



• LEGAL STUDIES RESEARCH PAPER SERIES •

Research Paper No. 2008-38

Date: 01-21-2008

**Title:       A Global Approach to Secret Evidence:  
              How Human Rights Law Can Reform Our  
              Immigration System**

**Author:     Jaya Ramji-Nogales**

**Cite: 39 Colum. Hum. Rts. L. Rev. \_\_\_\_ (forthcoming 2008)**

This paper can be downloaded without charge from the  
Social Science Research Network Electronic paper Collection:  
<http://ssrn.com/abstract=1080317>

A GLOBAL APPROACH TO SECRET EVIDENCE:  
HOW HUMAN RIGHTS LAW CAN REFORM OUR  
IMMIGRATION SYSTEM

*Jaya Ramji-Nogales*<sup>1</sup>

INTRODUCTION ..... 1  
LEGAL FRAMEWORK AUTHORIZING THE USE OF SECRET EVIDENCE IN IMMIGRATION  
PROCEEDINGS ..... 7  
    *Non-Citizens and the Constitution*..... 8  
    *The Statutory Framework*..... 10  
    *Challenges to the Use of Secret Evidence in Immigration Proceedings*..... 13  
THE TROUBLE WITH SECRET EVIDENCE..... 16  
    *Harm to Individuals* ..... 16  
    *Societal Harms* ..... 21  
    *Global Harms* ..... 24  
    *National Security Interests at Stake*..... 27  
HUMAN RIGHTS: A YARDSTICK AND A GUIDEBOOK ..... 28  
IMMIGRATION LAW AND THE HUMAN RIGHT TO DUE PROCESS ..... 29  
    *The Aptness of Human Rights Law*..... 30  
    *Sources of Human Rights Law* ..... 31  
    *What Human Rights Law Says* ..... 34  
        Non-Citizens Lawfully Present ..... 34  
        Non-Citizens Seeking Protection from Persecution..... 35  
        Non-Citizens Seeking Protection against Torture ..... 39  
        Non-Citizens with Strong Family Ties ..... 41  
        The Terrorism Suspect Who Cannot Be Removed..... 42  
    *Criticism of Human Rights Treaties*..... 44  
HUMAN RIGHTS IN STATUTORY INTERPRETATION, REGULATION DRAFTING, AND  
INSTITUTIONAL CULTURE ..... 45  
CONCLUSION ..... 48

INTRODUCTION

As the United States confronts a tide of global disapproval resulting from its mismanaged efforts to combat terrorism at home

---

<sup>1</sup> Assistant Professor of Law, The James E. Beasley School of Law, Temple University. J.D., Yale Law School; LLM, Georgetown University Law Center; B.A., University of California, Berkeley. The author would like to thank Ahilan Arulanantham, Jane Baron, Denise Gilman, David Hoffman, David Koplow, Alistair Newbern, Andrew Schoenholtz, Philip Schrag, Peter Spiro, Jenia Iontcheva Turner, and Lesley Wexler for their generous comments, as well as the fellows who participated in a workshop at Georgetown for their thoughts and feedback. Many thanks to Susan Akram, David Cole, Niels Frenzen, and Kit Gage for assistance in tracking down factual information, to Kathleen Gerber for excellent research assistance, and to Heba Nassef Gore for pinch-hitting on Arabic-language research. Last but not least, thanks to Luis Carlos Ramji-Nogales for his patience and support.

and abroad, the tension between national security interests and due process rights has become one of the most pressing issues facing our nation. In particular, observers have roundly criticized the government's use of expanded secrecy in various arenas and its prioritization of security interests at the expense of procedural fairness.<sup>2</sup> The conflict between security and fairness is especially acute in immigration proceedings, which the United States government often uses to remove foreign nationals, largely Arabs, Muslims, and South Asians,<sup>3</sup> suspected of terrorist activities.<sup>4</sup>

As evidenced during Congress's immigration reform debates of 2007, our immigration system is badly broken.<sup>5</sup> I have written elsewhere about the serious disparities in decision-making in the asylum process – disparities that appear to result from both the great discretion awarded to and the inadequate professionalization and oversight of administrative adjudicators in that system.<sup>6</sup> This article investigates discretionary decision-making by immigration officials more broadly, presenting as a case study the use of secret evidence in immigration proceedings. Through an exploration of problems with the current practice that result from an excessive focus on national security in a dysfunctional bureaucracy, this paper presents solutions applicable to efforts to combat terrorism and repair the immigration system more broadly.<sup>7</sup>

<sup>2</sup> See, e.g., Bob Barr & John Podesta, *Preface to*, David Banisar, *Government Secrecy: Decisions Without Democracy* at 3 <http://www.openthegovernment.org/otg/govtsecrecy.pdf> (“[T]he secrecy claims asserted by the [Bush] administration go far beyond what is contemplated by the law—and far beyond what is healthy for democracy, which depends on an informed citizenry.”).

<sup>3</sup> See, e.g., Kevin R. Johnson & Bernard Trujillo, *Immigration Reform, National Security After September 11, and the Future of North American Integration*, 91 Minn. L. Rev. 1369, 1380-86 (2007). (describing immigration-related measures targeted at Arab and Muslim nationals, including “interrogations, arrests, detentions, special registration, and selective deportation.”)

<sup>4</sup> See, e.g., Mary Beth Sheridan, *Immigration Law as Anti-Terrorism Tool*, Wash. Post., June 13, 2005, at A1 (“In the past two years, officials have filed immigration charges against more than 500 people who have come under scrutiny in national security investigations . . . .”); Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 Am. U. L. Rev. 367, 385 (2006) (“Immigration law is now often used in lieu of criminal law to detain or deport those alleged to be involved in terrorism.”); Nora V. Demleitner, *Misguided Prevention: The War on Terrorism as a War on Immigrant Offenders and Immigration Violators*, 40 No.6 Crim. Law Bulletin 2 (2004) (“[I]mmigration law has become a major investigatory and enforcement tool on the frontline in the fight against terrorism.”).

<sup>5</sup> See, e.g., FoxNews.com, *Bush: America's Immigration System is Broken*, (May 30, 2007), <http://www.foxnews.com/story/0,2933,276114,00.html?sPage=fnc.specialsections/immigration> (“President Bush called the nation's immigration system ‘broken’ . . . .”); Christi Parsons, *Obama: Arellano's plight shows 'broken immigration system'*, The Swamp: Chi. Trib.'s Washington Bureau, Aug. 21, 2007, [http://weblogs.chicagotribune.com/news/politics/blog/2007/08/obama\\_arellanos\\_plight\\_shows\\_b.html](http://weblogs.chicagotribune.com/news/politics/blog/2007/08/obama_arellanos_plight_shows_b.html) (Barack Obama said, “Although I do not condone Ms. Arellano's defiance of the law, her plight is representative of a broken immigration system.”).

<sup>6</sup> See Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 Stan. L. Rev. (forthcoming Nov. 2007).

<sup>7</sup> For the purposes of this article, ‘secret evidence’ is defined as documentary or testimonial information that the non-citizen is not allowed to see and on which the government relies to support removal of the immigrant.

In several cases over the past decade,<sup>8</sup> the government has relied on startlingly inaccurate evidence to support its claims that certain immigrants, generally Arab, Muslim, and South Asian, should be removed.<sup>9</sup> As a result of the government's claims that national security interests prevented the revelation of this information to the immigrants in question, the evidence was not tested by the adversarial process. More importantly, it appears that government lawyers did not endeavor to ensure the reliability of this evidence before presenting it in court, instead basing their cases on information from prejudiced sources, mistranslations, and rumors.

The case of Maher Arar is perhaps the best-known recent example of the misuse of secret evidence in immigration proceedings.<sup>10</sup> In September 2002, FBI agents detained and interrogated Mr. Arar, a Canadian and Syrian citizen, after he transited through JFK Airport.<sup>11</sup> Mr. Arar repeatedly denied any connection to terrorist groups and specifically asked the FBI not to send him to Syria as he feared torture there.<sup>12</sup> Nevertheless, the Immigration and Naturalization Service (INS) determined that Mr. Arar was a member of Al Qaeda and thus inadmissible and removable.<sup>13</sup> The INS refused to allow Mr. Arar to read the form he was initially asked to sign<sup>14</sup> and ignored Mr. Arar's plea for reconsideration.<sup>15</sup> Without allowing further inquiry before an immigration judge,<sup>16</sup> the INS removed Mr. Arar to Syria, where he was imprisoned and tortured severely for almost a year.<sup>17</sup>

---

<sup>8</sup> Information on the size of the secret evidence problem (i.e. how often the government uses secret evidence in immigration court) is purely anecdotal and only reflects the cases that the media publicizes. The government has not presented statistics on the use of secret evidence in immigration court since 2000, and because records of immigration proceedings are not publicly accessible, it is impossible to obtain this information independently. We do know of consistent efforts in Congress to expand the use of secret evidence in immigration proceedings as part of immigration reform legislation. See *infra* fns. 74 to 77 and accompanying text for further discussion of this issue.

<sup>9</sup> See also Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. Ann. Surv. Am. L., 295, 322 (2002) (describing the government's reliance on secret evidence to detain and deport Arabs and Muslims). The current term of art for physical expulsion of a non-citizen is "removal"; this article uses this term interchangeably with "deportation" although the terms have different technical meanings. In simple terms, removal proceedings are immigration proceedings in which a judge or government official determines whether a non-citizen may remain in the United States.

<sup>10</sup> *Arar v. Ashcroft*, 414 F. Supp. 2d 250, 252-53 (E.D.N.Y. 2006).

<sup>11</sup> *Id.* at 252-53 (describing Mr. Arar's confinement and interrogation and stating that FBI agents ignored Mr. Arar's repeated requests to see a lawyer). Mr. Arar repeatedly asked to make a phone call; the FBI ignored these requests for six days. He finally called his family, who contacted the Canadian consulate and retained an attorney. After a week in detention, a Canadian consular official visited Mr. Arar and assured him that he would not be removed to Syria.

<sup>12</sup> *Id.* (describing Mr. Arar's request to be sent to Canada, his country of residence, or to Switzerland, through which he had transited when returning from a vacation in Tunisia to New York).

<sup>13</sup> *Id.* at 254.

<sup>14</sup> *Id.* at 253.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 254.

<sup>17</sup> *Id.* at 254-55. (describing how Syrian officials held Mr. Arar in a rat-infested "grave" cell that was six feet long, seven feet high, and three feet wide, allowed him to bathe only once a week, fed him barely

Mr. Arar, it turns out, was casually acquainted with an individual suspected of terrorist activity, and was on the Canadian government's list of possible witnesses – not suspects or targets – for a terrorism investigation.<sup>18</sup> Mr. Arar and his family continue to suffer the psychological aftermath of his imprisonment.<sup>19</sup> The INS never verified the evidence allegedly linking Mr. Arar to Al-Qaeda through any independent legal process; this information was never presented to a judge, let alone to Mr. Arar or his attorney. Secretary of State Condoleezza Rice recently admitted that the United States government mishandled Mr. Arar's case, and should not have transferred him to a country where he faced torture.<sup>20</sup>

As this story illustrates, in the immigration system, rules restraining government discretion are relaxed and non-citizens have little political power – an explosive combination, particularly when combined with the government's incentive to appear effective in combating terrorism. This article examines the government's misuse of secret evidence in immigration proceedings as a case study to illustrate the individual, societal, and global ramifications of significantly favoring national security over due process in discretionary administrative decision-making. Given the repeated failure of domestic law safeguards to prevent this imbalance, the paper suggests that the administrative agencies responsible for immigration proceedings rely on human rights law in interpreting statutes, drafting regulations, and creating institutional culture. This turn to human rights law is particularly appropriate given the type of law (immigration) and relevant human rights (due process) at issue.

The misuse of secret evidence – the presentation of unreliable and inaccurate information, often without an adequate showing of the risk of revealing this information to the non-citizen – has serious ramifications, which I divide into three categories. First, on an individual level, the government's failure to test its evidence led to grave injustice, namely the detention of innocent men and, in some cases, the separation of families for many years. Second, on a societal level, the misuse of secret evidence decreases the legitimacy of immigration proceedings and actually increases the risk of terrorism by alienating immigrant communities. Moreover, this practice contradicts deeply held American norms of procedural fairness

---

edible food, regularly beat him with an electric cable and their fists, and threatened further torture in the form of electric shocks, hanging, and spine breaking).

<sup>18</sup> *Id.* at 255-56.

<sup>19</sup> Stephen J. Toope, Fact Finder, *Commission of Inquiry Into the Actions of Canadian Officials in Relation to Maher Arar* 19-23 (Oct. 2005); see also Arar, *supra* note 10, at 256. Mr. Arar suffers from nightmares, lethargy, bouts of unpredictable rage, phantom sensations of bugs crawling over his body, paranoia, stress headaches, and memory loss. He is emotionally distant from his family and impatient with his children, and overly dependent on his wife. He feels isolated from his community. He has been unable to find a job since he returned.

<sup>20</sup> Reuters, *Rice Admits U.S. Erred in Deportation*, N.Y. TIMES (Oct. 26, 2007).

embodied in the Sixth Amendment. Finally, on a global level, the misuse of secret evidence in immigration court contributes to the imbalance between national security interests and due process rights that has diminished the authority of the United States as a world leader, estranging allies in the fight against terrorism and providing support for those who oppose our values. It also sends a dangerous message to the international community: that America does not treat non-citizens, particularly Arabs, Muslims, and South Asians, fairly, and refuses to play by international rules.

This is not to say that the government's focus on preventing another terrorist attack on its citizens or its territory is entirely misguided. There are important national security issues at stake; the revelation of certain information could seriously jeopardize the lives of government witnesses and their families, the ability of intelligence agents to work in the field, current methods and sources of information-gathering, and vital security information that protects sites and people at risk of attack. These national security interests must be taken into account in framing the debate about the use of secret evidence. But how do we do so without eviscerating basic due process rights?

Human rights treaties bring us back to first principles, giving guidance on how to resolve the tension between national security concerns and the due process rights of non-citizens, while crafting an interpretive approach that is most germane to the U.S. context. Much ink has been spilled of late by eminent scholars and jurists on the use of foreign and international law in constitutional interpretation;<sup>21</sup> this article applies that literature to the context of administrative law.

<sup>21</sup> See, e.g., Justice Ruth Bader Ginsburg, "A Decent Respect to the Opinions of Humankind": *The Value of a Comparative Perspective in Constitutional Adjudication*, 1 *FIU L. Rev.* 27, 42 (2006) (stating "I nonetheless believe we will continue to accord 'a decent Respect to the Opinions of [Human]kind' as a matter of comity and in a spirit of humility"); Gerald L. Neuman, *International Law as a Resource in Constitutional Interpretation*, *Harv. J.L. & Pub. Pol'y* 177, 187 (2006) ("the content of an international norm receives persuasive force in the interpretation of a parallel constitutional norm"); Vicki C. Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 *Harv. L. Rev.* 109, 116 (2005) (discussing how "[e]ngagement with transnational legal sources may helpfully interrogate understanding of our own Constitution in several ways"); Hon. Diarmuid F. O'Scannlain, *What Role Should Foreign Practice and Precedent Play in the Interpretation of Domestic Law?*, 80 *Notre Dame L. Rev.* 1893, 1898, 1900 (2005) (discussing decisions where the Supreme Court has invoked foreign practice and precedent and arguing why "American courts may have a sound basis for treating foreign legal authorities with caution."); Hon. Richard Posner, *No Thanks, We Already Have Our Own Laws*, *Legal Aff.* (July/Aug. 2004), available at [http://www.legalaffairs.org/issues/July-August-2004/feature\\_posner\\_julaug04.msp](http://www.legalaffairs.org/issues/July-August-2004/feature_posner_julaug04.msp) (arguing "[t]he court should never view a foreign legal decision as a precedent in any way."); Justice Antonin Scalia, *Foreign Legal Authority in the Federal Courts*, 98 *Am. Soc'y Int'l L. Proc.* 305 (2004) (discussing when the use of foreign legal materials is legitimate); Hon. Patricia M. Wald, *The Use of International Law in the American Adjudicative Process*, 27 *Harv. J.L. & Pub. Pol'y* 431, 436 (2004) (discussing "the use by American judges . . . of decisions by the high courts of foreign countries as guides to or as persuasive authority for decisions involving our own Constitution"); Harold Hongju Koh, *Paying "Decent Respect" to World Opinion on the Death Penalty*, 35 *U.C. Davis L. Rev.* 1085 (2002) (discussing the significance of not relying on foreign and international law in the administration of the death penalty in the United States).

Administrative agencies can use human rights law as a yardstick, to understand where we may have deviated from the appropriate balance between national security and due process and as a guidebook to assist in determining how we can best uphold both by learning how other countries have resolved similar problems.

Human rights treaties are particularly appropriate in the case of secret evidence in immigration court. As immigration law involves the movement of people across borders and is partially derived from international law, it makes sense to apply human rights law here. Moreover, the right at issue – procedural due process – is one that the United States introduced into international law and that is fundamental to our legal system.<sup>22</sup> For reasons explained below, the statutory provisions authorizing the use of secret evidence in immigration proceedings have withstood facial constitutional challenges on procedural due process grounds.<sup>23</sup> The paper applies three treaties that the United States has signed and ratified: the International Covenant on Civil and Political Rights (ICCPR),<sup>24</sup> the United Nations Convention Relating to the Status of Refugees and its accompanying Protocol Relating to the Status of Refugees (Refugee Convention),<sup>25</sup> and the United Nations Convention Against Torture

---

<sup>22</sup> See United Nations Commission on Human Rights, Report of the Drafting Committee on an International Bill of Human Rights, *United States Suggestions for Articles to be Incorporated in an International Bill of Human Rights*, at Arts. 9, 10, U.N. Doc. E/CN.4/21; Manfred Nowak, U.N. Covenant on Civil and Political Rights: CCPR Commentary 236 (1993) (“During the drafting of Art. 14 [of the ICCPR], a fundamental role was played by the US, in whose constitutional history central importance has been placed on substantive and procedural “due process of law.”).

<sup>23</sup> While “as applied” constitutional challenges to the use of secret evidence against resident non-citizens have generally met with success, a facial due process challenge to the provisions of the Immigration and Nationality Act that authorize the use of secret evidence in immigration proceedings is unlikely to clear the hurdle of showing that “no set of circumstances exists under which the Act would be valid.” *Rafeedie v. INS*, 795 F.Supp. 13, 20 (D.D.C. 1992) (dismissing facial challenge under the Fifth Amendment to provisions of INA that authorized use of secret evidence because statute did not preclude Attorney General from giving more process than required) (citing *Ohio v. Akron Center for Reproductive Health*, 110 S.Ct. 2972, 2980-81 (1990)). This case did, however, uphold a facial challenge under the First Amendment to the secret evidence provisions of the INA.

<sup>24</sup> International Covenant on Civil and Political Rights, opened for signature Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) (hereinafter “ICCPR”). See *infra* fn. 159 for further discussion of the ICCPR.

