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Subject to Exception: Security Certificates, National Security and Canada’s Role in the “War on Terror”

Colleen Bell *

Everywhere around the world there is an increase of surveillance of the lawful conduct of citizens made easier with the advent of new technologies and the adoption of new measures: “sneak and peak” in the US, “stop and search” in the UK, “preventative detention” in Canada and “indefinite detention without trial” worldwide.¹

Introduction

Since its introduction in 1991,² the security certificate, deployed under division 9, section 77 of the Immigration and Refugee Protection Act³ (IRPA), has been used 27 times.⁴ Currently, there are five secret trial detainees fighting deportation and indefinite imprisonment without formal charges or conviction.⁵ A minister, having reasonable grounds to believe that a permanent resident or a foreign national are inadmissible to Canada because they pose a national security threat, have violated human or international rights, or are guilty of serious criminal or organized criminal

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¹  International Civil Liberties Monitoring Group, Anti-Terrorism and the Security Agenda: Impacts on Rights, Freedoms and Democracy (Report and Recommendations from a Public Forum held at Ottawa, 17 February 2004) at 9 [ICLMG].
²  Frank N. Marrocco & Henry Goslett, eds., The Annotated Immigration Act of Canada (Carswell: Toronto, 1990) at 149.
³  S.C. 2001, c.27.
⁵  Currently detained under Canadian certificate provisions are: Mahmoud Jaballah who was first detained on a security certificate in 1999, which was quashed by the Federal Court. A second certificate was issued in 2001 and has been upheld. He is currently detained in Toronto and risks deportation to Egypt. Mohamed Harkat has been incarcerated in Ottawa since December 2002, and his certificate was legally upheld in March 2005. He faces possible deportation to Algeria. Mohammed Zeki Mahjoub has been detained in Toronto since June 2000. With his certificate approved he was ordered to be deported to Syria in 2003, but has won a temporary stay. Hassan Almrei held in Toronto since October 2001, has also been granted a stay due to a faulty assessment on his risk of torture if deported to Syria. Adil Charkaoui was detained in May 2003 in Montreal. After almost two years of incarceration, he was released and is living under house arrest with a number of conditions. Review of his certificate is ongoing.

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conduct, is authorized to issue a security certificate. Such individuals need not have been actually charged or convicted of an international crime. The certificate is referred to a Federal Court judge, where its grounds for legitimacy are not substantively reviewed, but merely determined to have been reasonably or not reasonably issued. If the judge does not quash the certificate, it is treated as conclusive proof that the individual is inadmissible to Canada. Such a ruling doubles as a deportation order, which critics have noted, “amounts to an extra punishment, in which non-citizens serve two sentences.” Notably, this also results in the loss of the detainee’s right to seek a risk assessment under provisions of the IRPA to ensure that deportation will not result in substantial risk of torture or death. Finally, the Court’s determination “is not subject to review or appeal by any court,” even if an individual has sought refugee status in Canada as a consequence of having opposed the anti-democratic policies of his home government.

The use of preventative arrest and detainment provisions in the IRPA has been a formidable power for Canada’s expanding national security apparatus and for its contribution to the US-led “war on terror.” In comparison to the rescinded Immigration Act, the scope and security provisions of the IRPA have been expanded and procedurally altered, to increase the government’s discretionary treatment of immigrants and refugees deemed to pose a risk to national security. Relying heavily on the word of the Canadian Security Intelligence Service (CSIS), the security certificate provisions of the IRPA allow for refugee claimants and landed immigrants to be declared a national security threat, arrested and indefinitely detained without bail. They and their lawyers are denied the right to see the evidence used for the issuance of the certificate, or the right to be tried under normal procedures of Canadian criminal law. With an absence of judicial checks, and no structural imperative to balance the rights of the accused with their accuser, critics have pointed out that the security certificate process has effectively rendered the courts an investigative tool of CSIS and is part of a larger representational process that certifies immigrants and refugees as security risks.

8 Starnes & McNeil, supra note 4.
9 Waldman, supra note 7 at 7.276.
12 Waldman, supra note 7 at 7.274.
13 Ibid, at 7.257.
15 Waldman, supra note 7 at 7.248.
This article examines the values ascribed to the lives of non-citizens by the Immigration and Refugee Protection Act’s security certificate process and its implications for state power and political freedom. Under the national security imperative of the “war on terror”, the security certificate functions as a moment of legal exception for the assertion of sovereign power and legitimation. This compromises the rule of law by denying basic legal protection and judicial impartiality to non-citizen detainees. Prompted by the serious concerns for freedom and democracy that compel contemporary political analysis on the state of exception, 17 this article considers the political rationality that makes possible the use of “special” legal proceedings, secret evidence and detention without charge or conviction under the elusive provisions of national security. Such a process, it is further argued, is founded upon treating migration as a source of insecurity and is tied to a limitless search for state security which seeks to revision the concepts of freedom and liberty in ways commensurate with the intertwined objectives of national security and the “war on terror.” Judith Butler suggests that the configuration of law to address terrorism has taken the form of the “new war prison” exemplified by Guantanamo Bay. 18 While Canada obviously has its own unique political practices, there is a semblance of this war prison as seen by the use of the security certificate to indefinitely detain Arab and South Asian men, some of whom have languished in prison for years. What is starkly parallel is that both situations have been constituted through the logic of exception in which established law for the trial and conviction of criminal offences is suspended and declared to be inapplicable to non-citizen detainees. As the security certificate is not unique to the “war on terror,” but rather precedes it, what is meaningful for this discussion is the way in which it has been deployed as a viable means by which to wage it.

