case must meet stern resistance by the courts,"143 nevertheless approved the government’s actions.

134. Mallory v. United States, 354 U.S. 449, 456 (1957); see also United States v. Awadallah, 349 F.3d 42, 59 (2d Cir. 2003) ("[I]t would be improper for the government to use § 3144 [providing for the civil detention of material witnesses] for other ends, such as the detention of persons suspected of criminal activity . . .").

135. United States v. Ward, 448 U.S. 242, 248 (1980). The Supreme Court’s recent decision in Brigham City v. Stuart, 126 S. Ct. 1943 (2006), does not undermine my argument. Although the court refused to inquire of police officers’ subjective motivations, the court did ask whether the officers “had an objectively reasonable basis for believing” that an emergency was ongoing, id. at 1949, and reiterated the importance of inquiry into subjective programmatic purposes, id. at 1948.


140. Indeed, the Supreme Court recently intimated that a police officer need not have probable cause to suspect an immigration violation in order to question a non-citizen about his status. See generally Muehler v. Mena, 544 U.S. 93 (2005).


142. United States v. Abel, 258 F.2d 485, 495 n.9 (2d Cir. 1958) (quoting N.Y. HERALD TRIBUNE, Aug. 12, 1957, at 1 ("'We were well aware of what he was when we picked him up,' Gen. Swing said. 'Our idea at the time was to hold him as long as we could.'").

143. Abel, 362 U.S. at 226.
In part, this is due to the increasing interrelationship between criminal law enforcement and immigration processes. Congress now permits, for instance, “judicial removal” after criminal trials. Yet it is also due to judicial self-abnegation. Although there are persuasive legal reasons to believe a judge should not circumvent the procedural protections afforded all non-citizens by the INA by herself ordering a non-citizen deported, at least one court has sanctioned such behavior, perhaps out of deference to congressional expertise in immigration law. Some courts believe that “[t]he Department of Justice is in a far better position than are generalist judges to evaluate [immigration policies]. . . .” They are simply not interested in “smoking out” illicit motives.

The logic of those courts is at once impeccable and misleading. *Fiallo v. Bell* and *Mathews v. Diaz* counsel that courts should generally refrain from trying to ‘smoke out’ improper government purposes in immigration cases. In those cases, the Supreme Court upheld seemingly arbitrary classifications among and between non-citizens. In *Fiallo*, the Supreme Court found constitutionally unproblematic a law that authorized the distribution of a benefit to legitimate, but not illegitimate, children of U.S. citizens. Likewise, in *Diaz*, the Court upheld “statutory discrimination within the class of aliens . . .”

At the same time, it is not accurate to say that this is the usual way courts assess government policies. Consider the following thought:


146. United States v. Xiang, 77 F.3d 771 (4th Cir. 1996); United States v. Quaye, 57 F.3d 447 (5th Cir. 1995); United States v. Sanchez, 923 F.2d 236, 237 (1st Cir. 1991) (per curiam).

147. United States v. Chukwura, 5 F.3d 1420, 1423-24 (11th Cir. 1993).


150. 426 U.S. 67, 80 (1976); see also id. at 83 (discussing the “wholly irrational” test).

151. Indeed, as Peter Schuck has put it, “classical immigration law has essentially neutralized [the equal protection] principle.” Schuck, *supra* note 141, at 22.
experiment: Say the New York Police Department (NYPD) promulgated a policy “denying desk appearance tickets to persons arrested for minor offenses allegedly committed at demonstrations” while permitting them to those arrested for the same offenses in other places and at other times.152 Would this be constitutional? My guess is that a court would strike it down, and it may be that the NYPD concurs with my assessment: it withdrew the real policy upon which I base my hypothetical shortly after the New York Civil Liberties Union brought suit to enjoin it.153 But this policy is the analytical equivalent of the INS policy at issue in Reno v. American-Arab Anti-Discrimination Committee, a case in which the Supreme Court refused to consider whether the INS had engaged in selective prosecution.154 The Court sanctioned the arrest and removal of the “L.A. Eight,” two Palestinian LPRs and six Palestinian temporary visa holders, who had been under long-term FBI surveillance for their membership in a terrorist organization,155 the Popular Front for the Liberation of Palestine, despite the First Amendment protection afforded for membership in radical organizations.156