<sup>25</sup> United Nations Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150 (entered into force Apr. 22, 1954); United Nations Protocol Relating to the Status of Refugees, opened for signature Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267 (entered into force Oct. 4, 1967; for the United States, Nov. 1, 1968) (hereinafter “Refugee Convention”). While the United States has not ratified the Refugee Convention, it acceded to the Refugee Protocol on November 1, 1968. See <http://www.unhcr.org/protect/PROTECTION/3b73b0d63.pdf>. The Protocol incorporates Articles 2 through 34 of the Convention; as a result, the U.S. government has essentially signed on to the Refugee Convention. United Nations Protocol Relating to the Status of Refugees, Art. 1, para. 1 (“The States Parties to the present Protocol undertake to apply Articles 2 through 34 inclusive of the Convention to refugees hereinafter defined.”).

and Other Cruel, Inhuman, or Degrading Treatment (CAT)<sup>26</sup> to these provisions on the use of secret evidence in immigration court. Despite the limitations of domestic law in challenging this practice, this investigation illustrates that human rights law can provide a framework that will enable the administrative agencies responsible for immigration proceedings to interpret statutes, draft regulations, and create an institutional culture in a way that more appropriately balances national security and due process concerns. Such an approach will not only ensure fair treatment for individuals, but will strengthen the legitimacy of the American immigration system, which will in turn help to make our society safer and our nation more powerful on the world stage.

LEGAL FRAMEWORK AUTHORIZING  
THE USE OF SECRET EVIDENCE IN IMMIGRATION PROCEEDINGS

Before examining the problems that have resulted from the misuse of secret evidence in immigration proceedings, this paper lays out the relevant domestic legal framework, focusing on the Department of Homeland Security's (DHS) use of national security information against three types of non-citizens in three types of proceedings.<sup>27</sup> The Immigration and Nationality Act (INA) and its regulations authorize DHS to use secret evidence against non-citizens who: (1) are apprehended *at the border*, i.e. who have not been legally admitted into the United States; (2) entered the United States legally but *no longer hold lawful immigration status*; or (3) hold legal status but are *alleged to have engaged in terrorist activity*. DHS can use this secret evidence in: its own internal administrative processes, removal proceedings in immigration court, or an Alien Terrorist Removal Court (ATRC).

The first type of proceeding, internal administrative procedures, may be used only against non-citizens at the border. If the evidence shows that this person poses a threat to national security, DHS can order him removed without any review of this decision in immigration court or federal court.<sup>28</sup> In the second type of proceeding, a removal hearing in immigration court, DHS can present secret evidence against both non-citizens who were apprehended at the border as well as those who no longer hold lawful immigration status. This article focuses particularly on those immigrants in the latter category who seek permission to remain to be protected against

<sup>26</sup> United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/39/51 (entered into force June 26, 1987) (hereinafter "Convention Against Torture" or "CAT").

<sup>27</sup> In March 2003, the Department of Homeland Security took over the functions of the Immigration and Naturalization Service. *See* 6 U.S.C. §§251-298.

<sup>28</sup> INA § 235(c)(2)(B)(ii); 8 C.F.R. § 235.8(b)(1).

torture or persecution in their home country or because of close family ties to a U.S. citizen.<sup>29</sup> Finally, the government may use secret evidence in an Alien Terrorist Removal Court (ATRC) proceeding to remove immigrants who hold legal status, including permanent residents, but are alleged to have engaged in terrorist activity; however, this process has never been used.<sup>30</sup>

### *Non-Citizens and the Constitution*

These three categories of non-citizens reflect the distinctions that have been made in legislation and jurisprudence on the constitutional rights of immigrants. Until 1996, the INA distinguished between non-citizens who had “entered” the United States and those who had not. Non-citizens who had not yet entered could be removed in exclusion proceedings, in which few, if any, constitutional protections applied; this policy stemmed from the idea that the Constitution does not apply outside of the borders of the U.S. and that a person detained at the border had constructively not entered the constitutional space.<sup>31</sup> The resultant congressional authority “to exclude or expel aliens, unconstrained by any judicially enforceable constitutional limits” is known as the “plenary power” doctrine.<sup>32</sup> (Even in light of this principle, the Supreme Court has held that Fifth Amendment endows non-citizens who have not “entered” the United States with a minimum level of due process rights.)<sup>33</sup> In contrast, non-citizens who

---

<sup>29</sup>INA § 240(b)(4)(B); 8 C.F.R. § 1003.19(d). *See also* INA § 240A(b) (allowing non-citizens unlawfully present to become permanent residents if the alien (a) has been physically present in the United States for a continuous period of not less than ten years; (b) has been a person of good moral character during such period; (c) has not been convicted of an offense; (d) establishes that deportation would result in exceptional hardship to a U.S. citizen or permanent resident spouse, parent, or child or (e) they have been in the U.S. for three years and they or their U.S. citizen child has been battered or subjected to extreme cruelty by a U.S. citizen or permanent resident spouse or parent, and removal would result in extreme hardship to the non-citizen, her child, or her parent); INA § 245(i) (allowing adjustment to status of permanent resident for non-citizens unlawfully present who are beneficiaries of family-based visas, on the basis of their status as a child or sibling of a U.S. citizen or a spouse or unmarried child of a permanent resident, if that visa petition was filed on or before April 30, 2001); INA § 208(c)(1) (allowing non-citizens granted asylum to remain in the United States); INA § 241(b)(3) (prohibiting removal, except under very limited circumstances, of non-citizen whose life or freedom would be threatened in their country of origin); 8 C.F.R. §§ 1208.16(c), (d), 1208.17(a) (prohibiting removal of non-citizens to a country in which it is more likely than not that they would be tortured).

<sup>30</sup> INA §§501-07, *see also* INA § 237(a)(4)(B) (terrorist activities as grounds for deportation).

<sup>31</sup> *See, e.g.*, U.S. 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.”); U.S. ex rel. Shaughnessy v. Mezei, 345 U.S. 206, 212 (1953) (same).

<sup>32</sup> Gerald L. Neumann, *Strangers to the Constitution: Immigrants, Borders, and Fundamental Law* 14 (1996).

<sup>33</sup> *Wong Wing v. United States*, 16 S.Ct. 977, 981 (1896) (excludable aliens may not be punished at hard labor without due process of law); *see also* *Barrera-Echavarria*, 44 F.3d 1441, 1449 (9<sup>th</sup> Cir. 1995) (“Some of the cases involving excludable aliens suggest that they do enjoy certain substantive constitutional rights.”); *Lynch v. Cannatella*, 810 F.2d 1363, 1373 (5<sup>th</sup> Cir.1987) (“The ‘entry fiction’ that excludable aliens are to be treated as if detained at the border despite their physical presence in the United States (footnote omitted) determines the aliens’ rights with regard to immigration and deportation

had entered were entitled to deportation proceedings, in which the due process protections of the Fifth Amendment applied.<sup>34</sup>

This “entry fiction” led to confusing and convoluted results; a non-citizen at the border who had previously resided lawfully in the United States and had family members in the United States could be provided less process than a non-citizen who had entered illegally and had few ties to the United States.<sup>35</sup> The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 substantially altered the statutory basis for this distinction; both exclusion and deportation hearings are now called removal proceedings, in which determinations of a non-citizen’s admissibility and deportability are made.<sup>36</sup> The differing levels of procedural due process applicable to non-citizens at the border and those within the country, however, derive from the constitutional jurisprudence and therefore probably still constrain how the government can treat both non-citizens at the border and those found within the country.<sup>37</sup>

In the 1940s and 1950s, the Supreme Court heard several cases in which the government relied on secret evidence to exclude or deport three types of immigrants: those who had not yet “entered”; those who had entered lawfully but no longer held lawful status, and those who held lawful permanent residence. The first two groups were determined to receive little protection under the Fifth Amendment, while the third was entitled to basic due process rights.<sup>38</sup>

---

proceedings. It does not limit the right of excludable aliens detained within United States territory to humane treatment.”).

<sup>34</sup> See, e.g., *Yamataya v. Fisher*, 23 S.Ct. 611, 614-15 (1903) (holding that the executive cannot deport an alien who has entered the country, even if allegedly illegally, “without giving him all opportunity to be heard upon the questions involving his right to be and remain in the United States. No such arbitrary power can exist where the principles involved in due process of law are recognized.”); *Reno v. Flores*, 113 S.Ct. 1439, 1449 (1993) (“It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings.”)

<sup>35</sup> See, e.g., Charles D. Weisselberg, *The Exclusion and Detention of Aliens: Lessons from the Lives of Ellen Knauff and Ignatz Mezei*, 143 U. Pa. L. Rev. 933, 936-38 (1995).

<sup>36</sup> The INA retains separate provisions for determining whether a non-citizen is “admissible” or “deportable,” but the distinction now turns on whether a non-citizen has been lawfully admitted to the United States, rather than whether she has “entered” the country. *Rosales-Garcia v. Holland*, 322 F.3d 386, 391 n.1 (6th Cir. 2003).

<sup>37</sup> See, e.g., *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (noting that the “entry” distinction runs throughout immigration law, such that “certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders. (citations omitted)”). The question of how the old entry distinction applies after the 1996 Act has not yet been decided by the Supreme Court.

<sup>38</sup> In the case of a woman who had not “entered” the United States but was married to an American citizen, the Court held that the government could exclude her based on classified national security evidence. *U.S. ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950). In a similar case, the Court found that the Attorney General could exclude an alien who was not yet admitted “without a hearing when the [removal] is based on confidential information the disclosure of which may be prejudicial to the public interest.” *Shaughnessy v. U.S. ex rel. Mezei*, 345 U.S. 206, 210-11 (1953). Both Knauff and Mezei were held at Ellis Island, where they were not considered to have “entered” the U.S. In the second type of case, the Court determined that the government could use secret evidence to deport a non-citizen who had entered lawfully but no longer held lawful status, if the disclosure of this information would be prejudicial to the public interest, safety or security (as determined by the government and the Board of

### *The Statutory Framework*

Similarly, under current statutory law, non-citizens who have not been admitted into the United States are entitled to the fewest statutory safeguards against the use of secret evidence. If the Attorney General determines based on “confidential information” that a non-citizen “at the border”<sup>39</sup> poses a national security risk, he can be removed without appearing before a judge, let alone seeing or challenging the evidence against him.<sup>40</sup> While the regulations require that the government uphold the right to be protected from torture during this process, they do not contain any guidance on how to ensure that this right is secured.<sup>41</sup>

The government can also present secret evidence in immigration court against non-citizens who have not been admitted into the United States as well as those without lawful status who seek permission, known as “discretionary relief”, to remain in the United States.<sup>42</sup> The second category includes both non-citizens who were lawfully admitted but lost their lawful status, for example, by overstaying their visa as well as those who hold lawful status but may have violated the INA (for example, by engaging in terrorist activity) and face removal proceedings to determine whether these actions render them removable.<sup>43</sup> Because they fear persecution in their home country or

---

Immigration Appeals). *Jay v. Boyd*, 351 U.S. 345, 358 (1956). Finally, without reaching the constitutional question, the Court held that unsworn, *ex parte* testimony presented by the government to remove a lawful permanent resident violated Bridges’ right to a fair hearing under the regulations implementing the Immigration and Nationality Act. *Bridges v. Wixon*, 326 U.S. 135, 154-57 (1945) (finding “deportation without a fair hearing which may be corrected on habeas corpus” where “evidence was improperly received and where but for that evidence it is wholly speculative whether the requisite finding would have been made.”)

<sup>39</sup> The definition of “at the border” that I use here and throughout the paper includes all individuals subject to expedited removal, and so also applies to non-citizens who enter without inspection and are caught within 100 miles of the border. Designating Aliens for Expedited Removal, 69 Fed. Reg. 48877–81 (Aug. 11, 2004).

<sup>40</sup> INA §235(c)(2)(B)(ii); 8 CFR §235.8(b)(1); *see also* 8 C.F.R. § 1235.8(d), which provides that even where an non-citizen suspected of inadmissibility on national security grounds is provided with a hearing, the immigration judge can order her immediately removed based on new secret evidence if the judge decides that disclosure of this evidence might harm the public interest, safety, or security. Moreover, two federal courts have found that where the Attorney General determines based on confidential information that an unadmitted non-citizen poses a security risk, this individual can be denied an asylum hearing. *Azzouka v. Meese*, 820 F.2d 585, 587 (2d Cir. 1987); *Avila v. Rivkind*, 724 F.Supp. 945, 950 (S.D. Fl. 1989).

<sup>41</sup> 8 C.F.R. §§ 208.18(d), 235.8(b)(4); CRS Report on CAT. As discussed further below, the United Nations Convention Against Torture (CAT) and the regulations incorporating this treaty into U.S. law provide that an individual cannot be removed to a country where she would be in danger of torture.

<sup>42</sup> INA § 240(b)(4)(B) (“the alien shall have a reasonable opportunity to examine the evidence against the alien, to present evidence on the alien’s own behalf, and to cross-examine witnesses presented by the Government but these rights shall not entitle the alien to examine such national security information as the Government may proffer in opposition to the alien’s admission to the United States or to an application by the alien for discretionary relief under this Act.”).

<sup>43</sup> *See also* INA § 240A(b) (allowing non-citizens unlawfully present to become permanent residents if (a) they have been in the United States for ten years if their deportation would result in exceptional hardship to a U.S. citizen or permanent resident spouse, parent, or child or (b) they have been in the U.S.

because of strong family ties to American citizens, these individuals can apply to remain in the United States.<sup>44</sup> The Attorney General is not required to grant these requests for lawful status; relief from removal is at his discretion.<sup>45</sup> In a nutshell, the government can use secret evidence in immigration court against certain non-citizens who do not hold lawful status, including asylum seekers and those seeking permanent residence based on family ties, and against any non-citizen at the border.

The government faces few procedural hurdles in presenting secret evidence against these non-citizens in immigration court. The only requirement is that the information be relevant, and the government state that it is classified on national security grounds.<sup>46</sup> The Immigration Judge must inform the non-citizen that the government has presented classified information to the court. In asylum cases, the agency providing the secret evidence *may* create a non-classified summary for the asylum seeker, if it can protect the confidential information and its sources.<sup>47</sup> In applications for permanent

---

for three years and they or their U.S. citizen child has been battered or subjected to extreme cruelty by a U.S. citizen or permanent resident spouse or parent, and removal would result in extreme hardship to the non-citizen, her child, or her parent); INA § 245(i) (allowing adjustment to status of permanent resident for non-citizens unlawfully present who are beneficiaries of family-based visas, on the basis of their status as a child or sibling of a U.S. citizen or a spouse or unmarried child of a permanent resident, if that visa petition was filed on or before April 30, 2001); INA § 208(c)(1) (allowing non-citizens granted asylum to remain in the United States); INA § 241(b)(3) (prohibiting removal, except under very limited circumstances, of non-citizen whose life or freedom would be threatened in their country of origin); 8 C.F.R. §§ 1208.16(c), (d), 1208.17(a) (prohibiting removal of non-citizens to a country in which it is more likely than not that they would be tortured).

<sup>44</sup> INA 208; INA 241(b)(3)(A); INA 240(b)(4)(B); 8 C.F.R. §1003.19(d). U.S. law provides two distinct forms of relief for refugees: asylum, which provides benefits including eventual eligibility for permanent residence and citizenship and the right to bring one's spouse and children to the U.S. as asylees, and withholding of removal, which does not provide either of these benefits and requires a successful applicant to meet a higher legal standard but is available to asylum seekers who have missed a statutory one-year filing deadline or committed certain crimes and are therefore not eligible for asylum. Because withholding is mandatory rather than discretionary relief, there is no statutory basis for the use of secret evidence against an admitted non-citizen seeking withholding. Because asylum and withholding hearings are combined, it is likely that in practice secret evidence is used against admitted non-citizens seeking withholding.

<sup>45</sup> Note that withholding of removal and relief under the Convention Against Torture are not discretionary forms of relief. But because requests for these forms of relief are most often heard in conjunction with asylum claims, it is likely that secret evidence is used against non-citizens seeking these forms of relief.

<sup>46</sup> INA §240(b)(4)(B); 8 C.F.R. §1240.11(a)(3). The determination of relevance and classified status must be made by the Director of the Bureau of Citizenship and Immigration Services, the Commissioner of the Bureau of Customs and Border Protection, or the Assistant Secretary for the Bureau of Immigration and Customs Enforcement as defined in 8 C.F.R. § 1.1(d).

<sup>47</sup> 8 C.F.R. §1240.11(c)(3)(iv). Although withholding of removal is not a discretionary form of relief from removal, because the government must grant this status to those who are eligible, the determination of withholding relief is wrapped up in the asylum decision. As a result, the INA also authorizes the government to use secret evidence in withholding of removal cases. The regulations authorizing the use of secret evidence in asylum hearings do not explicitly mention applications for relief under the Convention Against Torture. While the INA authorizes the use of secret evidence in all admissibility proceedings, it limits further use to applications for discretionary relief. Since relief under the

residence, the Immigration Judge *may* inform the non-citizen of the general nature of the evidence and allow the presentation of opposing evidence, if she can safeguard the information and its source.<sup>48</sup> In both cases, while the government need only invoke national security concerns to withhold evidence, there is no obligation on the part of the judge or the government to provide even a summary of this secret evidence to the non-citizen.

A thus far unused provision of the INA authorizes the use of secret evidence against any non-citizen—even a permanent resident—suspected of links to terrorism. In 1996, as part of the Antiterrorism and Effective Death Penalty Act, Congress created an “Alien Terrorist Removal Court” to remove non-citizens whom the Attorney General alleges to be terrorists.<sup>49</sup> This court has never been used,<sup>50</sup> but the legislation constructing it provides for the use of secret evidence. In this court, the government may withhold evidence “if disclosure would endanger national security.”<sup>51</sup> The judge then must approve a government-prepared unclassified summary of the information.<sup>52</sup> If the judge decides that this summary would likely cause serious harm to national security or threaten a person’s life or health, the government can present the secret evidence without providing the summary to the non-citizen.<sup>53</sup> Again, permanent residents are provided with greater protections than other non-citizens: The judge must appoint a special attorney who can review the classified information and otherwise assist a permanent resident who faces national security charges before this court.<sup>54</sup> During the hearing, any part of the argument that refers to classified information may be heard *ex parte* and *in camera*.<sup>55</sup> As in immigration court, the Federal Rules of Evidence do not apply.<sup>56</sup>

It is important to note that existing regulations can protect sensitive national security information through the use of protective orders in immigration court.<sup>57</sup> To obtain a protective order, the government must establish a “substantial likelihood” that the information to be protected “will, if disclosed, harm the national

---

Convention Against Torture is mandatory for eligible non-citizens, there is no statutory basis for the use of secret evidence against an admitted non-citizen seeking relief under the Convention Against Torture.

<sup>48</sup> 8 C.F.R. §1240.11(a)(3).

<sup>49</sup> INA §§501-07.

<sup>50</sup> Robert M. Chesney, *Panel Report: Beyond Article III Courts: Military Tribunals, Status Review Tribunals, and Immigration Courts*, 5 CARDOZO PUB. L., POL., & ETHICS J. 27, 33 (2006) (summarizing presentation by Brian D. Boyle, who was the Principal Deputy Associate Attorney General, Department of Justice, from 2003-2005).

<sup>51</sup> INA §504(e)(1)(A).

<sup>52</sup> INA §504(e)(3).

<sup>53</sup> INA §504(e)(3)(E).

<sup>54</sup> INA §504(e)(3)(F).

<sup>55</sup> INA §504(f).

<sup>56</sup> INA §504(h).