The following analysis of Canada’s security certificate process is divided into three sections. The first section addresses the mechanisms and procedures of the security certificate. Special attention is paid to the use of detention and evidentiary standards in order to illustrate the manner in which the security certificate derogates the rule of law. The second section considers how diminishing the rule of law opens a space of exception for the exercise of sovereign, unmitigated state power that is grounded in the discriminatory criteria of citizenship status so as to implicate foreignness in the production of danger. The final section addresses how the security certificate configures freedom as commensurate with the national security objectives of the “war on terror,” exposing the limitations of liberal freedom in relation to modern state power.

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18 Butler, ibid. at 53.
The rule of law, detention and evidence

Section 34(1) of the *IRPA* sets out the grounds upon which a non-citizen may be defined as a threat to national security, be denied admission or be subject to removal. Grounds of inadmissibility include:

(a) engaging in acts of espionage or an act of subversion against a democratic government, institution or process as they are understood in Canada; (b) engaging in or instigating the subversion of any government; (c) engaging in terrorism; (d) being a danger to the security of Canada; (e) engaging in acts of violence that would or might endanger the lives or safety of persons in Canada; or (f) being a member of an organization that there are reasonable grounds to believe engages in, has engaged, or will engage in acts referred to in paragraph (a), (b) or (c).\(^{19}\)

Importantly, these grounds are afforded broad and unrestrictive interpretations,\(^{20}\) made possible because they are partnered with a set of decisive key terms that are provided with similarly broad interpretations. For instance, the vague criteria of subsection (d) leaves security and immigration officials with a wide range of discretionary movement for the issuance of a certificate, while also providing poor judicial guidance in determining the relevance of specific criteria in ascertaining the extent to which the detainee represents a security danger. Similarly, subsection (f) does not discern between membership for the purposes of engaging in coordinated violent acts and the complex reasons for membership of immigrants in organizations that have historically served many different cultural and economic purposes (i.e. Hamas, or the Popular Front for the Liberation of Palestine). Reliance on a vague link between membership and the security risks to Canadians appears to be a largely unfounded violation of freedom of association, as found in the 1996 *Al Yamani* case.\(^{21}\) In other cases, however, the courts have willingly applied these provisions and terms rather broadly. Lorne Waldman notes that while the Supreme Court has provided for a somewhat narrower definition of “terrorism,” it received broad application by the Federal Court in the *Suresh*\(^{22}\) case and was determined to be constitutionally sound.\(^{23}\) Constitutionally, the term “subversion” has also been treated as acceptably elusive\(^{24}\) and the definition given to “membership” has been interpreted broadly enough to include “associates of associates, sympathizers, supporters and ‘fellow travelers.’”\(^{25}\)

Such broad interpretations signal some of the ways in which current legislation used for anti-terrorism purposes (such as the *IRPA*), can become, as one commentator suggested, effectively akin to launching a war on an

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\(^{19}\) *IRPA*, *supra* note 3, s.34.

\(^{20}\) Waldman, *supra* note 7 at 7.251.


\(^{22}\) *Suresh v. Minister of Citizenship and Immigration Canada*, [2002] 1 S.C.R. 3

\(^{23}\) Waldman, *supra* note 7 at 7.252.

\(^{24}\) *ibid.* at 7.255.

\(^{25}\) *ibid.* at 7.260.
abstract noun, which does little to protect the integrity of the law’s or statute’s claimed intent. The targeting of terrorism, comments David Dyzenhaus, “presupposes that there is an internal political enemy, someone so existentially different that we cannot name him in advance in order to deal with him either through the ordinary criminal law, or by relaxing the rule of law to some extent for a definable and carefully supervised period.”

Carrying out national security measures in such a sweeping manner to address indeterminate threats is therefore assured to produce a trail of unexpected casualties, justifying claims made by critics of anti-terrorism initiatives that they are bound to target innocent people. What such vague criteria of applicability as set out in the terms of inadmissibility also mean, is that decisions about who is a terrorist and who is inadmissible to Canada are, in large measure, left to security powers for determination. As Dyzenhaus notes, “[i]t will be for the agents of law-enforcement and security to tell us who the terrorist is, when they have him in their grasp.”