Unlike in the United States, in Canada courts are willing to interrogate government motives in immigration cases. For instance, in Little Sisters Book & Art Emporium v. Canada (Minister of Justice),157 a bookstore selling gay and lesbian erotica brought suit challenging the motives of the government agents responsible for interdicting obscene material. Relying on the fact that “only 14 charges of obscenity were laid in four years in British Columbia while approximately 35,000 prohibitions were imposed by Customs in the same period” and noting that “[t]he evidence here . . . did not justify the targeting of Little Sisters,”158 the Supreme Court of Canada concluded, “[t]he administration of the Act . . . was oppressive . . . .”159 Indeed, even though the program was ostensibly legal—customs agents in Canada have the authority to search and seize contraband, including erotic materials—after testing the interdiction program for means-ends rationality, the Court concluded that the program was actually meant to harass buyers and sellers of homosexual erotica.


153. Id.

154. 525 U.S. 471, 491-92 (1999) ("[T]he Government does not offend the Constitution by deporting [an out-of-status alien] for the additional reason that it believes him to be a member of an organization that supports terrorist activity.").


156. For my views on this point, see generally Stephen Townley, The Hydraulics of Fighting Terrorism, 29 HAMLIN L. REV. 65 (2006).


158. Id. at 1187.

This U.S. "immigration exception" explains the secret evidence cases. U.S. litigants have demanded that the INS justify its use of secret evidence against non-citizens charged with visa overstays and other minor immigration violations (as opposed to terrorism-related offenses).\(^\text{160}\) The INS has demurred,\(^\text{161}\) sometimes even filing its limited answers under seal.\(^\text{162}\) And courts have not pressed the point. For instance, in *Kiareldeen v. Ashcroft*, the Third Circuit noted:

> Such a criticism implies that the government may only utilize information against an individual in a civil context, such as in deportation procedures, if it also intends to commence criminal proceedings against that same individual. Such a fettering of the Executive Branch has no support in either case law or statute.\(^\text{163}\)

By contrast, the House of Lords, in its famous decision in *A. v. Secretary of State for the Home Department*, held that those provisions of the ATCSA permitting the United Kingdom indefinitely to detain non-citizens who were deemed deportable for security reasons but who could not be safely placed in another country violated the European Convention on Human Rights. The Law Lords reprimanded the government, explaining, "the choice of an immigration measure to address a security problem had the inevitable result of failing adequately to address that problem (by allowing non-UK suspected terrorists to leave the country with impunity and leaving British suspected terrorists at large)."\(^\text{164}\)

C. Explanations for the Difference

In this Section, I present and assess three possible explanations for this difference between the United States, on the one hand, and Canada and the United Kingdom, on the other. I conclude that although each explanation sheds light on the problem, and although each is related to the others, none is fully persuasive, since despite the distinctions I draw between the three

---


\(^{163}\) *Kiareldeen v. Ashcroft*, 273 F.3d 542, 553 (3d Cir. 2001); see also *In re Ruiz-Massie*, 22 I. & N. Dec. 883, 844 (BIA 1999) ("It might be argued that a record of criminal conviction presents a different case because it is based on a determination of guilt following a formal judicial proceeding, as opposed to the Secretary of State's unilateral judgment regarding adverse foreign policy consequences. That argument, however, is properly directed at Congress[. . . .]"); *In re Parviz Ghadimi*, 2004 WL 2374513 (BIA 2004) ("The Immigration Judge's comment that the evidence is hearsay three times removed is somewhat of an exaggeration . . . . For the most part those involved in providing the evidence were Federal Bureau of Investigation agents and there is a legal presumption that a government official performs his duty properly . . . .").

\(^{164}\) *A v. Sec'y of State for the Home Dep't*, [2004] UKHL 56, [43].
nations, the United States, Canada, and the United Kingdom remain qualitatively similar.

1. History and Current Events

U.S. citizens are often suspicious of the President. For instance, Congress passed the Foreign Intelligence Surveillance Act (FISA) in response to complaints about government misconduct. Likewise, many Americans believe that prosecutors and police exercise too much discretion, and exercise it poorly; the trope here is the story of Rodney King. By contrast, in Canada and the United Kingdom, the public generally trusts the Prime Minister. Moreover, prosecutors (and presumably police) are generally perceived as public servants.