<sup>57</sup> 8 C.F.R. § 1003.46 (2007).

security” interests of the United States.<sup>58</sup> The non-citizen can respond, but may be prevented from seeing the evidence at issue.<sup>59</sup> Moreover, the judge must give “appropriate deference” to senior officials in national security agencies in deciding whether disclosure of the information at issue will harm the national security interests of the United States.<sup>60</sup>

Once issued, a protective order may prohibit the non-citizen, her attorney, and any witnesses from divulging the information, and also requires secure transmission and storage of the classified materials.<sup>61</sup> The immigration judge may impose additional requirements to protect the information from public disclosure.<sup>62</sup> The penalties for transgression are severe: if the information is revealed, the non-citizen will face removal unless one of a few stringent exceptions applies.<sup>63</sup> Her representative can also be suspended from practice before the immigration courts and asylum offices.<sup>64</sup>

#### *Challenges to the Use of Secret Evidence in Immigration Proceedings*

The government has presented secret evidence in immigration hearings for well over fifty years, based on various provisions of the INA.<sup>65</sup> The current statutory authority for using secret evidence, outlined above, was added to the INA by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).<sup>66</sup> The only federal court that has heard a constitutional challenge to these provisions held that the use of secret evidence to *detain* a non-citizen was unconstitutional “as applied”, but did not address the use of secret evidence to *remove* a non-citizen.

The court held that constitutional due process protections applied to the plaintiff, Hany Kiareldeen, as a resident, even though his visa

<sup>58</sup> 8 C.F.R. § 1003.46(a).

<sup>59</sup> 8 C.F.R. § 1003.46(b)–(c). The government must submit a motion requesting a protective order, and may attach the information it wishes to protect in the submission to the court but not to the non-citizen.

*Id.*

<sup>60</sup> 8 C.F.R. § 1003.46(d). (ok)

<sup>61</sup> 8 C.F.R. § 1003.46(f). (ok)

<sup>62</sup> 8 C.F.R. § 1003.46(f)(2)(iv).

<sup>63</sup> 8 C.F.R. § 1003.46(i). This penalty applies only to discretionary relief; mandatory relief, such as withholding of removal or protection under the Convention Against Torture can be awarded. To meet an exception, the non-citizen must establish by clear and convincing evidence that the disclosure was caused by extraordinary and extremely unusual circumstances or was beyond the control of the non-citizen and her representative, and the non-citizen must cooperate fully with any investigation about the breach of the protective order. 8 C.F.R. § 1003.46(i).

<sup>64</sup> 8 C.F.R. § 1003.46(i). (ok)

<sup>65</sup> *See supra* note 38.

<sup>66</sup> *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, §§ 302(a), 304(a)(3), 354, 110 Stat. 3009-546 (1996) (codified in scattered sections of 8 and 18 U.S.C.) (adding INA § 235(c) and § 240(b)(4)(B) and amending INA §§ 501, 502, 504, 505); 67 Fed. Reg. 36,799, 36,802 (May 28, 2002) (adding 8 C.F.R. § 1003.46); 62 Fed. Reg. 10,312, 10,358 (Mar. 6, 1997) (adding 8 C.F.R. § 235.8 and § 1235.8); and 62 Fed. Reg. at 10,367 (adding 8 C.F.R. § 1240.11).

had expired.<sup>67</sup> Using the *Mathews v. Eldridge* balancing test, the court held that Mr. Kiareldeen's interest in his physical liberty should be accorded great weight, that the risk of erroneous deprivation of his rights was high because of the one-sided nature of secret evidence, and that while the government's interest in national security was weighty, it had failed to establish that Mr. Kiareldeen actually posed a threat to national security.<sup>68</sup> Finding a due process violation, the court ordered Mr. Kiareldeen's release from detention.<sup>69</sup>

This was a victory for Mr. Kiareldeen and helpful for other non-citizens who have "entered" the United States, but because it was not a facial challenge, the secret evidence provisions of the INA and its regulations remain on the books. Immigrants' rights advocates tried to remove these sections of the statute through the Secret Evidence Repeal Act (SERA), which was introduced in Congress in 1999 and 2001.<sup>70</sup> The most recent version of this bill provided safeguards to ensure that information was properly classified, and allowed the non-citizen or the government to move to refer to federal district court any case in which classified information was introduced.<sup>71</sup> The federal court would then apply the Classified Information Procedures Act (CIPA), which governs the use of classified information in criminal cases, to the immigration proceedings. The bill also sought to eliminate the Alien Terrorist Removal Court, and to prohibit the use of secret evidence against permanent residents, asylum seekers, and certain other non-citizens.<sup>72</sup> The Secret Evidence Repeal Act had bipartisan support, and George W. Bush pledged in his presidential campaign to work with the bill's sponsors "to ensure respect for the law."<sup>73</sup> Introduced in its most recent incarnation almost six months before September 11, SERA failed to pass, and has not been re-introduced.

<sup>67</sup> See *infra* note 88–90 and accompanying text.

<sup>68</sup> Kiareldeen, 71 F.Supp.2d at 413-14.

<sup>69</sup> Kiareldeen, 71 F.Supp.2d at 414.

<sup>70</sup> H.R. 2121, 106th Cong. (1999); H.R. 1266, 107th Cong. (2001).

<sup>71</sup> H.R. 1266, 107th Cong. § 3(a) (2001).

<sup>72</sup> H.R. 1266, 107th Cong. §§ 3(b), 4, 5 (2001). SERA also prohibited the use of secret evidence against non-citizens paroled into the U.S., as well as in bond proceedings, which are immigration hearings in which a detained non-citizen seeks to post a bond to be released from detention. CIPA, however, is not an ideal solution to the problem of secret evidence in immigration court. As Ellen Yaroshesky explains, was created to prevent "gray-mailing", or threats by government officials or intelligence operatives to release confidential information unless the charges against them were dismissed – so the statute allows defendants to use classified materials in their defense under a protective order and other conditions. Ellen Yaroshesky, *The Slow Erosion of the Adversary System*, 5 *Cardozo Public Policy, Law, and Ethics Journal* 203, 209 (2006). In the immigration context, the government wants to present classified information – the non-citizen is usually unaware of the existence, let alone the content of this information. Moreover, CIPA is drafted for federal court use, whereas secret evidence in the immigration context is presented in immigration court. Because of these differences in motivation and application, CIPA is not a perfect fit for the problem of secret evidence in immigration court.

<sup>73</sup> American Civil Liberties Union, Letter to President Bush on the Use of Secret Evidence in Immigration Proceedings, July 13, 2001 (quoting Governor George W. Bush's Record of Inclusion), available at <http://www.aclu.org/news/NewsPrint.cfm?ID=279&c=98>.

We know that the Bush administration is still using secret evidence in immigration court, but we can only guess at the true size of this problem. Reports of secret evidence in immigration court are solely anecdotal – we hear of the few cases that are picked up by the media but do not know the parameters of the iceberg of cases that remains below the surface of public attention. Perhaps because the current administration has claimed that it does not use secret evidence in immigration court,<sup>74</sup> a claim we know to be false,<sup>75</sup> it has not provided statistics on this practice since 2000.<sup>76</sup> Moreover, because records of immigration proceedings are not publicly accessible, it is not possible to research this question independently.<sup>77</sup> While some cases are publicized, likely where the non-citizen has a savvy

<sup>74</sup> American Civil Liberties Union, Letter to President Bush on the Use of Secret Evidence in Immigration Proceedings, July 13, 2001, *available at* <http://www.aclu.org/news/NewsPrint.cfm?ID=279&c=98> (John Ashcroft, testifying before the House Judiciary Committee in his official capacity as Attorney General, stated that the Bush Administration had not used secret evidence in immigration court as of June 2001). However, a 2005 Washington Post article cites immigration authorities on background stating that “they sometimes turn to immigration charges rather than terrorism charges because a case might be based on classified information that they cannot reveal in court without damaging other investigations.” Mary Beth Sheridan, *Immigration Law as Anti-Terrorism Tool*, Wash. Post, June 13, 2005, at A01, *available at* [http://www.washingtonpost.com/wp-dyn/content/article/2005/06/12/AR2005061201441\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2005/06/12/AR2005061201441_pf.html).

<sup>75</sup> See *Abou-Elmajd v. Gonzales*, No. Civ.06 1154 KI, 2006 WL 2994840 (D. Or. Oct. 19, 2006) (lawsuit challenging use of “secret, undisclosed memo” in determining application for permanent residence and work authorization); *Arar*, *supra* note 10 (immigration case resulting in deportation to Syria based on the government’s finding that Arar was a member of Al Qaeda, even though Arar was denied an opportunity to refute and even see the evidence against him); *Toope*, *supra* note 19 and accompanying text; *Nadarajah v. Gonzales*, 443 F.3d 1069 (9th Cir. 2006) (immigration case in which government evidence was withheld from Nadarajah, his lawyers, and the judge); See also Nina Bernstein, *Music Scholar Barred from U.S., But No One Will Tell Her Why*, N.Y. Times, Sept. 17, 2007, at B1 (detailing story of Nalini Ghuman, a British national and assistant professor at Mills College in Oakland, whose residency visa was revoked without explanation in August 2006 and quoting Ghuman, who had lived and worked in the United States for 10 years, as stating “I don’t know why it’s happened, what I’m accused of. . . . There’s no opportunity to defend myself. One is just completely powerless.”); Nina Bernstein, *Girl Called Would-Be Bomber Was Drawn to Islam*, N.Y. Times, Apr. 8, 2005, at B1 (stating that government evidence presented in immigration court alleging that two teenage girls were potential suicide bombers was “withheld from the girls and anyone who represents them under a ‘protective order’ that F.B.I. investigators obtained from the immigration court. . .”).

<sup>76</sup> Currently, there are no available statistics as to the number of immigration cases per year in which secret evidence is used. The Washington Post attempted to obtain the names of the more than 500 persons estimated to have been charged in national security investigations between 2003 and 2005, but Homeland Security officials refused the Post’s request. Mary Beth Sheridan, *Immigration Law as Anti-Terrorism Tool*, Wash. Post, June 13, 2005, at A01. In 2000, the government was using secret evidence in eleven cases; in 1998, the government said it used secret evidence in approximately twenty cases per year. Testimony of Bo Cooper, INS General Counsel, Before the Committee on the Judiciary of the U.S. House of Representatives Concerning H.R. 2121, the “Secret Evidence Repeal Act,” 2000 WL 684411 (May 23, 2000); The National Security Considerations Involved in Asylum Applications: Hearings Before the Senate Judiciary Committee on Technology, Terrorism and Government Information, 105th Cong., Oct. 8, 1998 (testimony of Paul Virtue, INS General Counsel). These numbers could include at most only a year and a half of statistics after the implementation of IIRIRA. The government also uses secret evidence to detain non-citizens; a discussion of the use of secret evidence in immigration bond hearings is beyond the scope of this paper.

<sup>77</sup> While a Freedom of Information Act request might reveal some of these cases, the records of asylum and Convention Against Torture cases are generally sealed to protect the applicant, so any such inquiry would necessarily be incomplete.

attorney, the government may be using secret evidence in many more immigration proceedings that we do not know about.

We do know that efforts to expand the use of secret evidence in immigration proceedings are underway. In June 2007, the Senate considered an amendment to the immigration reform bill that would have authorized DHS to use secret evidence against permanent residents applying to become citizens.<sup>78</sup> A similar clause allowing the use of secret evidence in naturalization proceedings was presented in immigration bills in the House and the Senate in 2006.<sup>79</sup> While the amendment failed for other reasons, Congress appears poised to expand authorization of secret evidence in future immigration reform efforts.

#### THE TROUBLE WITH SECRET EVIDENCE

The misuse of secret evidence – namely, the presentation of unreliable and inaccurate information, particularly where the risk of revelation to the non-citizen has not been established – in immigration proceedings poses problems on at least three levels: individual, societal, and global. On an individual level, non-citizens and their families have sustained serious harm, including extended detention and family separation. On a societal level, this practice seriously damages our principles of procedural fairness and risks alienating Arab, Muslim, and South Asian immigrant communities. Finally, on a global level, the perception that Arabs, Muslims, and South Asians are unfairly treated in immigration proceedings will diminish America's moral authority and thus our leadership capacity on the world stage.

#### *Harm to Individuals*

Over the past decade, DHS has presented startlingly inaccurate secret evidence against several non-citizens in immigration court.<sup>80</sup> In the 1990s, government lawyers relied on mistranslated documents, withheld as classified documents that were unclassified, and failed to corroborate evidence based on rumors, prejudiced sources, and stereotyping. The very nature of secret evidence eliminates the adversarial system's traditional test of evidentiary reliability and accuracy: confrontation. Moreover, the broad discretion awarded to the government in these cases combined with a strong political incentive to appear effective in combating terrorism seem to have inspired government lawyers to present evidence without first testing

<sup>78</sup> S. Amdt. 1184, 109<sup>th</sup> Cong. §204 (2007) (introduced by Senator Cornyn on May 23, 2007 as an amendment to S.1348; rejected by Senate on June 6, 2007).

<sup>79</sup> See S. 2611, 108<sup>th</sup> Cong. § 204 (2006); H.R. 4437, 108<sup>th</sup> Cong. §609 (2006).

<sup>80</sup> For additional examples, see Susan M. Akram, *Scheherazade Meets Kafka: Two Dozen Sordid Tales of Ideological Exclusion*, 14 Geo. Immigr. L.J. 51, 76-81 (1999).

it for accuracy and reliability. Despite the grave harm suffered by non-citizens wrongly accused of terrorist activity in these cases, the government continues to use apparently untested secret evidence in immigration proceedings. In recent cases, the government has withheld evidence from even the judge, eliminating any external assessment of this information, and has prevented the non-citizen from rebutting even the charges against him.<sup>81</sup>

In the case of Nasser Ahmed, for example, the government relied on misclassified information, a biased source, and a mischaracterized document to make its case.<sup>82</sup> As a result, Mr. Ahmed, an Egyptian asylum seeker and father of two, was detained for three and a half years.<sup>83</sup> During Mr. Ahmed's asylum hearing, the immigration judge determined that he was eligible for asylum but that he was a danger to national security based on secret evidence presented by the government.<sup>84</sup> Once the evidence was declassified,<sup>85</sup> Mr. Ahmed's lawyers were able to refute the charges against him and to show that a crucial government witness against Mr. Ahmed was seriously prejudiced against him.<sup>86</sup> The Immigration Judge then determined that Mr. Ahmed was *not* a threat to national security and granted his asylum claim, finding that "[t]he use of secret evidence against a party, evidence that is given to, and relied on, by the IJ and BIA but kept entirely concealed from the party and the party's counsel, is an obnoxious practice, so unfair that in any ordinary litigation context, its unconstitutionality is manifest."<sup>87</sup>

In the case of Hany Kiareldeen, the government used a non-citizen's ex-wife as a secret witness against him; it is hard to imagine a more biased evidentiary source.<sup>88</sup> Suspecting that his ex-wife was

<sup>81</sup> See *infra* discussion of Maher Arar case, notes 10--18 and accompanying text.

<sup>82</sup> Ahmed, who admired Sheik Omar Abdel Rahman, a Muslim cleric convicted of conspiring to bomb several New York landmarks, adamantly denied any connection with Rahman's terrorist organization and testified that he is opposed to violence. *In re Ahmed*, No. A90-674-238, slip op. at 3 (N.Y., Immigr. Ct. July 30, 1999) [hereinafter *Ahmed Decision*] (decision following remand) (on file with author).

<sup>83</sup> *Id.*, at 14-15; *In re Ahmed*, No. A90-674-238 (B.I.A. Nov. 13, 1999) (bond redetermination decision).

<sup>84</sup> *Ahmed Decision*, *supra* note 82, slip op. at 1.

<sup>85</sup> After Mr. Ahmed's lawyers brought a constitutional challenge on the use of secret evidence against him, the government provided a full summary of the charges against him and a declassified version of the documentary evidence. Anthony Lewis, Op-Ed., *Abroad at Home: Janet Reno's Test*, N.Y. Times, Nov. 23, 1999, at A27.

<sup>86</sup> This witness's employment and opportunity to remain in the United States were threatened by Mr. Ahmed's complaints against him. *Ahmed Decision*, *supra* note 82, slip op. at 6-7. The government had charged that Mr. Ahmed published a letter given to him by the imprisoned Sheik Abdel Raman that led to a terrorist attack in Egypt. Mr. Ahmed's lawyers showed that the letter had no link to the attack. *Id.*, slip op. at 4-5. In addition, included in the allegedly "classified" information was a statement from an FBI agent that Mr. Ahmed should be detained because his release would make him "more well known, lending to his credibility." *Id.*, classified at 8.

<sup>87</sup> *Ahmed Decision*, *supra* note 82, slip op. at 14-15 (quoting *Haddam v. Reno*, 54 F. Supp. 2d 588, 598 (E.D. Va. 1999)).

<sup>88</sup> Mr. Kiareldeen, a Palestinian father of one married to a U.S. citizen, sought to become a permanent resident. The government jailed him based on his former wife's assertions to local police that he was linked to dangerous Muslim organizations. Matthew Purdy, *Our Towns: Custody Fight Disguised as*

the source of the evidence against him, Mr. Kiarldeen called her as a witness, but the government repeatedly failed to produce her.<sup>89</sup> After almost two years in detention, a federal judge eventually freed Mr. Kiarldeen, finding that the “most detailed” piece of evidence against him “identifie[d] not a single source and [wa]s barely over two pages.”<sup>90</sup> While Mr. Kiarldeen was imprisoned, his former wife absconded with his daughter; it took him over three years to find her.<sup>91</sup> The government’s reliance on only one obviously biased source in this case transformed Mr. Kiarldeen’s immigration proceedings into a weapon in a custody battle.

In a third case from the 1990s, the government used wrongly classified evidence against Dr. Ali Yasin Mohammed-Karim.<sup>92</sup> Relying on this secret evidence, the Immigration Court held that Dr. Karim could not apply for asylum because he posed a risk to national security.<sup>93</sup> After several senators wrote a complaint letter to Attorney General Reno, the government announced that most of the evidence in Dr. Karim’s case had been classified “in error.”<sup>94</sup> Former CIA Director James Woolsey, who represented Dr. Karim, characterized much of the secret evidence as, “vague suspicions, some the result of lies prompted by jealousies among the exiles, and some mistakes in translation during Federal Bureau of Investigation interviews of the exiles.”<sup>95</sup>

---

*Terror Case*, N.Y. Times, Jan. 29, 2003, at B1. The provision of the INA that the government alleges allows it to detain non-citizens based on secret evidence is typically related to but beyond the scope of this article. The language of these provisions does not expressly authorize the use of secret evidence, while the provisions allowing the use of secret evidence to deport non-citizens do. The *Kiarldeen* court did not decide this question but assumed for the constitutional analysis that the provisions do allow for the use of secret evidence in bond hearings. *Kiarldeen v. Reno*, 71 F. Supp. 2d 402, 408 (D.N.J. 1999).

<sup>89</sup> *Kiarldeen*, 71 F. Supp. 2d at 417.

<sup>90</sup> *Kiarldeen*, 71 F. Supp. 2d at 413.

<sup>91</sup> Purdy, *supra* note 88.

<sup>92</sup> Because the agencies that provided the classified information did not create summaries of the information, the government claimed that they could not provide evidence or summaries to Dr. Karim. *In re Ali Yasin Mohammed-Karim*, No. A76-200-431, slip op. at 4 (Cal. Immigr. Ct. June 21, 2000) [hereinafter *Karim Decision*] (decision and order of the immigration judge). The use of secret evidence against Dr. Karim was particularly surprising, as the U.S. government had evacuated him from northern Iraq to protect him from Saddam Hussein. *Id.*, slip op. at 2-3.

<sup>93</sup> *Id.*, slip op. at 4.

<sup>94</sup> *Karim Decision*, *supra* note 92, slip op. at 5; Andrew Cockburn, *The Radicalization of James Woolsey*, N.Y. Times Mag., July 23, 2000, at 26, 29. Dr. Karim retained James Woolsey, Jr., the former Director of the Central Intelligence Agency, to represent him in his appeal. Mr. Woolsey called the INS, CIA, FBI, and the Department of Justice, all who ignored his requests to discuss the evidence against his client. Cockburn, *supra*. Moreover, after the court re-heard Dr. Karim’s case, the government moved to reopen these hearings to submit what they alleged to be “new evidence.” In reality, this evidence consisted of certified copies of the tapes of Dr. Karim’s and his brother’s testimony during immigration proceedings. The court denied the motion to reopen. *Karim Decision*, *supra* note 92, slip op. at 5.

<sup>95</sup> Ronald Smothers, *U.S. Bars or Expels Suspect Immigrants On Secret Evidence*, N.Y. Times, Aug. 15, 1998, at A1. Immigrants have charged the government with using distorted and erroneous translations in other types of cases. In one example, a charity closed down for alleged donations to terrorist groups charged the FBI with mistranslating documents; an independent translating service found “67 discrepancies or errors in translation in a four-page F.B.I. document used in the case.” Eric Lichtblau, *Islamic Charity Says F.B.I. Falsified Evidence Against It*, N.Y. Times, July 27, 2004, at A12.

Just a few examples illustrate the government's failure to test its evidence for accuracy and reliability. An FBI agent found it suspicious that Dr. Karim had traveled to Iran "many times" in the 1970s. The agent failed to consider that the Shah was in power at this time and that Dr. Karim was a child throughout this decade.<sup>96</sup> Several agents alleged that Dr. Karim was a security threat because he did not use the name Ufayli, which indicates his membership in the Fayli Kurd tribe (a clan including approximately 500,000 Iraqis). These agents, who did not know the origins of this name, suspected that he dropped the name to avoid association with his cousin, whom they believed to be "connected" to the Iranian intelligence. In reality, Dr. Karim and his cousin shared the "Mohammed-Karim" portion of his name, which came from his grandfather; dropping the name Ufayli did not hide his relationship with his cousin.<sup>97</sup> At no time did Dr. Karim conceal or deny his relationship to his cousin; moreover, a CIA agent with in-depth knowledge of Iraq and personal knowledge of Dr. Karim's cousin testified that the cousin was never affiliated with Iranian intelligence.<sup>98</sup> Not only did the government fail to examine the basic assumptions of the evidence, but it did not even use its own experts to test the accuracy of the claims against Dr. Karim.

After hearing Dr. Karim's rebuttal evidence and the cross-examination of the government's witnesses, the court determined that he was not a threat to national security.<sup>99</sup> The court granted asylum and protection under the Convention Against Torture,<sup>100</sup> noting that "[t]he low burden of proof on the Government, combined with an initial veil of secrecy has resulted in the lack of disclosure of significant factual issues which have only been revealed through declassification and cross-examination of the evidence."<sup>101</sup>

In another recent case, the government relied on evidence that it failed to present even to the judge; as a result, Ahilan Nadarajah was detained for almost five years. Mr. Nadarajah is an ethnic Tamil—a group that suffers well-documented persecution at the hands of the Sri Lankan government—from the war-torn Jaffna peninsula in northern Sri Lanka.<sup>102</sup> When he tried to enter the United States,

---

A Justice Department investigation found that the FBI failed to ensure that its translators were providing accurate translations, ignoring the agency's own policy requirement that these translators undergo periodic proficiency exams. Eric Lichtblau, *F.B.I. Said to Lag on Translations of Terror Tapes*, N.Y. Times, Sept. 28, 2004 at A1.

<sup>96</sup> Karim Decision, *supra* note 92, at 11.

<sup>97</sup> *Id.* at 12--18.

<sup>98</sup> *Id.* at 19, 21--25.

<sup>99</sup> *Id.* at 105.

<sup>100</sup> *Id.* at 115.

<sup>101</sup> *Id.* at 122.

<sup>102</sup> See generally, U.S. Department of State, *Country Reports on Human Rights Practices 2001: Sri Lanka* (2002) (documenting Sri Lankan army, security forces, and police torture and killings of ethnic Tamils). Starting when he was sixteen years old, the Sri Lankan Army ("SLA") and the Elam People's Democratic Party ("EPDP"), a political party associated with the government, arrested, detained, and

immigration officials detained Mr. Nadarajah and placed him in removal proceedings. After delaying the removal hearing for eighteen months, the government alleged that a “confidential informant” told them that Mr. Nadarajah was associated with the Liberation Tigers of Tamil Eelam (L.T.T.E.), a designated terrorist organization.<sup>103</sup> Nonetheless, the judge granted Mr. Nadarajah asylum.

On the government’s motion, the case was re-heard over a year later.<sup>104</sup> A DHS Special Agent testified that the confidential informant told him that Mr. Nadarajah had lived in an L.T.T.E.-controlled area, and therefore could not have left Sri Lanka without the support and approval of the L.T.T.E.<sup>105</sup> In addition, the agent claimed that he had received an anonymous letter that corroborated the confidential informant’s statements.<sup>106</sup> The informant also alleged that Mr. Nadarajah placed a call, along with a female L.T.T.E. member detained in the same facility, to order that someone in Canada be killed.<sup>107</sup>

Because the government’s evidence was so slipshod, Mr. Nadarajah’s lawyers were able to refute it without seeing it.<sup>108</sup> His expert witness explained that the Sri Lankan army actually controlled the area of Sri Lanka from whence Mr. Nadarajah came.<sup>109</sup> On cross-examination, the government agent could not explain how Mr. Nadarajah could have made a phone call with a woman detained in the same facility when his facility was gender-segregated.<sup>110</sup> The judge again granted Mr. Nadarajah’s asylum claim, but the

---

beat Mr. Nadarajah three times, severely torturing him on two of these occasions. The army hung Mr. Nadarajah upside-down, stuck needles in his fingernails, and beat him with rubber hoses and rubber pipes filled with sand. Nadarajah *supra* note 75 at 1072--73. His mother secured his release each time with a bribe; after the third detention, an army officer told him that they would not release him the next time they arrested him. Mr. Nadarajah fled the country, arriving in the United States two months later. In the Matter of Ahilan Nadarajah, In Removal Proceedings, Brief in Opposition to Government’s Appeal and in Support of Respondent’s Cross-Appeal, at 3 (on file with author) (hereinafter “Nadarajah Brief”).

<sup>103</sup> Nadarajah *supra* note 75 at 1073.

<sup>104</sup> *Id.* at 1074. All the while, Mr. Nadarajah languished in detention—a difficult experience for anyone, and particularly traumatic for a survivor of torture. See, e.g., Craig Haney, PhD, *Conditions of Confinement for Detained Asylum Seekers Subject to Expedited Removal, in Study on Asylum Seekers in Expedited Removal, As Authorized by Section 605 of the International Religious Freedom Act of 1988*, Vol. II, 178, 191-99 (2005), available at [http://www.uscirf.gov/countries/global/asylum\\_refugees/2005/february/conditionConfin.pdf](http://www.uscirf.gov/countries/global/asylum_refugees/2005/february/conditionConfin.pdf) (detailing some of the conditions found in detention centers).

<sup>105</sup> Nadarajah, *supra* note 102 at 1074.

<sup>106</sup> *Id.* at 1074.

<sup>107</sup> *Id.* at 1074.

<sup>108</sup> The government did not provide Mr. Nadarajah, his lawyers, or even the judge with e-mails or recordings of the telephone conversations with the informant or with the anonymous letter that he claimed corroborated the informant’s statements. Mr. Nadarajah and his lawyers were not able to cross examine the government informant; the judge denied their motion to compel his testimony because the government witness claimed that his life would be at risk. *In re Ahilan Nadarajah, In Removal Proceedings*, I. & N. Dec., at 4 (2004) (on file with author) (hereinafter IJ Decision).

<sup>109</sup> Nadarajah, *supra* note 102 at 1074.

<sup>110</sup> *Id.*

government refused to release him from detention.<sup>111</sup> Granting his habeas corpus appeal, the federal court of appeals found that the government's detention of this refugee for almost five years was "unreasonable, unjustified, and in violation of federal law."<sup>112</sup>

### *Societal Harms*

The misuse of secret evidence in immigration proceedings can harm American society as a whole in three main ways: by diminishing the legitimacy of the American justice system, by increasing the threat of terrorism, and perhaps most importantly, by breaching fundamental societal norms. On the legitimacy issue, the perceived unfairness of this practice will make non-citizens less likely to comply with the immigration process and perhaps the American justice system as a whole. Moreover, the diminution of due process rights of non-citizens may lead to greater acceptance of abridgment of the procedural rights of citizens. On the security front, as this unfair treatment increasingly alienates Arab, Muslim, and South Asian non-citizens, they are both less likely to provide crucial assistance in combating terrorism, and, in some cases, will be more likely to support terrorist organizations. Finally, these violations contradict deeply held American norms of procedural fairness.

The government's use of untested secret evidence against non-citizens will likely lead to diminished compliance with the immigration process and possibly the justice system more generally. In a study of compliance with the police and courts, social psychologist Tom R. Tyler found that "people's willingness to accept the constraints of the law and legal authorities is strongly linked to their evaluations of the procedural justice of the police and the courts."<sup>113</sup> While the threat of force underlies law enforcement, institutions are most effective when they gain the consent of people over whom they exercise authority. "People are more likely to adhere to agreements and follow rules over time when they 'buy into' the decisions and directives of legal authorities."<sup>114</sup> Moreover, people are more likely to obey legal authorities if they believe that these officials are legitimate. These evaluations of legitimacy rest upon judgments as to whether officials have treated individuals and other members of their community fairly.<sup>115</sup>

The consequences of these findings for the immigration process are obvious; if non-citizens believe that immigration officials and

---

<sup>111</sup> *Id.* at 1074-75.

<sup>112</sup> *Id.* at 1084.

<sup>113</sup> Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUSTICE 283, 284 (2003).

<sup>114</sup> *Id.* at 286.

<sup>115</sup> *Id.* at 286.

judges have acted unfairly towards members of their community, they will be less likely to comply with the system. So, for example, fewer non-citizens are likely to obey removal orders, uphold immigration laws, and even attend immigration hearings.<sup>116</sup> Moreover, non-citizens may begin to avoid interactions with any government official and to mistrust the justice system as a whole. This outcome will place serious obstacles in the path of enforcing immigration laws and possibly of law enforcement more generally.<sup>117</sup>

The U.S. government's violations of due process rights of non-citizens may also lead to breaches of the due process rights of citizens. The government has already argued that a U.S. citizen can be detained based on secret evidence.<sup>118</sup> As the idea that it is acceptable to treat non-citizens in a way that derogates from human rights treaties that bind the United States becomes incorporated into the national psyche, it is a short step to say that the due process rights of certain U.S. citizens can also be violated in pursuit of the war on terror. This risk is particularly high in administrative tribunals, such as military or other specialized courts, in which the federal or state rules of procedure and evidence do not apply.

By treating non-citizens unfairly in immigration proceedings, the United States alienates community members who might otherwise provide useful information on terrorist threats.<sup>119</sup> As Kerwin and Stock note, "[l]aw enforcement depends on the cooperation of immigrant communities to provide them with intelligence on

<sup>116</sup> See, e.g., Alfonso Chardy, *Detentions lead some immigrants to fear day in court*, Miami Herald (Oct. 4, 2006) (discussing new policy of detaining all immigrants at the beginning of removal proceedings in Miami immigration court, whether or not they had a criminal record and before they had been ordered removed, an Immigration Judge said that "the number of no-shows in court increase when talk spreads through the community about court detentions." This policy was also criticized by Immigration Judge Denise Slavin, President of the National Association of Immigration Judges.)

<sup>117</sup> See, e.g., Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. Pa. J. Const. L. 1084, 1115 (2004) (explaining that "measures [that] discourag[e] immigrants from communicating with police and other local officials . . . [deny] local police the community cooperation on which the law enforcement officials depend.")

<sup>118</sup> See, e.g. Carol D. Leonnig, *U.S. Offers Judge Secret Evidence To Decide Case*, Wash. Post, at B02, Feb. 12, 2005 (where the government argued for the need to use secret evidence against a man who was arrested in Saudi Arabia and not publicly charged with any crimes).

<sup>119</sup> Arab and Muslim groups have repeatedly expressed concern about the use of secret evidence in immigration court. See, e.g., Arab-American Anti-Discrimination Committee, *Secret Evidence Creeps Back into Senate Immigration Debate* (June 27, 2007), available at <http://www.adc.org/index.php?id=3123&type=100> (expressing concern about proposed expansion of use of secret evidence); Council on American Islamic Relations, *A Decade of Growth: CAIR Tenth Anniversary Report, 1994-2004* at 16 (2004), available at [http://www.cair.com/Portals/0/pdf/10th\\_anniversary\\_report.pdf](http://www.cair.com/Portals/0/pdf/10th_anniversary_report.pdf) (criticizing 1995 anti-terrorism bill that "allowed resident aliens to be deported . . . on the basis of secret evidence without due process."); Arab-American Anti-Discrimination Committee, *Members of Congress, Victims to Demand an End to Secret Evidence in American Courts* (Feb. 14, 2001), available at <http://www.adc.org/index.php?id=510&type=100>; Council on American-Islamic Relations, *Executive Summary: The Status of Muslim Civil Rights in the United States 1998* (1998), available at <http://www.cair.com/CivilRights/CivilRightsReports/1998Report.aspx> (noting that "American Muslims are apprehensive about community members held under so-called secret evidence procedures").

suspicious persons or terrorist plots.”<sup>120</sup> In interviews with counter-terrorism experts, the authors learned that immigrant communities can play a vital “early warning” role in alerting intelligence agencies of possible threats, but that non-citizens are not likely to assist when they believe that they are not being protected or are being targeted by the government.<sup>121</sup> The perception that the government is using secret evidence unfairly against members of the Arab, Muslim, and South Asian immigrant communities will actually make America less safe by drying up sources of crucial national security intelligence.

Alienation of immigrant communities also increases the possibility that members of these groups will be drawn into terrorist activities. Several studies of race relations in Europe have found that assimilation is “a major factor in reducing support for violence among immigrant communities.”<sup>122</sup> The misuse of secret evidence against members of certain populations may lead those individuals and their communities to believe that the immigration process is unfairly discriminatory towards them, and could, in some cases, push non-citizens to join terrorist groups. This outcome could again threaten our safety; we should instead be making every effort to integrate non-citizens present in the United States.<sup>123</sup>

Of course, changing perceptions of unfairness the immigration system is only one step of many in increasing immigrant communities’ cooperation with law enforcement. Anger over the war in Iraq, bias against Arab and Muslim communities in the popular media, and hate crimes committed against Arabs, Muslims, and South Asians all contribute to alienation of these immigrant communities, and must all be resolved to reach a maximum level of cooperation. However, these other factors do not diminish the important role of reforming the immigration system in integrating immigrant communities.

Beyond these potential consequences, the right to confrontation is a fundamental component of the American legal system. Because our adversary system depends on the parties to test the quality of the evidence presented, confrontation rights have historically been strongly protected in U.S. law.<sup>124</sup> Indeed, the primary purpose of the

<sup>120</sup> Donald Kerwin & Margaret D. Stock, *National Security and Immigration Policy: Reclaiming Terms, Measuring Success, and Setting Priorities* 52 (Oct. 31, 2006), available at [http://www.ctc.usma.edu/research/National\\_Security\\_and\\_Immigration\\_Policy.pdf](http://www.ctc.usma.edu/research/National_Security_and_Immigration_Policy.pdf).

<sup>121</sup> *Id.* at 53 n. 333 and 335; see also Robert S. Leiken, *Bearers of Global Jihad: Immigration and National Security After 9/11* 141 (The Nixon Center 2004), available at [http://www.nixoncenter.org/publications/monographs/Leiken\\_Bearers\\_of\\_Global\\_Jihad.pdf](http://www.nixoncenter.org/publications/monographs/Leiken_Bearers_of_Global_Jihad.pdf).

<sup>122</sup> *Id.* at 58.

<sup>123</sup> *Id.* at 132.

<sup>124</sup> See *Crawford v. Washington*, 541 U.S. 36, 48-50 (2004) (tracing the history of confrontation rights in the United States to the drafting of the Constitution, noting the 1794 state court holding that “[I]t is a rule of the common law, founded on natural justice, that no man shall be prejudiced by evidence which he had not the liberty to cross examine.”) (quoting *State v. Webb*, 2 N.C. 103, 104 (Super. L. & Eq. 1794) (*per curiam*)); *Ohio v. Roberts*, 448 U.S. 56, 63–64 (1980) (discussing the methods of examining

Confrontation Clause was to prevent the use of *ex parte* affidavits, particularly in highly political cases.<sup>125</sup> As Justice Scalia has noted, the Framers created the right to cross examination specifically for politically charged cases—“great state trials where the impartiality of even those at the highest levels of the judiciary might not be so clear.”<sup>126</sup> By failing to prevent the misuse of secret evidence in immigration proceedings, we violate one of our society’s most sacred legal principles.

### *Global Harms*

The misuse of secret evidence is one of many violations of individual rights perpetrated in the name of combating terror that will damage the United States on a global level. While the misuse of secret evidence in immigration court is not the sole cause of these harms, this practice contributes to a deteriorating global reputation that injures our international relationships in several ways. By pursuing tactics that breach fundamental notions of fairness, we alienate crucial allies in the global struggle against terrorism – not only friends in Arab, Muslim, and South Asian nations, but states around the world. We also lend legitimacy to terrorist groups, who can recruit new members by pointing to the government’s unfair treatment of non-citizens. By acting unilaterally, rather than in accordance with international agreements, the United States sends a message that we are not interested in playing by the rules of the international community. As the United States’ moral authority

---

evidence envisioned by the Confrontation Clause and concluding that “[t]hese means of testing accuracy are so important that the absence of proper confrontation at trial ‘calls into question the ultimate ‘integrity of the fact-finding process.’ ”); *Pointer v. Texas*, 380 U.S. 400, 404 (1965) (stating that the Sixth Amendment’s right of confrontation is fundamental, thereby extending its application to the states through the Fourteenth Amendment.); see also Henry J. Friendly, *Some Kind of Hearing*, 123 U. Pa. L. Rev. 1267, 1283 (1975) (discussing the components of a fair administrative hearing, Judge Friendly states “[t]here can . . . be no fair dispute over the right to know the nature of the evidence on which the administrator relies.”); *Greene v. McElroy*, 360 U.S. 474, 508 (1959) (holding that in the absence of explicit executive or congressional authorization, the Defense Department could not deprive claimant of his job through a proceeding in which he was denied the right to confrontation). Confrontation rights are particularly crucial in immigration cases, where the non-citizen is likely to have a more complete understanding of the often complex politics within the emigrant or exile community from which he comes, and may be able to provide rebuttal evidence questioning the source of information against him that the judge will be hard-pressed to find on her own.