However, during emergencies, these trends seem not to hold. On the one hand, "the [U.S.] government enjoys an unusually high level of trust among citizens," and advocates of the "new community policing" believe that, during crime waves, police should have more power, not less. On the other hand, U.K. citizens rebelled against their government’s tight secrecy rules after a series of Iraq-related crises in the mid-1990s, including the notorious "Matrix Churchill" trial; citizens weighed the government’s response to the Iraq emergency, and found it wanting. U.K. citizens have since become more suspicious of government demands for power during emergencies.


168. Cf Leigh, supra note 50, at 129 (noting that Canada’s “record of political persecution during the cold war is generally considered to have been more fortunate than that of its southern neighbour”).


Perhaps Canadian and U.K. nationals are less affected by emergencies because they have longer experience fighting terrorism. As one author has put it, “Londoners endured repeated bombings” and learned to adjust. Or perhaps Hollywood’s persistent dramatization of threats to the United States has engendered a stronger emotional reaction in U.S. citizens than they might otherwise evince. So, one potential explanation for my observations is that U.S. courts may be reluctant to engage in motive analysis because they are simply more willing to “trust” the government during a time of crisis, whereas Canadian and U.K. courts worry about repeating past mistakes.

2. Structure of Government

Both Canada and the United Kingdom are parliamentary democracies, without an independent executive, whereas the United States has a presidential (tripartite) structure. This has no obvious explanatory force—in fact, one might predict that courts in a parliamentary system would be more suspicious of government attempts to use secret evidence. However, differences in how the machinery of government runs may have first-order—and appear likely to have second-order—effects on government secrecy.

First, in a presidential system, the President and his foreign policy officers enjoy considerable democratic legitimacy, to which the judiciary may feel compelled to defer. Moreover, proponents of the “unitary executive” theory argue that the United States’ separation of powers—which gives the President little role in lawmaking—requires courts to respect executive control over such matters as foreign policy. By contrast, in a parliamentary system, foreign policy personnel are often bureaucrats and may not even be members of the governing party. Consequently, to the extent that their actions are susceptible of judicial review as rules promulgated

---

177. Id. at 583-84. Consider, for instance, the range of 9/11-related productions, including WORLD TRADE CENTER (Paramount Pictures 2006) and UNITED 93 (Fox Broadcasting Company 2006).
179. For one explanation of Canada’s political system, see generally PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA (4th ed. 1997).
184. See Bruce Ackerman, The New Separation of Powers, 113 HARV. L. REV. 633, 690-92, 712-14 (2000) (noting “[i]t is one thing for the president . . . to read statutes ‘creatively’; it is quite another for the prime minister to force long-term officials, steeped in the ethic of neutrality, to play fast and loose”).
185. Calabresi, supra note 181, at 71. But see Ackerman, supra note 184.
by administrative agencies, courts may find the sailing easier than in a presidential system. Moreover, since the Prime Minister both makes and executes the laws, arguments for foreign policy independence avail him less. However, other data suggest that the executive in a parliamentary system may be as independent as its counterpart in a presidential system, and the extent to which presidential and parliamentary systems differ in the foreign policy realm should not be overstated.

Second, and more importantly, a parliamentary system is more flexible than a presidential one: One Parliament can immediately override the acts of a prior Parliament or the rules articulated by a court. The Canadian Charter of Rights and Freedoms, for instance, explicitly provides for such a "legislative override." Likewise, the Human Rights Act of 1998, which incorporates the European Convention on Human Rights into domestic U.K. law, encourages the legislature to reconsider immediately any law questioned by a court. By contrast, in the United States, the Supreme Court has final say on all matters of constitutional law. And, over the past decade, the Supreme Court has required Congress to make ever more detailed findings to justify legislation. There are few of the incentives to legislate that there are in Canada or the United Kingdom.

It is possible that courts in Canada and the United Kingdom are comfortable regulating the use of secret evidence because a foreign minister speaks with less authority than a secretary of state (or because it is easier for courts in those countries to assess whether individual officers have abused their authority). Or, perhaps Canadian and U.K. courts are confident that the

---

188. See RICHARD A. POSNER, LAW AND LEGAL THEORY IN ENGLAND AND AMERICA 33-35 (1996) for one such view.
190. United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 320 (1936) (discussing the “very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations”).
191. Douglas W. Vick, The Human Rights Act and the British Constitution, 37 TEX. INT’L L.J. 329, 336 (2002); see also id. at 339 (“The basic provisions of the U.S. Constitution are certain and stable . . . while the content of the British constitution is less stable but more adaptable.”).
194. See Cooper v. Aaron, 358 U.S. 1, 18 (1958) (declaring the “basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution”).
Parliament will swiftly promulgate new rules governing the use of secret evidence should they err.