<sup>125</sup> *Crawford v. Washington*, 541 U.S. 36, 50 (2004) (“[T]he principal evil at which the Confrontation Clause was directed was the . . . use of *ex parte* examinations as evidence against the accused.”); *Maryland v. Craig*, 497 U.S. 836, 845–46 (1990).

<sup>126</sup> *Id.* at 67–68 (holding that the Sixth Amendment requires that testimonial evidence may only be introduced after cross-examination, unless the witness is unavailable and the defense has had a prior opportunity for cross-examination). Tracing the history of the right to confrontation, Justice Scalia states that the Framers emphasized the importance of this right to prevent a recurrence of the procedural errors made during treason trial of Sir Walter Raleigh. Raleigh was sentenced to death based on the written testimony of an accuser who did not appear in court for cross examination. *Id.* at 44.

declines, we are losing leadership abilities on the world stage in areas including and beyond terrorism and human rights.

The United States cannot successfully fight terrorism alone; it requires the financial, military, and investigatory support of other nations.<sup>127</sup> Combatting terrorist groups is an exceptionally complex effort that by necessity requires the support of our allies in agreements ranging from multilateral antiterrorism treaties to passport verification agreements.<sup>128</sup> This vital assistance will not come at the end of a stick, but will be successful only if other nations trust the United States enough to work with us voluntarily.<sup>129</sup> Practices such as the misuse of secret evidence in immigration proceedings that signal disrespect for individual rights will only destroy this spirit of cooperation, severely hampering our ability to dismantle terrorist organizations.<sup>130</sup> Moreover, violations of fundamental rights serve “only to confer a sense and appearance of legitimacy on those who attack institutions.”<sup>131</sup> In other words, by pursuing security interests in disregard of due process rights, we are not only weakening our own ability to fight terror, but we are also providing fodder to terrorist groups.

By breaching international agreements that protect individual rights, the United States is seriously tarnishing its reputation. World opinion of the United States has dropped dramatically over the past five years. A poll conducted earlier this year shows that since 2002, the image of the U.S. has become less favorable in 26 of 33 countries surveyed.<sup>132</sup> While this precipitous decline is not due solely to the misuse of secret evidence in immigration court, it is largely the result

<sup>127</sup> See, e.g., The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States 390 (2004), available at <http://www.9-11commission.gov/report/911Report.pdf> (noting that the U.S. government cannot meet its own obligations to the American people to prevent the entry of terrorists without a major effort to collaborate with other governments).

<sup>128</sup> See, e.g., Sixth Committee Working Group, *Report of the Working Group of the Sixth Committee: Measures to eliminate international terrorism*, U.N. Doc. No. A/C.6/56/L.9 (Oct. 29, 2001) (presenting the text of a proposed draft comprehensive convention on international terrorism); 9/11 Commission Report, *supra* note 127 at 389.

<sup>129</sup> See, e.g., Council of Europe, Parliamentary Assembly, Committee on Legal Affairs and Human Rights, *Alleged secret detentions and unlawful inter-state transfers of detainees involving Council of Europe member states*, Doc. 10957, at 53 ¶ 259 (June 12, 2006), available at <http://assembly.coe.int/Documents/WorkingDocs/doc06/edoc10957.pdf>; Ruth Bader Ginsburg, “A Decent Respect to the Opinions of [Human]kind”: *The Value of a Comparative Perspective in Constitutional Adjudication*, 1 Florida Int’l. Univ. L. Rev. 27, 42 (2006).

<sup>130</sup> See, e.g., Harold Hongju Koh, *On America’s Double Standard; The good and bad faces of exceptionalism* The American Prospect, Oct. 2004, at A19 (“Even as the United States was using its stunning military technology to bomb Baghdad, it could not diplomatically secure the Security Council votes of even its closest allies on a matter that the president deemed of highest national importance.”).

<sup>131</sup> Council of Europe, Parliamentary Assembly, Committee on Legal Affairs and Human Rights *supra* note 129 at 53 ¶ 263.

<sup>132</sup> Pew Global Attitudes Project, *Global Unease with Major World Powers: 47-Nation Pew Global Attitudes Survey 3-4* (June 27, 2007), available at <http://pewglobal.org/reports/pdf/256.pdf> (noting that favorable ratings of the U.S. are lower than in 2002 in 26 of 33 countries for which trends are available).

of policies that emphasize national security at the expense of individual rights and international agreements. Indeed, since 2002, support for America's anti-terrorism efforts has dropped in 30 of 34 countries surveyed – including sharp drops in Canada, Europe, and several countries that have suffered terrorist attacks in recent years.<sup>133</sup>

As the grass-roots movement against the war in Iraq has shown, citizens of our traditional allies can become angry when the United States does not follow the international procedures that it has bound itself to comply with, and can vote in a government that is less cooperative with the United States.<sup>134</sup> The decline in American moral authority hampers foreign policy efforts even more severely in Arab, Muslim, and South Asian countries.<sup>135</sup> As the United States loses standing in the international community, we lose our influence in shaping human rights norms and in positively influencing the behavior of other nations.<sup>136</sup> The loss of America's image as a beacon of freedom and fairness is to be mourned regardless of the consequences for our power and influence.

<sup>133</sup> Pew Global Attitudes Project, *supra* note 132 at 22.

<sup>134</sup> See Alan Cowell, *Turmoil in Iraq Jangles Nerves in Allied Capitals, and Bush Works to Shore Up Support*, N.Y. Times, Apr. 10, 2004, at A7 (“Spanish Socialists . . . campaigned in part on a pledge to withdraw Spain’s 1,300 troops from Iraq in the absence of a clear United Nations mandate . . .”); Elaine Sciolino, *Spain Will Loosen Its Alliance With U.S., Premier-Elect Says*, N.Y. Times, Mar. 16, 2004, at A1 (“Mr. Zapatero offered scathing criticism of the American-led war in Iraq, which his party, like 90 percent of the Spanish people, opposed . . . Many Europeans view the war on Iraq as the latest in a series of unilateral American actions taken in defiance of European interests or wishes, including American decisions not to join treaties on the environment and the International Criminal Court.”).

<sup>135</sup> See, e.g., Ivan Krastev & Mark Leonard, *The Rise of ‘Herbivorous Powers’?*, European Council on Foreign Relations, Oct. 24, 2007, [http://www.ecfr.eu/content/entry/commentary\\_gallup\\_poll\\_results/](http://www.ecfr.eu/content/entry/commentary_gallup_poll_results/) (“The distinctive characteristic of the new world order seems to be that it will be determined not simply by the balance of ‘hard power’ (the ability to use economic or military power to coerce or bribe countries to support you), but by the balance of what the American academic Joseph Nye has called “soft power”—the ability to get what you want through attraction rather than coercion and payment, arising from the appeal of your culture, political ideals, and policies. Paradoxically nothing seems to erode soft power as much as the possession of military power.”); John Shattuck, *A Lawless State*, *The American Prospect*, Oct. 2004, at A5 (“The president’s appeal [to transform authoritarian regimes in the Middle East into democracies] met with disdain in Arab countries, not because there is a lack of appetite for reform in the region but because the Bush administration has undermined the moral authority of the United States by trying to impose democracy through the unilateral and preemptive use of force in Iraq.”).

<sup>136</sup> See, e.g., Brief of Former United States Diplomats as *Amici Curiae* in Support of the Petitioners at 7, *Boumediene v. Bush*, Nos. 06-1195; 06-1196 (U.S. Aug. 24, 2007), 2007 WL 2414900 (“Our nation cannot credibly champion the rule of law in the world, while being seen to disregard it in our own affairs.”); Adam Gopnik, *The Human Bomb: The Sarkozy Regime Begins*, *The New Yorker*, Aug. 27, 2007, at 42 (“When Sarkozy met Conoleezza Rice, she said, ‘What can I do for you?’ And he said, bluntly, ‘Improve your image in the world. It’s difficult when the country that is the most powerful, the most successful—that is, of necessity, the leader of our side—is one of the most unpopular countries in the world. It presents overwhelming problems for you and overwhelming problems for your allies.”); Senate Comm. On Foreign Relations, *International Covenant On Civil and Political Rights*, S. Exec. Rep. No. 102-23, at 4 (1992) (noting that ratification of the ICCPR “will enable the United States . . . to participate with greater effectiveness in the process of shaping international norms and behavior in the area of human rights.”).

*National Security Interests at Stake*

The use of secret evidence in immigration proceedings presents a conflict between due process rights and national security concerns that is not easily resolved; there are important principles, with deep roots in domestic and international law, supporting both sides of the debate. While the rationale for protecting the nation and its citizens against terrorist activity may be obvious, it is worth briefly enumerating the specific risks posed by revealing national security information.

In combating terrorist activity on its soil, the state has an interest in maintaining the confidentiality of certain national security information: the identity of its agents, its sources and methods of intelligence gathering, and security details.<sup>137</sup> First, if an intelligence agent's identity is revealed, not only will her life be at risk, but she will no longer be able to obtain evidence from sources who may not have known that she worked for the U.S. government.<sup>138</sup> This loss of effectiveness, or, even worse, of an individual agent, could seriously hamper the state's efforts to combat terrorism.

The government also has a vital interest in protecting sources and methods of intelligence gathering and analysis. Even if the identity of a source is kept confidential, if organizations that pose a real threat to the security of the United States learn from this source's testimony or from other documents how federal agents undertake investigations and what their current avenues of information-gathering are, these sources of information will likely dry up.<sup>139</sup> Revelation of sources and methods of obtaining intelligence thus puts the United States at a disadvantage and makes all of its residents less secure.

Moreover, if testimony or documentary evidence reveals important security details, the provision of this information could easily be relayed to terrorists seeking to attack sites and people in the United States.<sup>140</sup> Evidence could also inform terrorist organizations as to how much the U.S. government knows about their operations, allowing them to alter their plans and practices to prevent the U.S. from securing its territory.<sup>141</sup>

<sup>137</sup> Henry J. Hyde, Statement, House Committee on the Judiciary Hearing: H.R. 2121, "Secret Evidence Repeal Act of 1999" (May 23, 2000), 2000 WL 684407.

<sup>138</sup> Bo Cooper, INS General Counsel, Testimony before House Committee on the Judiciary Concerning H.R. 2121, "Secret Evidence Repeal Act of 1999" (May 23, 2000), 2000 WL 684411, 12.

<sup>139</sup> Protective Orders in Immigration Administrative Proceedings, 67 Fed. Reg. 36799, 36799 (May 21, 2002) (codified at 8 C.F.R. § 1003.46) (hereinafter "Protective Orders Regulation Notice"); *see also* North Jersey Media Group, Inc. v. Ashcroft, 308 F.3d 198, 203 (3rd Cir. 2002) (noting that the government's proffered interest in closing deportation hearings involving persons the Attorney General has determined might have connections to the September 11 terrorist attacks included a risk that terrorists will learn what the U.S. knows about them and may be able to discern the sources and methods the government used to obtain this information, learn the easiest avenues for entering the country, and determine which of its cells may have been compromised).

<sup>140</sup> Protective Orders Regulation Notice, *supra* note 139, at 36799.

<sup>141</sup> *Id.*; *see also* North Jersey Media Group, Inc., 308 F.3d at 203.

In addition to state duties, the revelation of confidential national security information implicates individual rights. People who provide information about potential terrorist activity, be they government agents or private individuals, may face real risks of retaliation if their identity as a source is revealed.<sup>142</sup> Moreover, this threat could spread to their families and neighbors. These potential harms could violate the rights to life, liberty, security of person, and family and home. Linking back to the state's fight against terrorist organizations, the protection of these fundamental rights is crucial; an individual may not provide valuable information unless she feels confident that she and her family will be protected from any acts of retaliation.

#### HUMAN RIGHTS: A YARDSTICK AND A GUIDEBOOK

As the individual, societal, and global ramifications of the misuse of secret evidence illustrate, these very real security concerns must be carefully balanced with the due process rights of non-citizens in immigration proceedings. Human rights treaties that bind the United States can act as a yardstick, alerting us when our justice system fails to sufficiently protect deeply rooted American values. They can also provide a guidebook, explaining how other countries have resolved similar problems, from which we can draw lessons germane to the American context.

First, human rights law can perform an evaluative function – that of a yardstick warning that the government's focus on one societal interest (such as national security) has threatened individual rights fundamental to the American system of justice. As Gerald Neuman explains,

[I]nternational law rules may provide insights concerning the proper realization of values common to the domestic and international systems. In particular, the international human rights regime challenges states to reexamine the justifiability of their local practices.<sup>143</sup>

Where American practices are out of step with human rights treaties to which the United States has bound itself, there is cause for concern that the Constitution is not protecting important rights as robustly as it should. Moreover, the non-local perspectives represented in these treaties and the soft law interpretations of them provide crucial information in assessing the morality of America's stance on specific

<sup>142</sup> Protective Orders Regulation Notice, *supra* note 139.

<sup>143</sup> Gerald L. Neuman, *International Law as a Resource in Constitutional Interpretation*, Harv. J.L. & Pub. Pol'y 177, 187 (2006). (discussing here, as with much of the discussion of domestic incorporation of international law, the use of international law to interpret the Constitution. This article applies many of the arguments from that literature to the functions of administrative agencies, specifically statutory interpretation, regulation drafting, and organizational culture creation.).

legal questions.<sup>144</sup> Treaty language and the decisions of treaty bodies can show America whether our practices measure up to legal experts' definitions of and other nations' protection of fundamental rights, and can contribute thoughtful input as to why these approaches may or may not be appropriate in the domestic context.

Human rights law can also perform an empirical function,<sup>145</sup> exposing how other decision-makers have resolved similar problems.<sup>146</sup> This valuable information, while providing a guidebook of different approaches, doesn't necessarily require the United States to follow an identical path, but allows us to learn both what has worked in other countries and what might work best in America given our unique legal system and society.<sup>147</sup> In the words of Justice Ginsburg, international law "can add to the store of knowledge relevant to the solution of trying questions."<sup>148</sup> Hopefully, this empirical use of human rights law can promote the importation of best practices from other nations into America's administrative agencies responsible for immigration processes.<sup>149</sup> By relying on a carefully crafted body of decisions created through "academic consensus and transnational debate",<sup>150</sup> these executive agencies can interpret statutes, draft regulations, and create institutional cultures that balance important rights as fairly as possible.

#### IMMIGRATION LAW AND THE HUMAN RIGHT TO DUE PROCESS

Human rights law is particularly appropriate in addressing the use of secret evidence in immigration proceedings, due to the substance of the law and the source of the rights at issue. Looking to human rights treaties ratified by the United States, we find a solution that not only mirrors the priorities found in our immigration system, but takes

---

<sup>144</sup> Amartya Sen, *Human Rights and the Limits of Law*, 27 *Cardozo L. Rev.* 2913, 2926 (2006) ("[W]ell-established practices in a rich and advanced country, which receive widespread support within the country, might be subjected to serious criticism – and rejection – in many other countries, where public dialogues may bring in other considerations that are ignored in the first country.")

<sup>145</sup> See Neuman, *supra* note 143, at 187; Vicki C. Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 *Harv. L. Rev.* 109, 116 (2005).

<sup>146</sup> Prof. Melissa Waters labels this approach, "using treaties as bridges to soft law". Melissa Waters, *Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties*, 107 *Colum. L. Rev.* 628, 666–667 (2007).

<sup>147</sup> See, e.g., Chief Justice William H. Rehnquist, Foreword, *Defining the Field of Comparative Constitutional Law* viii (Vicki C. Jackson & Mark Tushnet eds., 2002) (stating that U.S. courts should use comparative constitutional law to "aid in their own deliberative process"). This paper sees a similar use for human rights law by administrative agencies.

<sup>148</sup> Ruth Bader Ginsburg, "A Decent Respect to the Opinions of Humankind": *The Value of a Comparative Perspective in Constitutional Adjudication*, 1 *Fl. Int'l. U. L. Rev.* 27, 32 (2006). Again, Justice Ginsburg is discussing comparative law in constitutional interpretation, while this article analyzes the use of human rights law by administrative agencies.

<sup>149</sup> Lesley Wexler, *The Non-Legal Role of International Human Rights Law in Addressing Immigration*, 2007 *UNIV. OF CHICAGO LEGAL FORUM* 359, 382–88 (2007).

<sup>150</sup> Ralph Steinhardt, *The Role of International Law as a Canon of Domestic Statutory Construction*, 43 *Vand. L. Rev.* 1103, 1129 (1990).

seriously national security concerns. While critics of human rights treaties claim that they threaten American sovereignty, this case study illustrates the balanced nature of a human rights approach to the use of secret evidence in immigration proceedings.

### *The Aptness of Human Rights Law*

A human rights framework is particularly appropriate to examine the use of secret evidence in immigration proceedings, both because of the substance of the law at issue and because of the source of the rights concerned. Both the plenary power doctrine discussed above and the offered protections against persecution and torture discussed below are derived from international law. Moreover, the due process rights at issue are strongly rooted in American law, so much so that it is fair to say that the United States exported these norms of procedural fairness to other countries by introducing them into the human rights treaties discussed below.

Of all domestic legal fields, immigration law is perhaps the most suited to applications of international law. First, much of immigration law comes from international law. In particular, the plenary power doctrine that limits the rights of non-citizens is derived from international legal conceptions of sovereignty.<sup>151</sup> As David Cole argues, these deep roots in international law may make immigration law “particularly susceptible” to human rights restrictions on government power.<sup>152</sup> Second, immigration law is federal law, and this article discusses its application by administrative agencies that are part of the executive branch. As a result, concerns about federal lawmakers encroaching on state authorities and the judicial branch imposing on the foreign affairs power of the executive are not present here.<sup>153</sup>

The particular rights at issue here—to procedural due process, and specifically to confrontation—are American exports. As the champion of procedural due process rights during the drafting of these treaties, the United States led the rest of the world to include these important values in their own legal systems.<sup>154</sup> The right to

---

<sup>151</sup> See David Cole, *The Idea of Humanity: Human Rights and Immigrants' Rights*, 37 Colum. Hum. Rts. L. Rev. 627, 635-36 & n.29 (2006); See also Andrew B. Ayers, *International Law as a Tool of Constitutional Interpretation in the Early Immigration Power Cases*, 19 Geo. Immigr. L.J. 125, 131-41 (2004); Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power Over Foreign Affairs*, 81 Tex. L. Rev. 1, 83 (2002) (explaining that international law scholars generally viewed power to exclude aliens as deriving from principles of sovereignty and territoriality).

<sup>152</sup> Cole, *supra* note 151, at 636.

<sup>153</sup> See Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 Yale L.J. 1564, 1621--23 (2006).