3. **International Law**

One final theory holds that courts in Canada and the United Kingdom are more willing to apply international law to domestic actors than are courts in the United States, and that it has been international law that has spurred Canadian and U.K. courts to undertake motive analysis.\(^{196}\)

The United Kingdom, for instance, uses international law in three ways: (1) in interpreting domestic law;\(^{197}\) (2) in assessing the compatibility of domestic law with the European Convention on Human Rights;\(^{198}\) and (3) in applying European Community (EC) law.\(^{199}\) By contrast, in the United States, both legislators and judges have expressed reluctance to use international law to decide U.S. cases.\(^{200}\) For instance, several members of the House of Representatives recently proposed a resolution forbidding citation to foreign authorities in Supreme Court opinions.\(^{201}\)

International law—in particular, the Refugee Convention, the Convention Against Torture (CAT), the International Covenant on Civil and Political Rights (ICCPR), and the European Convention on Human Rights (ECHR)—may bear on the legality of secret evidence. For instance, Articles 13 and 14 of the ICCPR require states to disclose to non-citizens the information upon which removal decisions are based.\(^{202}\)

Indeed, courts in both Canada and the United Kingdom seem to have been moved by international law in secret evidence cases. For instance, in *Sogi v. Canada (Minister of Citizenship and Immigration)*, the court cited the CAT to justify its decision to release on bail a non-citizen whom the government sought to detain based on secret evidence.\(^{203}\) Likewise, in *R v.*

---

\(^{196}\) See, e.g., Powell, supra note 73, at 99 ("[I]t must be remembered that the court in *A v. Secretary of State for the Home Department* would not have been able to hold as it did but for the HRA 1998."). But see K.D. Ewing, *The Futility of the Human Rights Act*, 2004 Pub. L. 829, 833 (U.K.).


\(^{198}\) See *Shany*, supra note 197, at 359.


\(^{203}\) (2005) 3 F.C. 517, para. 18.
Secretary of State for the Home Department ex parte Gallagher, the court of appeals invoked European Court of Justice decisions in limiting the use of secret evidence. By contrast, U.S. administrators have often been unsympathetic to international law arguments.

4. Conclusion

Each explanation tells part of the story; moreover, they are related. U.S. courts may be reluctant to advert to international law because by doing so, they might upset the separation of powers "hydraulic"—as Roger Alford would have it, "[i]ncluding a new source [international law] fundamentally destabilizes the equilibrium of constitutional decision making." By contrast, in a nation where judges may also be legislators or foreign policy decision-makers, the balance is not so delicate. Likewise, nations with experience fighting terror may be inclined to endorse international law, which some see as a potent weapon in the War on Terror.

None of these explanations, however, fully accounts for my observations. The U.S. Supreme Court bases its Confrontation Clause jurisprudence on the common law of England. Likewise, during the lead-up to the invasion of Iraq in 2003, the United Kingdom had little truck with jus ad bellum. The explanatory power, respectively, of arguments from legal culture and international law may therefore be limited. Yet these theories are not useless. Not only do they suggest avenues for future research, but they also help to inform the search for potential solutions to the secret evidence problem, since any such solution must be textured to account for differences between the United States, Canada, and the United Kingdom. It is to those potential solutions that I now turn.

IV. NEW WAYS TO GOVERN SECRET EVIDENCE

In this Part, drawing upon my exploration of the differences between the United States, Canada, and the United Kingdom, I propose that those troubled by the U.S. government's use of secret evidence take one of two different tacks: either use international law to persuade courts to engage in motive analysis or press Congress to regulate secret evidence (and the detention and interrogation of terrorist suspects) more thoroughly. I also explain why the

---

209. I distinguish “ordinary cases” from “national security cases.”
current approach is flawed. This is the approach that argues that the INA is unconstitutional to the extent that it permits the use of secret evidence either in removal proceedings\textsuperscript{212} or to deny a non-citizen bail or asylum.\textsuperscript{213}

A. Two Solutions to the Secret Evidence Problem

1. Motive Analysis

Litigants should demand, as the 9/11 Commission put it, that “the executive . . . explain (a) that [any] power [invoked] actually materially enhances security and (b) that there is adequate supervision of the executive’s use of the powers to ensure protection of civil liberties.”\textsuperscript{214} In short, litigants should demand motive analysis. And, taking a page from the books of Canadian and U.K. litigants, they should use international law to do so.