<sup>154</sup> Nowak, *supra* note 22 at 236 (“During the drafting of Art. 14 [of the ICCPR], a fundamental role was played by the US, in whose constitutional history central importance has been placed on substantive and procedural “due process of law.”)

confrontation remains fundamental to our adversarial system of justice, and is arguably more important here than in investigatorial common law systems. Given the strong roots of the principle of due process of law in our legal system, the United States should be at least as protective of these rights as the U.N. bodies and peer nations to which it promoted this concept.<sup>155</sup>

That said, even defenders of the value of international law in domestic decisions have criticized reliance on the ICCPR and decisions of the Human Rights Committee. Professor Melissa Waters claims that the International Covenant on Civil and Political Rights (ICCPR) might be deemed a “low value” treaty in the United States because of the number of reservations, understandings, and declarations (RUDs) made in ratifying that treaty.<sup>156</sup> While this may be a reason to place low value on the provisions modified by these RUDs, it should not minimize the power of sections of the treaty ratified without modification, particularly given the role of the United States in drafting these provisions. Professor Vicki Jackson has argued that decisions of the Human Rights Committee should be less persuasive than decisions of foreign courts because the Committee “is not a court . . . [and] does not have general governmental responsibilities comparable to sovereign nations.”<sup>157</sup> The Committee is composed of legal experts from States Parties (past members from the United States include Prof. Louis Henkin and Prof. Ruth Wedgwood) and issues individual opinions in cases before it – so while not a court in name, it is arguably a judicial body. And while it is true that the Committee is not part of a national judiciary “subject to institutional reactions from other parts of the government,” it has no police force to enforce its decisions, and therefore relies on the perception of its decisions as legitimate to ensure state enforcement. This dependence arguably imposes a level of “seriousness” on the Committee’s decisions akin to that of a national court.

### *Sources of Human Rights Law*

Human rights law derives from four principal sources: treaties and conventions, customary international law, general principles of law, and judicial decisions and the teachings of highly qualified legal scholars.<sup>158</sup> This paper focuses on three treaties that the United States

<sup>155</sup> See O’Sannlain, *supra* note 21, at 1907 (“[J]udges may be able to glean valuable insights from the practice and precedent of foreign jurisdictions where American conditions are consistent with those prevalent in the rest of the world or where Congress has expressed a desire to bring the United States into alignment with the international community.”).

<sup>156</sup> Waters, *supra* note 146, at 703.

<sup>157</sup> Vicki C. Jackson, *Constitutional Law and Transnational Comparisons: The Youngstown Decision and American Exceptionalism*, 30 Harv. J.L. & Pub. Pol’y 191, 211–12 (2006).

<sup>158</sup> Statute of the International Court of Justice, *opened for signature* June 26, 1945, art. 38(1), 59 Stat. 1031, T.S. No. 993 (entered into force Oct. 24, 1945).

has signed and ratified: the ICCPR,<sup>159</sup> the U.N. Convention Relating to the Status of Refugees and its accompanying Protocol Relating to the Status of Refugees (Refugee Convention),<sup>160</sup> and the U.N. Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment (CAT).<sup>161</sup> While some understanding of the treaty provisions can be gleaned from the bare text, this is an exercise rather like relying on only the words of the Constitution to determine the scope and substance of that document. As a result, this paper looks to opinions of the U.N. Human Rights Committee,<sup>162</sup> the U.N. High

<sup>159</sup> International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, S. Exec. Doc. E, 95-2 (1978), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR]. The ICCPR is the main source of due process rights in international human rights law. With a few explicit exceptions, the ICCPR applies to “all individuals within [the] territory and subject to [the] jurisdiction” of the United States, regardless of the nationality or legal status of the individual. *Id.* art. 2(1). The exceptions are as follows: article 25 applies only to nationals; article 13 applies only to non-citizens; article 12(1) applies only to individuals lawfully present; article 24 applies only to children. In contrast to American jurisprudence that does not extend the full procedural due process protections of the Constitution to non-citizens at the border, the rights contained in the ICCPR extend to all human beings “within the power or effective control of [a] State party, even if not situated within the territory of the State party . . . . [T]he enjoyment of Covenant rights is not limited to citizens of States parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum-seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State party.” U.N. Hum. Rts. Comm., *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, ¶ 10, U.N. Doc. HRI/GEN/1/Rev.7, at 195 (May 12, 2004); *see also* U.N. Hum. Rts. Comm., *General Comment No. 15: The Position of Aliens Under the Covenant*, ¶ 2, U.N. Doc. HRI/GEN/1/Rev.7, at 140 (May 12, 2004) (“Aliens receive the benefit of the general requirement of non-discrimination in respect of the rights guaranteed in the Covenant.”). Moreover, the ICCPR requires parties to provide an effective remedy for a violation of the rights contained therein, including judicial, administrative, or legislative determination of the treaty-based right to a remedy and official enforcement of such a remedy. ICCPR, *supra*, art. 2(3). The United States has contested the extraterritorial application of the ICCPR. *See* U.N. Hum. Rts. Comm., *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant Third Periodic Reports of States Parties Due in 2003, United States of America*, at 109-111, U.N. Doc. CCPR/C/USA/3 (Nov. 28, 2005) (second and third periodic reports); U.N. Hum. Rts. Comm., *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee, United States of America*, ¶ 10, U.N. Doc. CCPR/C/USA/CO/3/Rev.1 (Dec. 18, 2006) (noting that the United States should acknowledge the applicability of the ICCPR to individuals under its jurisdiction and outside its territory).

<sup>160</sup> U.N. Convention Relating to the Status of Refugees, *adopted* July 28, 1951, 189 U.N.T.S. 150 (entered into force Apr. 22, 1954); U.N. Protocol Relating to the Status of Refugees, *opened for signature* Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 (entered into force Oct. 4, 1967; for the United States, Nov. 1, 1968) [hereinafter Refugee Convention]. While the United States has not ratified the Refugee Convention, it acceded to the Refugee Protocol on November 1, 1968. *See* <http://www.unhcr.org/protect/PROTECTION/3b73b0d63.pdf>. The Protocol incorporates Articles 2 through 34 of the Convention; as a result, the U.S. government has essentially signed on to the Refugee Convention. United Nations Protocol Relating to the Status of Refugees, Art. 1, para. 1 (“The States Parties to the present Protocol undertake to apply Articles 2 through 34 inclusive of the Convention to refugees hereinafter defined.”).

<sup>161</sup> U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85 (entered into force June 26, 1987) [hereinafter Convention Against Torture or CAT].

<sup>162</sup> The U.N. Human Rights Committee is a self-monitoring body set up by parties to the ICCPR to monitor reports, which are submitted by parties on their compliance with the Covenant. ICCPR, *supra* note 159, arts. 28, 40. Note that the Human Rights Committee is a different entity from the often criticized Human Rights Commission, which was recently replaced by the Human Rights Council. The 1966 Optional Protocol to the International Covenant on Civil and Political Rights, to which the United

Commissioner for Refugees,<sup>163</sup> and the U.N. Committee Against Torture to assist in interpreting these treaties.<sup>164</sup> This paper also examines the *travaux préparatoires*, or drafting history of the ICCPR and the Refugee Convention, to confirm the meaning of the treaty language.<sup>165</sup> Finally, this paper relies on the writings of respected international law scholars who have analyzed these treaties and the opinions of the bodies charged with treaty interpretation.

An examination of treaties and their soft law interpretations on the use of secret evidence in immigration proceedings gives rise to three principles. Heightened procedural due process protections should apply to decisions to remove (a) non-citizens lawfully present, (b) non-citizens unlawfully present who have special claims to protection from torture or persecution, and (c) non-citizens unlawfully present with strong family ties. In the cases of non-citizens with lawful status, claims to asylum, or strong family ties, where the government shows that “compelling reasons of national security” require, the rights to submit reasons against expulsion and to review may be limited in a manner that specifically responds to the national security interest at stake. Other aspects of those rights and other due process protections still apply. In the case of non-citizens in

---

States is not a party, “recognizes the competence of the [Human Rights] Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant.” Optional Protocol to the International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, art. 1, 999 U.N.T.S. 302, 302 (entered into force Mar. 23, 1976) [hereinafter ICCPR Optional Protocol]. While the United States therefore could not be charged by an individual with violations of the Covenant, the decisions of the Human Rights Committee provide guidance in interpreting and complying with the treaty.

<sup>163</sup> The Refugee Convention provides that parties will cooperate with the United Nations High Commissioner for Refugees (UNHCR), a body created by the United Nations General Assembly on December 14, 1950. Refugee Convention, art. 35(1), *available at* <http://www.unhcr.org/protect/PROTECTION/3b66c2aa10.pdf>. The Executive Committee of the UNHCR, composed of 72 member nations, meets annually to advise on international protection issues. UNHCR, *Executive Committee of the High Commissioner's Programme (ExCom)*, <http://www.unhcr.org/excom.html> (last visited Nov. 19, 2007). These bodies issue notes, guidelines, and conclusions that provide guidance in interpreting and upholding the Refugee Convention.

<sup>164</sup> The U.N. Committee Against Torture is a self-monitoring body set up by parties to the CAT to monitor reports by parties on their compliance with the Convention and investigate claims of systematic torture in the territory of a party. CAT, Arts. 17, 19, 20; United Nations Committee Against Torture, *General Comment No. 1: Implementation of article 3 of the Convention in the context of article 22 (Refoulement and communications)* ¶ 9, U.N. Doc. No. HRI/GEN/1/Rev.7 (1996). Article 22(1) of the CAT allows a party to declare that they “[R]ecognize the competence of the Committee [Against Torture] to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention.” The United States has not made such a declaration and therefore could not be charged by an individual with violations of the Covenant. However, the decisions of the Committee Against Torture provide guidance in interpreting and complying with the treaty.

<sup>165</sup> Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, art. 32, 1155 U.N.T.S. 331, 340 (entered into force Jan. 27, 1980) (authorizing recourse to supplementary means of interpretation, including preparatory work of the treaty, in order to confirm the meaning of the treaty language). *Travaux préparatoires* are the “legislative history” of treaties, consisting of verbatim transcripts of the statements made by representatives of various nations during the drafting process.

danger of torture, procedural due process protections cannot be limited.

### *What Human Rights Law Says*

#### Non-Citizens Lawfully Present

The ICCPR is the seminal treaty providing procedural due process rights in human rights law. Specifically, the ICCPR provides non-citizens lawfully in the territory of a state party a right to a removal decision “reached in accordance with law,”<sup>166</sup> Non-citizens lawfully

<sup>166</sup> ICCPR, *supra* note, 159, art. 13 (“An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefore only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.”). A non-citizen is considered lawfully present when “she has entered the State of residence in accordance with its legal system . . . and/or is in possession of a valid residency permit (ex lege or by sovereign act in the form of a visa).” Nowak, *supra* note 22, at 224. *See also* U.N. Human Rights Comm., *General Comment No. 15: The position of aliens under the Covenant*, ¶ 9, U.N. Doc. CCPR General Comment No. 15 (April 11, 1986) (explaining that where the lawfulness of a non-citizen’s status is in dispute, the due process protections of Article 13 must apply to the decision to deport), *reprinted in* U.N. Econ. & Soc. Council [ECOSOC], *Compilation of general comments and general recommendations adopted by Human Rights Treaty Bodies* 141, U.N. Doc. HRI/GEN/1/Rev.7 (May 12, 2004). The U.N. Human Rights Committee recently decided that Article 13’s “in accordance with law” language incorporates Article 14’s due process provisions, which include confrontation rights. U.N. Human Rights Comm., *Ahani v. Canada*, Communication No. 1051/2002, ¶ 10.9, U.N. Doc. CCPR/C/80/D/1051/2002 (June 15, 2004). Professor Ruth Wedgwood, of the United States, was a Committee member at the time of the decision. *See Meeting of State Parties, Election, in accordance with articles 28 to 32 of the International Covenant on Civil and Political Rights, of nine Members of the Human Rights Committee to replace those whose terms are due to expire on 31 December 2002*, 31, U.N. Doc. CCPR/SP/58 (July 5, 2002). The Committee has also found that the concept of a fair hearing in Article 14(1), providing the right to a fair trial in the civil context, “should be interpreted as requiring a number of conditions, such as equality of arms, [and] respect for the principle of adversary proceedings. . . .” U.N. Human Rights Comm. *Moraël v. France*, Communication No. 207/1986, ¶ 9.3, U.N. Doc. CCPR/C/36/D/207/1986 (July 28, 1989); *E/CN.4/AC.1/SR.25* at 8, *E/CN.4/AC.1/SR.32* at 10-11. The Committee has found that “equality of arms” includes the requirement that the inspection of records be dealt with in a manner equal for both parties. Nowak, *supra* note 22, at 246-47, 261; U.N. Human Rights Comm., *Compass v. Jamaica*, Communication No. 375/1989, ¶ 10.3, U.N. Doc. CCPR/C/49/D/375/1989 (March 11, 1993) (noting that Article 14(3)(e) “protects the equality of arms between the prosecution and the defense in the examination of witnesses.”). The Committee, including Professor Louis Henkin of the United States, has found, in a civil suit where one party was allowed to submit a brief to which the opposing party was not allowed to respond, that Article 14(1) protects “the ability to contest all the argument and evidence adduced by the other party” U.N. Human Rights Comm., *Äärelä v. Finland*, Communication No. 779/1997, ¶ 7.4, U.N. Doc. CCPR/C/73/D/779/1997 (Nov. 7, 2001). In addition, the Committee, also including Professor Henkin, has extended the right of “equality of arms” to administrative proceedings: in a proceeding to declare an individual disabled, where the claimant was not allowed to submit a psychological report refuting the conclusions of the psychological report of the opposing party, the Committee found a violation of Article 14(1) “[i]n the absence of the guarantee of equality of arms between the parties in the production of evidence for the purposes of the hearing.” U.N. Human Rights Comm., *Jansen-Gielen v. The Netherlands*, Communication No. 846/1999, ¶ 8.2, U.N. Doc. CCPR/C/71/D/846/1999 (Apr. 3, 2001). The ICCPR *travaux préparatoires* reveal that although some states opposed including specific safeguards for expulsion, the majority believed that protection of the individual should be balanced against the state’s interest. Article 13, as adopted, was accordingly based on the Refugee Convention’s provision of adequate and specific

present must be allowed to submit reasons against removal and to have their cases reviewed by the competent authority.<sup>167</sup> Notably, this treaty provision incorporates considerations of national security: the right to submit a response and to review do not attach “where compelling reasons of national security otherwise require.”<sup>168</sup>

This basic treaty framework, as fleshed out by Human Rights Committee decisions, gives rise to two principles that thoughtfully balance due process rights and national security concerns in decisions to expel non-citizens lawfully present: (a) most non-citizens lawfully present must be allowed to see all of the evidence used against them in removal proceedings and (b) in order to withhold evidence against non-citizens lawfully present, the state must establish that “compelling reasons of national security” apply. In other words, the government must present a convincing case that it is necessary to withhold documentary evidence in order to protect lives, important sources, and/or intelligence gathering methods. Administrative agencies responsible for enforcing the immigration laws should incorporate these principles.

#### Non-Citizens Seeking Protection from Persecution

The Refugee Convention provides a balanced approach to the due process rights of asylum seekers facing terrorism charges in immigration proceedings.<sup>169</sup> In a nutshell, the Refugee Convention prohibits member states from returning a refugee—a non-citizen who has a well-founded fear of persecution based on her race, religion, nationality, political opinion, or membership in a particular social group—to the country in which she fears persecution.<sup>170</sup> This obligation, known as the principle of *non-refoulement*, is a universally accepted and binding international law norm.<sup>171</sup> Where

---

safeguards for expulsion actions. Mark J. Bossuyt, Guide to the “Travaux Préparatoires” of the International Covenant on Civil and Political Rights 269 (1987) (citing E/CN.4/SR.316 at 6, 8)

<sup>167</sup> ICCPR, *supra* note 159, art. 13.

<sup>168</sup> *Id.*

<sup>169</sup> Although the United States has yet to sign and ratify the Refugee Convention, it acceded to the Refugee Protocol on November 1, 1968. UNHCR, *UNHCR Global Report 2003*, 487 (2003), available at <http://www.unhcr.org/publ/PUBL/40c6d7680.pdf>. Accession refers to the formal acceptance of treaty provisions by a state that failed to sign the treaty when it was open to signature; it may occur before or after entry into force. Ian Brownlie, *Principles of Public International Law* 604-05 (3d. ed. 1979). The Protocol incorporates Articles 2 through 34 of the Convention, so in essence, the U.S. government has joined the Refugee Convention as well. Refugee Protocol, *supra* note 148, art. 1, ¶ 1 (“The States Parties to the present Protocol undertake to apply articles 2 through 34 inclusive of the Convention to refugees as hereinafter defined.”)

<sup>170</sup> Refugee Convention, *supra* note 160, art. 33(1). The Convention also provides numerous substantive rights to refugees.

<sup>171</sup> *Id.* For further discussion of the basis for the principle of *non-refoulement* in treaty law and customary international law, see Guy S. Goodwin-Gill, *The Refugee in International Law* 124-37 (1996). High standards of procedural fairness should apply to asylum determinations because of the universal and fundamental nature of the *non-refoulement* principle and the serious consequences of returning an asylum seeker to a country in which she fears persecution. Sir Elihu Lauterpacht & Daniel Bethlehem, *The Scope and Content of the Principle of Non-Refoulement: Opinion*, in *Refugee Protection*

the asylum seeker's presence implicates national security concerns, the Convention provides two exceptions to this protection principle: one for non-citizens whom are suspected of having committed various enumerated crimes (the exclusion clauses)<sup>172</sup> and another for those who are suspected of being a current or future threat to national security (the expulsion clauses).<sup>173</sup>

In the early 1950's, the drafters of the Convention were concerned about dangers posed by spies or subversive agents of foreign governments who would "engage in activities on behalf of a foreign Power against the country of their asylum. . ."<sup>174</sup> These agents posed threats parallel to those posed by terrorists, including violence against American citizens both within U.S. territory and abroad and theft of information about the United States' efforts to protect its citizens and retaliate against enemy agents and states. It was against this backdrop that the drafters of the Convention balanced the rights of refugees with the national security interests of States Parties.

The Refugee Convention's exclusion and expulsion clauses protect these national security interests.<sup>175</sup> Article 1(F) enumerates

---

in International Law: UNHCR's Global Consultations on International Protection 87, 133-34 (Erika Feller et al. eds., 2003) (describing limitations on the interpretation and application of Article 33 national security and public safety exceptions and emphasizing the "humanitarian character of *non-refoulement*"). available at <http://www.unhcr.org/publ/PUBL/419c75ce4.pdf>; UNHCR Executive Comm, *The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum*, ¶(e), U.N. Doc. 12A(A/38/12/Add.1) (Oct. 20, 1983) (recognizing "the grave consequences of an erroneous determination for the applicant and the resulting need for such a decision to be accompanied by appropriate procedural guarantees").

<sup>172</sup> Refugee Convention, *supra* note 160, art. 1(F) ("The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that (a) He has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; (b) He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; (c) He has been guilty of acts contrary to the purposes and principles of the United Nations.").

<sup>173</sup> *Id.*, art. 32(1) ("The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order."). Prior to assessing the actual threat posed by the asylum-seeker, authorities should conduct a full and fair individual review of the asylum-seeker's claim. UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, ¶ 176, U.N. Doc. HCR/IP/4/Eng/Rev.1 (Jan. 1992) (hereinafter "UNHCR Handbook"); U.N. Special Rapporteur of the Commission on Human Rights, *Report of the Special Rapporteur of the Commission on Human Rights on the question of torture and other cruel, inhuman or degrading treatment or punishment*, ¶ 30, U.N. Doc. A/57/173 (July 2, 2002).

<sup>174</sup> The Refugee Convention, 1951: The Travaux Préparatoires Analysed With a Commentary By Dr. Paul Weis, at 330 (Weis ed. 1995).

<sup>175</sup> The UNHCR states that a decision-maker first provide a full hearing on the merits of the asylum claim and a decision on whether the applicant merits asylum before examining the government's allegations of past criminal acts or an ongoing national security risk. United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, at ¶ 176, U.N. Doc. No. HCR/IP/4/Eng/Rev.1 (Jan. 1992) (hereinafter "UNHCR Handbook"); Theo van Boven, United Nations Special Rapporteur of the Commission on Human Rights, *Report on the question of torture and other cruel, inhuman or degrading treatment or punishment*, at ¶ 30, U.N. Doc. No. A/57/173 (July 2, 2002) (hereinafter "Special Rapporteur's Torture Report"). Because *non-refoulement* is a binding obligation on parties to the Refugee Protocol, and because a mistake in determining asylum status or exclusion would

several grounds for exclusion from refugee status, including the commission of serious non-political crimes outside the country of refuge.<sup>176</sup> This provision would likely apply to an asylum seeker who had engaged in terrorist activity in the past.<sup>177</sup> UNHCR states that the government may not keep secret the substance of evidence used to exclude a non-citizen from refugee status, but should protect its security interests through procedural safeguards such as protective orders.<sup>178</sup>

The expulsion clauses, Articles 32 and 33(2), provide that a refugee who poses a current or future risk to national security may be expelled where there are “reasonable grounds” for regarding him as such a threat.<sup>179</sup> This expulsion decision must be made “in accordance with due process of law.”<sup>180</sup> In most cases, the specific rights to

---

pose a serious risk to human life and liberty, the UNHCR states that it is not appropriate to apply summary expulsion procedures to asylum seekers suspected of terrorist activity. United Nations High Commissioner for Refugees, *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention Relating to the Status of Refugees*, at ¶ 99 (Sept. 4, 2003), reprinted at 15 Int'l J. Refugee L. No. 3 502, 543 (2003) (hereinafter “UNHCR Background Note”) (noting that applicability of exclusion clauses should not be examined in accelerated procedures).

<sup>176</sup> The exclusion clauses mandate that the Convention’s protections cannot apply to individuals who committed an international crime such as a war crime or a crime against humanity, a serious non-political crime outside the country of refuge, or acts contrary to the purposes and principles of the United Nations. Refugee Convention Art. 1(F). The exclusion clauses do not apply to current or future threats to national security.

<sup>177</sup> “Exclusion should not be based on evidence that the individual concerned does not have the opportunity to challenge, as this offends principles of fairness or natural justice.” UNHCR Background Note, *supra* note 175 at ¶ 112, 15 Int'l J. Refugee L. No. 3 502, 543 (2003).

<sup>178</sup> UNHCR provides an example: the court could create an order that dictates that only the “general content” of the information can be provided to the asylum seeker. UNHCR Background Note, *supra* note 175 at ¶ 113; United Nations High Commissioner for Refugees, *Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, at ¶ 36, U.N. Doc. No. HCR/GIP/03/05 (Sept. 4, 2003).

<sup>179</sup> Refugee Convention Art. 32(1) & (2); 33(2). Article 32 allows expulsion of a refugee lawfully present on grounds of national security, and Article 33 allows a State Party to deny protection against refoulement (return to the country in which she fears persecution) to a refugee whom it has “reasonable grounds” to regard as a danger to the national security of that state. Refugee Convention Art. 33(2) (“The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.”) See also *The Refugee Convention, 1951: The Travaux Préparatoires Analysed With a Commentary* By Dr. Paul Weis, *supra* note 174 at 328, 330 (explanation of Article 33(2) by Swedish representative to the 1951 United Nations Conference on the Status of Refugees and Stateless Persons, who introduced this language into the Convention). See UNHCR Background Note, *supra* note 175 at ¶ 10 15 Int'l J. Refugee L. No. 3 502, 505 (2003) (noting that Article 33(2) is “a measure of last resort, taking precedence over and above criminal law sanctions and justified by the exceptional threat posed by the individual—a threat such that it can only be countered by removing the person from the country of asylum.”).

<sup>180</sup> Refugee Convention Art. 32(2) (“The expulsion of [a refugee lawfully in the territory on grounds of national security] shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.”) There is no case law interpreting the meaning of “due process of law”. Dr. Paul Weis notes that the term, which comes from the U.S. Constitution, includes a “decision reached in accordance with a procedure established by law, and containing the safeguards which the law provides for the class of cases in

submit evidence to rebut the charges against one, and to appeal to and have representation before a competent authority, apply.<sup>181</sup> However, where the state establishes that “compelling reasons of national security” require a specific abrogation of these rights, these two specific due process protections may be limited.<sup>182</sup>

While a refugee facing expulsion is looking for another country to accept him, for which he is allowed a “reasonable period” of time, the state may apply “such internal measures as [it deems] necessary” to protect its national security interests.<sup>183</sup> It is important to note that this individual is still a refugee—the expulsion clauses maintain refugee status while permitting deportation—so she should not be returned to the country in which she fears persecution.<sup>184</sup>

In asylum cases, the Refugee Convention and the UNHCR’s interpretation of it provide a balanced approach to protecting asylum seekers’ procedural due process rights and national security. The Convention supports security interests with measures to remove asylum seekers who have committed acts of terrorism or pose a present or future threat to national security, while ensuring the protection of these asylum seekers’ rights to a fair determination of their refugee case through procedural safeguards.<sup>185</sup> The UNHCR interprets the Convention to protect the rights of refugees by placing the burden on the state to establish the need to use secret evidence, and ensuring that the asylum seeker is always privy to the general substance of the allegations included in such evidence. The UNHCR’s interpretation also promotes the state’s interests by allowing, in the exceptional cases in which it can make a showing of

---

question, in particular equality before the law and the right to a fair hearing.” The Refugee Convention, 1951: The Travaux Préparatoires Analysés With a Commentary By Dr. Paul Weis, *supra* note 174 at 322. Prof. Guy Goodwin-Gill suggests that minimum due process requirements in the expulsion context arguably include the right to be informed of the case against one, the right to submit evidence to rebut that case, and the right to a reasoned decision. Goodwin-Gill, *supra* note 171 at 306-07

<sup>181</sup> Refugee Convention Art. 32(2).

<sup>182</sup> Refugee Convention Art. 32(2). There is no case law interpreting the meaning of “compelling reasons of national security.” It is apparent from the plain text of Article 32(2) only that the standard for “compelling reasons of national security” does not encompass all refugees who pose a risk to national security. Moreover, Dr. Weis finds that the “compelling reasons of national security” exception may be invoked “when it is not in the public interest that the reasons for the decisions should be divulged, for example, in espionage cases.” The Refugee Convention, 1951: The Travaux Préparatoires Analysés With a Commentary By Dr. Paul Weis, *supra* note 174 at 322.

<sup>183</sup> Refugee Convention Art. 32(3).

<sup>184</sup> This status entitles her to the protection of the United Nations High Commissioner for Refugees, as well as the opportunity to look for a country other than her country of origin (because she fears persecution in her home country) to accept her. In contrast, non-citizens who are excluded from refugee status under Article 1(F) can be returned to their country of origin. Moreover, the text of the Convention provides that protection against *refoulement* may be denied only to refugees about whom there are reasonable grounds for believing that they pose a danger to the security of the country in which they reside; refugees who pose a danger to national security more generally may be expelled, but may not be returned to the country in which they fear persecution. Refugee Convention Art. 32(1) & (2); 33(2); The Refugee Convention, 1951: The Travaux Préparatoires Analysés With a Commentary By Dr. Paul Weis, *supra* note 174 at 342; Lauterpacht and Bethlehem, *supra* note 171 at 129.

<sup>185</sup> Refugee Convention, Arts. 32(2),(3), 33(2).

necessity, for the withholding of the identity of a witness, and by recommending the use of safeguards, such as protective orders, to protect this information.<sup>186</sup>

### Non-Citizens Seeking Protection Against Torture

International law contains a universal prohibition on torture that cannot be derogated. This obligation derives from international treaties such as the Convention Against Torture and the ICCPR,<sup>187</sup> as well as regional treaties such as the African Charter on Human and Peoples' Rights, the American Convention on Human Rights, and the European Convention on Human Rights.<sup>188</sup> While these treaties permit derogations from some of their provisions, they mandate explicitly that governments cannot derogate from the clauses proscribing torture.<sup>189</sup> In addition to this powerful treaty-based obligation, the absolute ban on torture has become a *jus cogens* norm of customary international law that imposes obligations *erga omnes*.<sup>190</sup>

CAT's categorical, treaty-based prohibition on torture includes a specific and non-derogable duty not to return an individual, whether he is a citizen or a non-citizen, to a country "where there are substantial grounds for believing that he would be in danger of being subjected to torture."<sup>191</sup> In addition, the more general prohibition on torture found in international and regional human rights instruments has been interpreted to include a ban on deportation to a state in

---

<sup>186</sup> Refugee Convention, Art. 32(2); Lauterpacht and Bethlehem, *supra* note 171 at 134; UNHCR Background Note, *supra* note 176 at ¶¶ 112-13, 15 In '1 J. Refugee L. No. 3 502, 543 (2003).

<sup>187</sup> CAT, *supra* note 161, arts. 2-4; ICCPR, *supra* note 159, art. 7.

<sup>188</sup> African Charter on Human and Peoples' Rights, *adopted* June 27, 1981, art. 5, 1520 U.N.T.S. 217, 247 (entered into force Oct. 21, 1986); Organization of American States, American Convention on Human Rights, *opened for signature* Nov. 22, 1969, art. 5(2), O.A.S.T.S. No. 36, 1144 U.N.T.S. 143, 146 (entered into force July 18, 1978) [herein after American Convention]; Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, art. 3, Europ. T.S. No. 5, 213 U.N.T.S. 221, 224 (entered into force Sept. 3, 1953) [hereinafter European Convention]; *see also* Soering v. United Kingdom, A161 Eur. Ct. H.R. 1, ¶ 88, at 34 (1989) ("Article 3 . . . makes no provision for exceptions and no derogation from it is permissible . . . in time of war or other national emergency. This absolute prohibition of torture and of inhuman or degrading treatment or punishment under the terms of the Convention shows that Article 3 enshrines one of the fundamental values of the democratic societies making up the Council of Europe. It is . . . generally recognised as an internationally accepted standard.")

<sup>189</sup> ICCPR, *supra* note 159, art. 4(2) ("No derogation from articles . . . 7 . . . may be made . . ."); CAT, *supra* note 161, art. 2(2) ("No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political in stability [sic] or any other public emergency, may be invoked as a justification of torture."); American Convention, *supra* note 188, art. 27(2) (prohibiting suspension of Article 5); European Convention, *supra* note 188, art. 15(2) ("No derogation . . . from Article 3 . . . shall be made . . ."). *See also* U.N. Hum. Rts. Comm., *General Comment No. 29: Article 4: Derogations During a State of Emergency*, ¶ 7, U.N. Doc. HRI/GEN/1/Rev.7, at 184 (May 12, 2004) [hereinafter *General Comment 29*] (describing the prohibition on torture in the ICCPR as non-derogable).

<sup>190</sup> *See* Prosecutor v. Furun dzija, Judgement, IT-95-17/1-T, ¶¶ 143-54, (ICTY Trial Chamber 1998); *General Comment No. 29, supra* note 189, at ¶ 11 (noting "the peremptory nature" of article 7 of the ICCPR).

<sup>191</sup> CAT, *supra* note 161, art. 3(1).

which there are substantial grounds for believing that a non-citizen would be at risk of torture.<sup>192</sup> The scope of the prohibition on torture covers all persons at risk of torture, and thus protects all non-citizens, whether or not they hold lawful status in the United States.<sup>193</sup>

The peremptory norm prohibiting torture requires enhanced procedural due process protections in removal proceedings for non-citizens accused of terrorist activity. Simply put, claims for protection from torture should be examined independently of any secret evidence to ensure compliance with CAT. The Committee Against Torture has repeatedly decided that alleged and even admitted members of terrorist organizations cannot be returned to the country in which they fear torture.<sup>194</sup> As a result, there is no need to use secret evidence to show that a CAT claimant is a threat to national security because even if he is found to pose such a threat, he cannot be sent to torture.<sup>195</sup>

As the Human Rights Committee has noted, “[W]here one of the highest values protected by the Covenant, namely the right to be free from torture, is at stake, the closest scrutiny should be applied to the fairness of the procedure applied to determine whether an individual is at a substantial risk of torture.”<sup>196</sup> The peremptory nature of the

<sup>192</sup> See, e.g., U.N. Hum. Rts. Comm., *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, ¶ 12, U.N. Doc. HRI/GEN/1/Rev.7, at 192 (May 12, 2004) (noting that ICCPR article 2, requiring states to ensure Covenant rights for all persons in their territory and under their control, “entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by [article 7 of the ICCPR] . . .”); U.N. Hum. Rts. Comm., *General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, ¶ 9, U.N. Doc. HRI/GEN/1/Rev.7, at 150 (May 12, 2004) (“In view of the Committee, States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement.”).

<sup>193</sup> CAT, *supra* note 161, art. 3(1).

<sup>194</sup> The Committee has found violations of article 3 (prohibiting deportation to torture) against Sweden for return of a suspected member of a terrorist organization to Egypt, U.N. Comm. Against Torture, *Agiza v. Sweden*, ¶ 13.4, U.N. Doc. CAT/C/34/D/233/2003 (May 20, 2005) [hereinafter *Agiza*] (finding a breach of article 3 because claimant was at real risk of torture in Egypt), against France for return of an individual convicted for links to ETA in Spain, U.N. Comm. Against Torture, *Arana v. France*, ¶¶ 11.4-11.5, 12, U.N. Doc. CAT/C/23/D/63/1997 (June 5, 2000) [hereinafter *Arana*] (finding a violation of Article 3 because of risk of torture and failure to respect due process rights during deportation), and against Sweden for return of a member of Sendero Luminoso to Peru, U.N. Comm. Against Torture, *Tapia Paez v. Sweden*, ¶¶ 14.3, 14.5, U.N. Doc. CAT/C/18/D/39/1996 (Apr. 28, 1997) [hereinafter *Tapia Paez*] (“The nature of the activities in which the person concerned engaged cannot be a material consideration when making a determination under article 3 of the Convention.”). In each of these cases, the central question was how the country of origin’s government treated suspected members of the terrorist organizations to which these individuals allegedly belonged. See *Tapia Paez*, *supra* at ¶¶ 14.3-14.4; *Arana*, *supra* at ¶¶ 11.4-11.5; *Agiza*, *supra* at ¶¶ 13.4-13.5. *But see* *Cruz Varas v. Sweden*, A201 Eur. Ct. H.R. 1, ¶¶ 78-82, at 30-31 (1991) (allowing expulsion of asylum seeker under article prohibiting torture where credibility was at issue, corroboration was found insufficient, and human rights conditions in country of origin had improved).

<sup>195</sup> The government might want to use secret evidence to show that a CAT claimant is not credible. Even here, due process protections should apply. See CAT, *supra* note 161.

<sup>196</sup> Ahani, *supra* note 166 at ¶ 10.6.

prohibition on torture requires that the highest levels of due process protection attach to torture claims.<sup>197</sup> In order to comply with CAT, the government should not rely on secret evidence to challenge a claim to protection against torture.

#### Non-Citizens with Strong Family Ties

The ICCPR, as interpreted by the Human Rights Committee, provides heightened due process rights in removal proceedings to non-citizens with strong family ties to the United States. Two provisions of the treaty---the right to family life and the right to effective remedies---combine to require particular procedural fairness in these cases. This special protection of family life is consonant with policies underlying U.S. immigration law that preference family ties between spouses, parents and children, and siblings in awarding immigrant visas.<sup>198</sup>

Article 17(1) of the ICCPR prohibits “arbitrary or unlawful interference” with the family.<sup>199</sup> According to the Human Rights Committee, “[T]he exclusion of a person from a country where close members of his family are living can amount to an interference within the meaning of Article 17.”<sup>200</sup> This article requires due process protections even for unlawfully present family members in removal proceedings.<sup>201</sup> And under Article 2(3), member states must provide

<sup>197</sup> See *Chahal v. United Kingdom*, 1996-V Eur. Ct. H.R. 1831, ¶¶ 79-82, at 1855-56 (finding that a claim to protection against torture in removal proceedings must be examined independently without regard to any national security risk). Cf. *Suresh v. Canada*, [2002] S.C.R. 3, at ¶¶ 118-23 (holding under Canada’s commitment to CAT and its requirement of substantial procedural protection for individuals at risk of torture, Canadian common law duty of procedural fairness directs that non-citizen facing deportation to torture must be provided with material on which decision to deport is based and opportunity to respond, “subject to privilege or similar valid reasons for reduced disclosure, such as safeguarding confidential public security documents”).

<sup>198</sup> See INA § 240A(b), 8 U.S.C. § 1229b(b) (2000) (allowing non-citizens unlawfully present to become permanent residents if (a) they have been in the United States for ten years and if their deportation would result in exceptional hardship to a U.S. citizen or permanent resident spouse, parent, or child or (b) they have been in the U.S. for three years and they or their U.S. citizen child has been battered or subjected to extreme cruelty by a U.S. citizen or permanent resident spouse or parent, and removal would result in extreme hardship to the non-citizen, her child, or her parent); INA § 245(i), 8 U.S.C. § 1255(i) (2000) (allowing adjustment to status of permanent resident for non-citizens unlawfully present who are beneficiaries of family-based visas on the basis of their status as a child or sibling of a U.S. citizen or a spouse or unmarried child of a permanent resident, if that visa petition was filed on or before April 30, 2001); INA § 208(b)(3), 8 U.S.C. § 1158(b)(3) (2000) (providing asylee status to spouse and children of non-citizen granted asylum).

<sup>199</sup> ICCPR, *supra* note 159, art. 17(1).

<sup>200</sup> *Aumeeruddy-Cziffra v. Mauritius*, United Nations Human Rights Committee, Communication No. 35/1978, ¶9.2(b) 2 (i) 2, U.N. Doc. No. CCPR/C/12/D/35/1978 (Apr. 9, 1981). Even where sanctioned by law, interference may violate this provision if the law is arbitrary or imposed arbitrarily. United Nations Human Rights Committee, *General Comment No. 16: Article 17 (Right to privacy)*, ¶ 4 (1988), U.N. Doc. HRI/GEN/1/Rev.7 at 142 (May 12, 2004).

<sup>201</sup> *Winata and Li v. Australia*, United Nations Human Rights Committee, Communication No. 930/2000, ¶¶7.3, 9, U.N. Doc. No. CCPR/C/72/D/930/2000 (Aug. 16, 2001) (finding “arbitrary interference” with the right to family life where unlawfully present parents with a citizen child were ordered removed without adequate due process protections.) Mr. Louis Henkin, on behalf of the United States of America, joined in this opinion. The Committee found that the decision to deport these parents, requiring them to

an effective remedy for violations of the right to family life.<sup>202</sup> Article 23 buttresses these protections, stating that “The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.”<sup>203</sup> This wording imposes affirmative obligations on States Parties to adopt legislative, administrative, or other measures to protect family life.<sup>204</sup>

Human rights treaties that bind the United States guide us to a thoughtful balance between the rights of non-citizens to due process of law, and the security rights and interests of the state and its agents. Procedural due process protections should apply fully to non-citizens lawfully present in or with strong family ties to a country as well as to non-citizens with a special claim to protection against persecution or torture. In these situations, the government’s security interests are also protected, by allowing expulsion of refugees and non-citizens lawfully present who pose a threat to national security, and limitations on their right to present reasons against expulsion where the government establishes a “compelling reason of national security” requires. Non-citizens at risk of torture are always entitled to full confrontation rights; secret evidence cannot be used in these cases.