Despite conventional wisdom, U.S. courts seem more willing than ever before to consider international law arguments, both in terrorism and in immigration cases. First, Hamdan suggests the Supreme Court may be willing to apply treaty law to the War on Terror.\textsuperscript{215} As one group of Guantanamo detainees argued in a recent brief, Hamdan and Hamdi v. Rumsfeld,\textsuperscript{216} read together, may imply that the Authorization for the Use of Military Force (AUMF) incorporates international law.\textsuperscript{217}

Second, there are both historical and practical reasons to apply international law in immigration cases. On the one hand, the Supreme Court derived the plenary power doctrine—a doctrine which under-girds much of modern immigration law—not from the Constitution but from the law of nations.\textsuperscript{218} Sarah Cleveland argues, therefore, that “the authority of states over aliens is now limited by international law protections regarding the rights of refugees, including the fundamental prohibition against forcible return.”\textsuperscript{219}


\textsuperscript{213} Jackson, supra note 14, at 59.


\textsuperscript{218} Fong Yue Ting v. United States, 149 U.S. 698, 711 (1893) (“The United States are a sovereign and independent nation, and are vested by the Constitution with the entire control of international relations, and with all the powers of government necessary to maintain that control and to make it effective.”); Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892); see also T. Alexander Aleinikoff, Federal Regulation of Aliens and the Constitution, 83 AM. J. INT’L L. 862, 862 (1989).

And some court actions seem to support this proposition. In *Beharry v. Reno*, the court noted, "[s]ince Congress’s power over aliens rests at least in part on international law, it should come as no shock that it may be limited by changing international law norms." 220 Indeed, courts have grown somewhat skeptical of certain government programs—in particular, the practice of requesting automatic stays of immigration judges’ orders temporarily releasing non-citizens 221—and have begun to use international law to discipline the government.222

Should U.S. courts decide to use motive analysis, they could draw on established Fourth Amendment jurisprudence.225 While courts do not generally inquire of police officers’ individual motives224—a court will not, for instance, find unconstitutional an arrest made out of spite if legally acceptable225—courts have been able to distinguish criminal law enforcement from civil law enforcement.226 They do this by comparing observed behavior with the ostensible justifications for the program. For instance, in *City of Indianapolis v. Edmond*, the Court struck down an Indianapolis roadblock scheme because it had “the primary purpose of interdicting illegal narcotics.”227 Rejecting the notion that “prior cases preclude an inquiry into the purposes of the checkpoint program,” 228 the Court held that “programmatic purposes may be relevant.”229 The Court took the same tack in *Ferguson v. City of Charleston.*230 Courts could use the same techniques in immigration cases. A court could reasonably ask: If so many non-citizens are dangerous terrorists, why not convene the ATRC? Why, as a matter of policy, hold them for visa violations?231

220. 183 F. Supp. 2d 584, 598 (E.D.N.Y. 2002), rev’d on other grounds, 329 F.3d 51 (2d Cir. 2003).


222. See Wang v. Ashcroft, 320 F.3d 130 (2d Cir. 2003) (permitting aliens to bring habeas claims asserting rights under the Convention Against Torture); Ogbudamkpa v. Ashcroft, 342 F.3d 207 (3d Cir. 2003) (same).


228. Id. at 45.

229. Id.

230. 532 U.S. 67 (2001) (striking down a hospital program permitting police drug-testing of pregnant women because although ostensibly designed to protect the women’s babies, the program was deemed too intimately linked to law enforcement).

2. *A Legislative Fix*

Civil libertarians could also press Congress to regulate the use of secret evidence as the Canadian and U.K. Parliaments have. Congress may finally be ready to pass rules for the War on Terror, especially in light of the election results of November 7, 2006. Some members of Congress now share the concern of pundits and judges that the government may be misusing civil laws (including immigration laws) to facilitate the interrogation and incarceration of suspected terrorists.

Were Congress willing to regulate the use of secret evidence, legislators could proceed in any one of (at least) three ways. Congress could constrain the use of secret evidence in minimally invasive fashion by requiring the Attorney General to certify that he personally approved each use of secret evidence and by requiring periodic public accounting. When the public’s eye is on prosecutors, it is considerably harder for them to bring pretextual charges (this is why, according to Stuntz and Richman, local prosecutors do not undercharge as frequently as federal prosecutors). In fact, government disclosures, and the ensuing public debates, spurred Parliament to rewrite terrorism laws in Canada and the United Kingdom.