#### The Terrorism Suspect Who Cannot Be Removed

While due process rights necessarily override national security interests in certain cases, the state is not left without recourse. State security concerns may be ensured through a variety of means in these cases, including criminal prosecution, restrictions on freedom of movement, and removal to a third country.

The state can institute criminal proceedings under domestic law against individuals suspected of terrorist activity. If a court determines that a non-citizen at risk of torture is engaged in criminal terrorist activity, this individual can be placed in jail, where he will not be able to perpetrate future crimes. Human rights treaties that bind the United States also permit a state to impose narrowly tailored and temporally limited restrictions on the freedom of movement of an individual who cannot be removed because she may face persecution

---

choose whether to leave or bring their child, would result in “substantial changes to long-settled family life.” Where such strong family ties existed, the government could not rely solely on domestic law to defend its actions but was required to provide additional factors justifying removal. *Id.* ¶¶ 7.2, 9. Conversely, where full procedural safeguards are applied, the right to family life is not violated in removal proceedings. *Canepa v. Canada*, United Nations Human Rights Committee, Communication No. 558/1993, ¶¶ 2.3, 4.2, 11.4, U.N. Doc. No. CCPR/C/59/D/558/1993 (June 20, 1997) (finding separation from family was not arbitrary in part because the applicant had benefited from a “[F]ull [removal] hearing with procedural safeguards. . .”).

<sup>202</sup> ICCPR, *supra* note 159, art. 2(3) (“[A]ny person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity”).

<sup>203</sup> ICCPR, *supra* note 159, art. 23(1).

<sup>204</sup> United Nations Human Rights Committee, *General Comment No. 19: Article 23 (The family)*, ¶¶ 3, 5 (1990), U.N. Doc. HRI/GEN/1/Rev.7 at 149–50 (May 12, 2004); Nowak, *supra* note 22, at 402.

in her home country but is suspected to pose a risk to national security.<sup>205</sup>

If a state is incapable of protecting itself through either of these approaches, it is possible in extreme circumstances to allow for detention based on suspicion of terrorist activity without a criminal trial. The ICCPR would likely prohibit such detention as arbitrary.<sup>206</sup> However, parties can derogate from this provision of the ICCPR in “[T]ime of public emergency which threatens the life of the nation and the existence of which is officially proclaimed . . . .”<sup>207</sup> The state must, however, show that this derogation is “[S]trictly required by the exigencies of the situation, . . . .” is consistent with international human rights law, and does not involve discrimination based on race, color, language, religion, or social origin.<sup>208</sup> The state must craft a law that is narrowly tailored and temporally limited, and immediately inform other parties, through the U.N. Secretary General, of this derogation and the reasons behind it.<sup>209</sup>

Finally, a state may remove an asylee or recipient of CAT protection to a third country in which she does not fear persecution or torture. As a non-citizen lawfully present, this individual would be entitled to Article 13 due process protections in her removal hearing. Sending suspected members of terrorist organizations to another country where the state cannot monitor their activity may not be the most effective method of preventing terrorism, and it is rare that a third country will accept a non-citizen suspected of terrorist activity. Most importantly, the state has an obligation to ensure that the individual will not be tortured or persecuted in the third country to which it sends her or returned to the country in which she fears torture or persecution.<sup>210</sup>

<sup>205</sup> Celepli v. Sweden, United Nations Human Rights Committee, Communication No. 456/1991, ¶¶ 2.1-2.3, 9.2, U.N. Doc. No. CCPR/C/51/D/456/1991 (Aug. 2, 1994) (approving Sweden’s imposition of restrictions on the freedom of movement of a Kurd who was at risk of political persecution if returned to Turkey, but whom the government suspected of being involved in terrorist activity). Mr. Celepli was confined to his home municipality and had to report to the police three times each week. He was not permitted to change his town of residence or employment or to leave this town without prior permission from the police. The restrictions on his freedom of movement were reduced several years later and eventually eliminated.

<sup>206</sup> ICCPR, *supra* note 159, art. 9 (stating that “No one shall be subjected to arbitrary arrest or detention” and that “Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release”).

<sup>207</sup> *Id.* at art. 4(1).

<sup>208</sup> *Id.* at art. 4(1).

<sup>209</sup> *Id.* at art. 4(3) (“Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated”).

<sup>210</sup> United Nations Committee Against Torture, *General Comment No. 1: Implementation of article 3 of the Convention in the Context of Article 22 (Refoulement and Communications)*, ¶ 2, U.N. Doc. No. HRI/GEN/1/Rev.7 (Nov. 21, 1997); Lauterpacht and Bethlehem, *supra* note 171, at 160.

Human rights treaties binding on the United States provide general principles to guide the administrative agencies responsible for immigration proceedings. Certain groups of non-citizens should be entitled to heightened due process protections in immigration proceedings—a principle consistent with policy preferences underlying domestic immigration law. These groups include non-citizens lawfully present, non-citizens with a claim to protection against persecution or torture, and non-citizens with strong family ties.

### *Criticism of Human Rights Treaties*

The incorporation of human rights law into the domestic sphere has been criticized by both opponents of international law and supporters of immigrants. The first group claims that international law, and human rights law specifically, threatens American sovereignty and identity.<sup>211</sup> The second criticism raises a concern that a turn to human rights law may dilute American norms protective of immigrants' rights and focuses excessively on the rights of immigrants rather than on the benefit to society from immigration.<sup>212</sup> I address these arguments in turn.

One line of arguments against the incorporation of international law into the domestic legal arena claims that such a move is harmful to American sovereignty and identity. By implementing international laws written by an unelected "world authority", so the argument goes, we are ceding our democratically determined values to authorities that may ignore important government interests.<sup>213</sup> Moreover, American culture is unique in many ways, and international law may not sufficiently prioritize fundamental American values.<sup>214</sup> The treaties examined in this article – the ICCPR, the Refugee Convention, and the Convention Against Torture – were each ratified

<sup>211</sup> See, e.g., Jack Goldsmith, *The Unexceptional U.S. Human Rights RUDs*, 3 U. St. Thomas L. J. 311, 321-27 (2005); Curtis Bradley, *Treaties, Human Rights, and Conditional Consent*, 149 U. Pa. L. Rev. 399 (2000); John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 Colum. L. Rev. 1955 (1999).

<sup>212</sup> Hiroshi Motomura, *Federalism, International Human Rights, and Immigration Exceptionalism*, 70 U. Colo. L. Rev. 1361, 1386-87 (1999).

<sup>213</sup> Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 Yale L. J. 1564, 1609 (2006) (cataloguing current criticisms of international law such as the belief held by Justices Rehnquist and Thomas that "[I]nternational guarantees put protections of the Bill of Rights in jeopardy" and the belief that "[T]ransnational law making drains too much authority from America's elected officials.").

<sup>214</sup> See, e.g., O'Scannlain, *supra* note 21, at 1906-07 (stating such values that make the United States different as "[T]he intentions of the Constitution's Framers [holding] a privileged position in American jurisprudence" to the degree that the Founding generation is given a significant degree of deference, the "American Creed" of liberty, equality, individualism, democracy, and the rule of law as the definition of what it means to be American such that the loss of those ideals would mean the loss of nationality, and such regrettable differences as the uniquely high violent crime rate and drug use rate in the United States such that foreign criminal jurisprudence may be inappropriate for the United States to follow)..

by the Senate and signed by the President. As exemplified in the case study presented above, the United States played an active role in drafting and in promoting these human rights treaties. Created by sovereigns, and by this sovereign in particular, the treaties carefully balance governmental interests and individual rights. The outcomes of legal rights analyses under these treaties are reasonable, and not far from the letter of American law. And because much of this law was drafted by American officials, human rights treaties often reflect and promote fundamental American values. Where human rights law appears to differ from these norms, it can often be adapted to the American context while meeting the minimum requirements of rights protection.

Another line of criticism focuses directly on the use of human rights law in the immigration context. Professor Hiroshi Motomura argues that because the United States model of immigration is one of transition to citizenship, distinct from many of its peer nations that do not regard themselves as immigrant nations, American norms may be diluted through the application of human rights law to immigration processes.<sup>215</sup> In addition, human rights law focuses on individual rights of immigrants rather than the ways in which they benefit society. To the first argument, the case study of secret evidence in immigration court illustrates that human rights law is a floor, not a ceiling. As with those examined in this paper, many human rights treaties were drafted by Americans and reflect our norms. While non-immigrant nations may contain different domestic conceptions of immigration law, the same human rights treaties apply to them, as we see with the example of secret evidence. Even in civil law countries without an adversarial tradition, human rights treaties and treaty-enforcing bodies have protected the right to confrontation for certain groups of non-citizens. Second, while it is important to focus on the ways in which immigrants benefit society, it is equally crucial to secure the rights of non-citizens, especially those who may not appear to benefit society or fit the “model immigrant” mold. A human rights framework humanizes non-citizens, making clear that they are not simply economic beings, and in this way helps to prevent mistreatment of immigrants.<sup>216</sup>

#### HUMAN RIGHTS IN STATUTORY INTERPRETATION, REGULATION DRAFTING, AND INSTITUTIONAL CULTURE

While much of the academic discussion of domestic incorporation of international law and human rights treaties focuses on federal courts and constitutional interpretation, this article points instead to

<sup>215</sup> Hiroshi Motomura, *Federalism, International Human Rights, and Immigration Exceptionalism*, 70U. Colo. L. Rev. 1361, 1386-87 (1999).

<sup>216</sup> See Wexler, *supra* note 149 at 388-396.

the administrative agencies responsible for the immigration process as the site for incorporation. First, immigration courts and the Board of Immigration Appeals can and should look to human rights law when interpreting the INA, extending the *Charming Betsy* principle to the administrative context.<sup>217</sup> Second, the DHS and DOJ should take human rights obligations into account when drafting immigration regulations. Finally, these agencies should inculcate a culture of human rights in their employees to prevent future misuse of secret evidence.

Perhaps the most obvious way in which the immigration bureaucracy can utilize human rights law is to rely on it as a guide to statutory interpretation.<sup>218</sup> This approach might draw in additional safeguards from treaty text and soft law to protect individual rights while insuring that national security interests are respected. Administrative agencies responsible for the immigration process have already turned to human rights treaties for guidance, a sensible approach given immigration law's direct rooting in international law.<sup>219</sup> These agencies should also look to human rights treaties when drafting immigration regulations to ensure that efforts to protect national security do not needlessly trample individual rights.<sup>220</sup> We might see as a result less discretion given to immigration officials to rely on secret evidence at their whim, ensuring that government actions are more narrowly constrained by law (for example, by requiring the presentation of compelling national security reasons for offering secret evidence). Through the use of human rights law to interpret statutes and draft regulations, the immigration courts and Board of Immigration Appeals as well as high-ranking DOJ and DHS officials can create a legal framework that is more thorough in its protection of individual rights, incorporating procedural safeguards to prevent the misuse of secret evidence.

<sup>217</sup> *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804) (“an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains . . .”).

<sup>218</sup> See Cole, *supra* note 151 at 645-648 (noting that the use of human rights law by federal courts to interpret immigration law has already been done responds to concerns about judicial activism and non-self-executing treaties and is consistent with immigration law jurisprudence, which relies heavily on statutory construction).

<sup>219</sup> See, e.g., Memorandum from Phyllis Coven, Office of Int'l Affairs, Dep't of Justice, on Considerations for Asylum Officers Adjudicating Asylum Claims from Women, to All INS Asylum Office/rs & HQASM Coordinators (May 26, 1995) (on file with author) (reviewing the historical and human rights context in which guidance on gender-sensitive and gender-based adjudications have evolved internationally); see also Gerald P. Heckman, *Securing Procedural Safeguards for Asylum Seekers in Canadian Law: An Expanding Role for International Human Rights Law?*, 15 Int'l J. Refugee L. 212, 237-238 (2003) (discussing *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, in which the Canadian Supreme Court directed the Minister of Citizenship and Immigration to rely on the Convention on the Rights of the Child, a treaty Canada had ratified (see <http://www.unhcr.ch/pdf/report.pdf>) but had not implemented through domestic legislation, in discretionary decision-making.).

<sup>220</sup> See, e.g. *supra* note 220 (explaining that current regulations governing removal of terrorism suspects at the border do not explicitly ensure protection against removal to torture).

While a more carefully crafted process is an important first step, this focus on human rights will not take root unless it is accompanied by a change in institutional culture. Remember that in the cases studied above, these were lawyers who presented inaccurate evidence; their legal training should have alerted them to the serious dangers of relying on evidence that they had not tested. Moreover, procedural devices that protect national security and due process – namely, protective orders – were available but these lawyers chose instead to withhold the evidence entirely.<sup>221</sup> A single-minded focus on national security interests, without consideration of protecting individual rights as an important goal, will enable government officials to find loopholes even in statutes interpreted and regulations drafted through human rights law.

The literature on administrative behavior provides insight into this phenomenon.

If an administrator, each time [s]he is faced with a decision, must perforce evaluate that decision in terms of the whole range of human values, rationality is impossible. If [s]he need consider the decision only in light of limited organizational aims, h[er] task is more nearly within the range of human powers.<sup>222</sup>

The problem, of course, with this focus on one set of values is that the administrator makes incorrect decisions in cases in which the “restricted area of values with which [s]he identifies h[er]self must be weighed against other values outside that area.”<sup>223</sup> Applying this framework to the use of secret evidence in immigration court, we can posit that government officials have restricted their value system to emphasize enforcement only, and therefore fail to take into account individual rights in their decision-making processes – leading them to present evidence that a well-trained lawyer should recognize as unreliable and inappropriate.

In order to “effectively regulate the behavior of . . . agents of social control,” these administrative agencies should turn to a “self-regulatory” approach, ensuring that officials internalize the importance of balancing security concerns with respect for individual rights.<sup>224</sup> This strategy requires “[c]ongruence between rules and an individual’s moral values,”<sup>225</sup> which is where human rights treaties can play an important role. The essentially moral nature of human rights law makes it a powerful starting point for a self-regulatory institutional culture. Training immigration officials in the basics of

<sup>221</sup> See *supra* text accompanying notes 63-70.

<sup>222</sup> Herbert A. Simon, *Administrative Behavior*, at 12 (4th ed. 1997).

<sup>223</sup> *Id.*

<sup>224</sup> Tom R. Tyler, et al., *Armed, and Dangerous (?): Motivating Rule Adherence Among Agents of Social Control*, 41 *Law & Soc’y Rev.* 457, 457, 462– 66 (2007).

<sup>225</sup> *Id.* at 464.

human rights law, and perhaps more importantly, teaching them to respect and even promote human rights could lead to a shift in institutional culture.<sup>226</sup> This training would necessarily be reinforced through various mechanisms, including an internal regulatory organ that ensures compliance with human rights norms.<sup>227</sup> Combined with a legal framework that incorporates human rights concerns, this institutional culture of human rights could transform the DHS and DOJ into not only more just, but also more effective agencies.

#### CONCLUSION

A human rights approach to immigration proceedings offers a powerful solution to the problem of secret evidence. Balancing national security interests and individual rights, human rights treaties that bind the U.S. can effectively address the individual, societal, and global harms resulting from the misuse of secret evidence in immigration court. This type of change in the immigration bureaucracy could be a first step towards repairing America's damaged image, indicating to both immigrant groups within the country and potential allies in other nations that America can be trusted to treat them fairly and protect their interests. Such a move will make our country not only safer, but more powerful as a world leader.

On an individual level, the increased procedural fairness resulting from the incorporation of human rights law into statutory interpretation, regulation drafting, and institutional culture will prevent the above-catalogued harms that inevitably result from the misuse of secret evidence. As administrative adjudicators and supervisors begin to interpret immigration laws through a human rights lens and as regulation drafters take human rights into account when crafting administrative rules, opportunities for immigration officials to abuse their discretion will be constrained. Moreover, as a human rights culture is inculcated in these administrative agencies, officials will begin to self-regulate, ensuring that individual rights are balanced with national security interests in their decision-making. For example, immigration officials ensconced in a human rights culture would first test the reliability of secret evidence before presenting it in court because of the moral value of ensuring that a

---

<sup>226</sup> For example, human rights norms could be used in training ICE officers to exercise discretion during apprehension and removal of immigrants. See U.S. Gov't Accountability Office, *Immigration Enforcement: ICE Could Improve Controls to Help Guide Alien Removal Decision Making* 23 (2007), available at <http://www.gao.gov/new.items/d0867.pdf> (noting the need for guidance to ICE on exercising discretion in encounters with noncitizens who present humanitarian issues and with noncitizens who are not ICE targets).

<sup>227</sup> Others have suggested the creation of a board in the Executive branch to oversee various agencies' commitment to defending individual rights. The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States, 395; Cole, *supra* note 151 at 655-56, quoting Elisa Massimino,  *Holding America Accountable*, *The American Prospect*, Oct/ 2004, at A14.

non-citizen is not wrongly deported. Moreover, these officials would be more sparing in their use of secret evidence, as they would weigh the importance of confrontation rights as part of their legal strategy. The elimination of the individual harms wrought by the misuse of secret evidence in immigration court is a valuable goal in and of itself.

In turn, the minimization of individual harms and a more general respect for individual rights will have powerful societal consequences. Instead of alienating immigrant communities, as the misuse of secret evidence does, a human rights approach would demonstrate an inclusive attitude towards non-citizens – a message that is crucial to the fight against terrorism. In the words of the 9/11 Commission, “[o]ur borders and immigration system, including law enforcement, ought to send a message of welcome, tolerance, and justice to members of immigrant communities in the United States and in their countries of origin.”<sup>228</sup> To create a safer America, we must enlist these communities in the struggle against terrorism, and a human rights approach to the immigration process is a compelling way of inviting Arab, Muslim, and South Asian immigrant groups to join our team. A human rights approach would also uphold the fundamental American values of procedural fairness that have been damaged through the misuse of secret evidence, returning our society to its roots and to the moral high ground simultaneously.

Finally, on a global level, human rights law is a uniquely appropriate way of repairing fractured relations with our international allies and the world community more generally. The incorporation of human rights law into domestic immigration proceedings performs a powerful expressive function, stating clearly to the rest of the world that America wishes to abide by their rules in its treatment of their citizens.<sup>229</sup> Such an approach holds not only moral, but also strategic value. Again, the 9/11 Commission states, “[t]he U.S. government must define what the message is, what it stands for. We should offer an example of moral leadership in the world, committed to treat people humanely, abide by the rule of law, and be generous and caring to our neighbors. America and Muslim friends can agree on respect for human dignity and opportunity.”<sup>230</sup> Only by acting as a moral beacon and finding common ground with allies and potential allies will the United States have a chance of defeating the forces of

---

<sup>228</sup> The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States, 390.

<sup>229</sup> See, e.g., Owen Fiss, *Against Settlement*, 93 Yale L.J. 1073, 1085–87 (1984) (noting the value of adjudication in expressing constitutional values); Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harv. L. Rev. 1281 (1976) (arguing that adjudication is often used to validate statutory and constitutional policies).

<sup>230</sup> See The 9/11 Commission Report, *supra* note 228 at 376 (describing how in order to achieve this goal, the United States must evidence respect for the rule of law).

terrorism. A human rights approach to immigration proceedings would be a powerful first step in that direction.