---


235. See, e.g., In re Application of the United States for Material Witness Warrant, 214 F. Supp. 2d 356 (S.D.N.Y. 2002) (describing how the FBI detained an Egyptian national as a material witness and induced him to confess to a crime he did not commit).


238. See, e.g., SECRETARY OF STATE FOR THE HOME DEPARTMENT, COUNTER-TERRORISM POWERS: RECONCILING SECURITY AND LIBERTY IN AN OPEN SOCIETY: A DISCUSSION PAPER, 2004, Cm. 6147, available at http://www.archive2.official-documents.co.uk/document/cm61/6147/6147.htm (noting that “[w]hile it would be possible to seek other powers to detain British citizens who may be involved in international terrorism it would be a very grave step. The Government believes that such draconian powers would be difficult to justify”); National Security Committee of Parliamentarians Act, 2005, Bill C-81, §§ 13-14 (Can.) (first reading complete) (would establish a committee to review the
More ambitiously, Congress could solve the underlying problem by permitting the government to detain both citizens and non-citizens for investigation or to prevent commission of a terrorist act. Many countries permit limited investigative detention. For instance, in Northern Ireland, a constable may arrest on suspicion, and the exercise of this power is not subject to judicial supervision. Some countries, including Canada, also permit preventive detention. Such laws might be acceptable in the United States. In fact, the USA PATRIOT Act already permits detention pending investigation or as prophylaxis. But to work, any such law would have to have strict limits and would have to be exclusive. For models, Congress could look to the U.K. Terrorism Act of 2006 and the Prevention of Terrorism Act 2005 (PTA). The PTA, for instance, permits the government to issue control orders (e.g., orders confining a suspect to his home, or to a particular town or city). These come in two shades: derogating and non-derogating. The former would, other things being equal, violate the European Convention on Human Rights; such orders may only be issued by a court after a full, adversary hearing and are subject to periodic review.

Finally, Congress could reduce the incentives to use immigration law to fight terrorism. It could establish a “wall” between immigration and law enforcement, just as it has between the intelligence community and prosecutors. There are several ways to build such a wall. Congress could require that the Attorney General certify that all secret evidence he sought or gathered was tied to the immigration charge pressed—creating a nexus requirement like the one that governed requests for warrantless wiretaps until recently. Congress could also require immigration judges to exclude and

---

239. Frase, supra note 236, at 576 (noting that in France “defendants may be held in investigatory detention (garde à vue) for up to forty-eight hours without probable cause, judicial approval, or mandatory court appearance”); Jonathan Grebinar, Responding to Terrorism: How Must A Democracy Do It? A Comparison of Israeli and American Law, 31 FORDHAM URB. L.J. 261, 265 (2003); Roach, supra note 136, at 2167-72. Such laws are usually applicable both to citizens and non-citizens. See generally Moeckli, supra note 11, at 504-05.


244. Cf. Margaret H. Taylor, Dangerous by Decree: Detention Without Bond in Immigration Proceedings, 50 LOY. L. REV. 149, 149-50 (2004) (“[T]his provision was not used in the post-9/11 detention effort. Instead, the Immigration and Naturalization Service (INS) relied on the detention authority in the existing immigration statute.”).


247. Powell, supra note 73, at 94.

248. PTA c. 2, § 1(2)(b). The hearing procedure contemplates a special counsel. Powell, supra note 73.

249. PTA c. 2, §§ 1(2)(a), 3(4).

250. See generally In re Sealed Case, 310 F.3d 717 (FISA Ct. Rev. 2002).

refuse to consider any secret evidence unrelated to an immigration investigation. This list is surely not exhaustive.

B. The Weakness of the Due Process Clause Argument

Even to the extent my proposals are flawed or difficult to realize, they are probably improvements on—and more likely to succeed than—the current approach, which has been to argue that the use of secret evidence is unconstitutional. In this Section, I address the strongest and most popular constitutional argument made by civil libertarians—that the use of secret evidence to deny non-citizens bail or asylum is unconstitutional—and show how it is ineffective both as a matter of law and as a matter of policy.

1. Legal Weakness

The constitutional argument against the use of secret evidence to deny bail or asylum proceeds in two steps. First, those not yet subject to a final removal order but who are out-of-status (i.e. have violated some immigration law) must be treated like LPRs. Second, the language of the INA must be parsed and read to limit the Secretary of Homeland Security’s discretion to deny bond or asylum.

Each move is necessary, not sufficient. Excludable non-citizens have few rights under the Due Process Clause. Indeed, while they are not bereft of constitutional protection—they enjoy, for instance, protection against inhumane treatment—they have almost no constitutional process rights, and may be subject to indefinite detention if necessary to further an immigration goal. Therefore, to invoke the Due Process Clause, a non-citizen applying for bail or asylum relief must argue that she is somehow differently situated than an excludable non-citizen. Moreover, the Due Process Clause not only protects a limited set of people, but also a limited set of interests. Only if a non-citizen can show that she has a judicially cognizable liberty or property interest can she claim due process protection.

In Najjar v. Reno, for instance, the court refused to permit the government to use secret evidence against a non-citizen applying for bail. It

---


253. Any constitutional argument against the ATRC, for instance, seems likely to fail. See, e.g., Matter of M-, 5 I. & N. Dec. 484 (BIA 1953) (permitting a confidential informant to testify at a removal hearing).

254. Hall, supra note 59, at 518 (“This Note focuses on the use of undisclosed information to defeat an application for discretionary relief.”).

255. To reiterate, I deal here only with bail and asylum, not withholding of removal, which is a form of non-discretionary relief.

256. See, e.g., Lynch v. Cannatella, 810 F.2d 1363, 1374 (5th Cir. 1987).

257. See United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950) (“Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.”).


260. See id. at 1333 (objecting to the decision of an immigration judge denying bail because “[n]either Petitioner nor his counsel were present”).

2007] The Use and Misuse of Secret Evidence 249
first echoed the district court in *Kiareldeen* and held that a non-citizen who had conceded deportability should not "be 'assimilated' to the status of an excludable alien."\(^{261}\) It then held that INA § 236 (authorizing the release of non-citizens on bail pending resolution of their claims)\(^ {262}\) imposed substantive Due Process Clause limits on the discretion of the Attorney General.\(^ {263}\)

But non-citizens applying for bail or asylum should, under current law,\(^ {264}\) be treated like those seeking admission at the border, not like those within our borders who contest their removability.\(^ {265}\) Also, the INA does not sufficiently circumscribe the Attorney General's discretion to permit a non-citizen to claim a liberty interest in bail or asylum. In particular, it is hard to square the view that the Due Process Clause covers requests for bail or asylum with recent Supreme Court precedent.

Prior to 1995, courts would ask whether a statute limited the discretion of a decision maker; if it did, the statute created a due process right. In *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, for instance, the Supreme Court ruled that "the use of the word 'shall'" indicated a limitation.\(^ {266}\) Yet in *Sandin v. Conner*, the Supreme Court refused to hold that mandatory language created a liberty interest.\(^ {267}\) Subsequently, the Court has held that even though there are established (and discretion-limiting) procedures for resolving clemency petitions, a death row inmate has no liberty or life interest in clemency.\(^ {268}\)

Before *Sandin*, courts seldom held that non-citizens could invoke the Due Process Clause in seeking discretionary relief. For instance, courts have discerned no due process right for non-citizens to immigrant visas.\(^ {269}\) Also, the INS may transfer non-citizens from one location to another without affording them hearings.\(^ {270}\) Since *Sandin*, courts have been even more reluctant to infer that a statute endows a non-citizen with a liberty or property interest sufficient to trigger the Due Process Clause.\(^ {271}\)

---


\(^{263}\) *Najjar*, 97 F. Supp. 2d at 1350-51.

\(^{264}\) I in no way mean to intimate my support for the current state of immigration law. I simply mean to argue that the due process argument is likely ineffective under established precedent.

\(^{265}\) Demore v. Kim, 538 U.S. 510 (2003). The Seventh Circuit agrees that *Demore* supports this proposition. See Gonzalez v. O'Connell, 355 F.3d 1010, 1019 (7th Cir. 2004) ("In . . . Kim . . . the detainees at issue conceded their deportability. Indeed, Kim's holding was expressly premised on that fact."). (internal citations omitted).


\(^{268}\) Ohio Adult Parole Authority v. Woodard, 523 U.S. 272 (1998). The Court called the proposed interest in clemency a "unilateral hope." *Id.* at 282 (internal citation omitted).

\(^{269}\) Azizi v. Thornburgh, 908 F.2d 1130, 1134 (2d Cir. 1990) (holding that the INA granted a married couple no property interest in an immigrant visa); Anetekhai v. INS, 876 F.2d 1218, 1223 (5th Cir. 1989) (same).

\(^{270}\) United States v. Lopez-Tello, 353 F.3d 1199, 1205 (10th Cir. 2004) (en banc) (holding that "there is no constitutional right to be informed of the existence of discretionary relief for which a potential deportee might be eligible"); *Dave* v. Ashcroft, 363 F.3d 649, 653 (7th Cir. 2004) (same); Oguejiofor v. Att'y Gen. of U.S., 277 F.3d 1305, 1309 (11th Cir. 2002) (same); United States v. Lopez-
Most forms of relief from removal are discretionary. As the Supreme Court explained in *INS v. Yueh-Shaio Yang*, the INA "imposes no limitations on the factors that the Attorney General (or her delegate, the INS[...]) may consider in determining who, among the class of eligible aliens, should be granted relief." Bail and asylum are no different. First, there is no right to bail, even for a U.S. citizen accused of a crime. As the Supreme Court affirmed in *Carlson v. Landon*, "[t]he Eighth Amendment has not prevented Congress from defining... bail." Although there are a handful of cases that suggest that the discretion of the Attorney General to grant or deny bail may be limited, the Attorney General has recently explicitly said, "section 236(a) does not give detained aliens any right to release on bond." And second, "the decision to grant asylum is committed to the Attorney General’s discretion." The recently passed REAL ID Act confirms this understanding.

2. **Normative Weakness**

Even if non-citizens seeking bail or asylum could invoke the Due Process Clause, would it make sense to permit them to do so? My answer is a qualified "no" for two reasons. First, due process is not static; it varies...
with the circumstances.\textsuperscript{281} In \textit{Department of the Navy v. Egan}, for instance, the Supreme Court held that the government can withdraw the security clearance of an employee without affording him an adversary hearing.\textsuperscript{282} The Court relied on the fact that no one has a "right" to a security clearance. Non-citizens who have conceded their deportability by definition have no "right" to remain in the United States. It makes sense that they should enjoy fewer due process rights than citizens.

Second, if the United States were to treat persons \textit{within its borders} equally,\textsuperscript{283} it might reinvigorate geographic distinctions. The government will always distinguish among non-citizens. Too many members of Congress believe that if it did not, it would unfairly equate those non-citizens who aspire to citizenship with those whose claims are the most "provisional, contingent, and [least] compelling."\textsuperscript{284} The interrelationship of status and geography in immigration law is such that as the salience of one diminishes, that of the other increases.\textsuperscript{285} For instance, once courts hinted that non-citizen enemy combatants might be able to invoke the Due Process Clause once within the United States, the United States began to transfer prisoners to Guantanamo Bay and farther afield.

But geography is arbitrary in a way that status is not. Why, for instance, should those who have been illegally deported be forbidden to apply for habeas relief simply because they are outside the United States? They should not.\textsuperscript{286} But if courts emphasize geography, they might be.\textsuperscript{287} Likewise, why should one non-citizen, who sneaks ashore to the United States on a raft, be treated differently than several hundred countrymen still on board the ship from whence he came?\textsuperscript{288}
V. CONCLUSION

In the United States, a non-citizen who has conceded deportability and is ready to board a plane back to his country of birth may be detained—"held until cleared"—by the FBI on the basis of secret evidence. This could not happen to a similarly situated non-citizen in Canada or the United Kingdom. It is not that those two nations forbid secret evidence in immigration cases (they do not), but rather that both nations police the line between immigration law enforcement and criminal law enforcement more effectively than the United States. When either Canada or the United Kingdom relies on secret evidence, it is less frequently a pretext for achieving criminal law enforcement aims.

For too long, Congress has abdicated its responsibility to consider meaningfully the relationship between immigration and national security. But, as Canada and the United Kingdom have already recognized, neither of these two related problems is going away. When it convenes in January 2007, the 110th Congress should debate and clarify whether and how the U.S. government can use immigration law in the War on Terror. If it tarries in doing so, the judiciary should take steps—including by using motive analysis—to encourage congressional action.