The national security provisions of the IRPA also provide decisive discretionary powers for top security and public officials. Executive power to issue a certificate has been expanded by a December 13, 2003 Order in Council that set out a dramatic reorganization of government offices, including the creation of the department of Public Safety and Emergency Preparedness as part of Canada’s current security strategy. Presently, a security certificate must be signed by the Minister of Public Safety and Emergency Preparedness and the Minister of Citizenship and Immigration, though there was a brief period in which the signature of only the Deputy Prime Minister (also now the Solicitor General) was required. Once signed, special deportation proceedings are initiated under the jurisdiction of the Federal Court, replacing the role of the immigration officials, who are more likely to prioritize refugee protection. Unlike the rescinded Immigration Act, the national security provisions of the IRPA also transfer key immigration matters to national security officials by the sweeping powers of Ministers “to use confidential proceedings in order to protect national security,” which may result in detention and possibly the deportation of permanent residents, protected persons and Convention refugees. While claiming that it has never sent someone to be tortured, yet

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28 Ibid.
29 Starnes & McNeil, supra note 4 at 16.
30 Waldman, supra note 7 at 7.262.
31 Ibid., at 7.319.
32 Amnesty International issued a letter to former P.M. Martin detailing serious concerns that Canadian law enforcement and security agencies may in fact be implicated in the detention and torture of Canadian citizens abroad (and of course there is also the ongoing Maher Arar Inquiry to access the role of Canadian officials in his deportation to and consequent torture in Syria). See Letter from Alex Neve, Secretary General of Amnesty International...
unhampered by Canada’s commitment to the *UN Convention Against Torture*, government officials hold that the right to deport “can be justified in exceptional circumstances”. Such an argument was recently made by the Crown in the ongoing *Jaballah* case, despite the acknowledgement that he is very likely to be subject to torture or inhuman treatment if deported to Egypt. Once signed, the security certificate is then referred to the Federal Court where a judge determines whether the certificate is reasonable, or should be quashed. While the burden of establishing the reasonableness of the certificate lies with the Ministers, they are not charged with the task of proving that the person in question actually constitutes a threat to national security. Rather, the judge must only be convinced that it was reasonable for those issuing the certificate to have believed that it was reasonable; proof that the assessment was made correctly is not required. Thus, executive powers, while seemingly limited to the task of bringing forth the certificate for deliberation, actually end up playing a decisive role in determining the outcome because the determination itself is derived from the rationality of executive officials, rather than an independent review of the legitimacy of the certificate itself.

**Detention**

The filing of a security certificate leads to the immediate detention of foreign nationals (non-permanent residents), and the likely detention of permanent residents who are often deemed to be a danger to society or to be unlikely to attend court hearings. In theory, the detention of people who have been issued a security certificate is claimed to be a preventative as opposed to punitive measure, arguably displacing legal accountability for the purposefully oppressive experience of incarceration, especially without charges or conviction. If detained, a permanent resident is entitled to a Federal Court detention review within 48 hours, and subsequent reviews every six months thereafter. When reviewing the detention, the Court is

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33 *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, GA Res. 39/46 (entered into force 26 June 1987).


36 CBC News Online, “Indepth”, supra note 34.


40 Waldman, *supra* note 7 at 7.265.
charged with deciding whether or not the person is likely to be removed from Canada within a reasonable time, if release would constitute a threat to national security or any individual, or if the detainee may fail to appear for removal proceedings. Release is not easily achieved, as the terms of release require that a change in circumstances be evident from the conditions under which the certificate was originally issued. Also, when determining whether the length of detainment is reasonable, the Court refuses to take any delays resulting from the individual’s attempt to assert his right to resist deportation into account. Thus, despite a three year long detention, the release of Mohammad Mahjoub was denied because, by contesting the proceedings, he was deemed to carry the onus of blame for the length of detention. For all other non-citizens, not only is detention mandatory, but release is not considered until either the certificate is ruled to be unreasonable or if 120 days have passed since the decision of the Federal Court judge and the person has not been removed from Canada. Continued detention can be ordered should the judge determine that the person continues to pose a threat. Significantly, only in order to permit departure from Canada will a Minister authorize release of a detainee, though the pattern has been to deny release, even for departure, before the conclusion of the hearing.

To date, the practice of preventative detention has been deemed to be consistent with the Charter. However, Walden notes there are circumstances in which detention under immigration proceedings can come to be regarded as abusive enough to present a violation of section 7 of the Charter. This would appear plausible given that immigration proceedings are not criminal proceedings, making such lengthy detention less justifiable. That such proceedings are designated as immigration as opposed to criminal, however, is paradoxically also the condition that has enabled the denial of Charter protection to begin with. As a result, non-citizens reside in an in-between space in which they are subject to the state’s power, but are not benefactors of the rights that citizens have accrued to limit the power of the state in this regard. Detainees are regarded as undeserving of the minimum standards of equitable jurisprudence and the procedures of separated and checked power that are held to be a hallmark of liberal societies that claim to be governed by the rule of law. Such was the reasoning of Britain’s highest court when it recently struck down a pillar of Britain’s anti-terrorism law, discontinuing the government practice of indefinitely detaining foreign suspects. Such policies of detention, Justice
Lord Nicholls of Birkenhead declared, are “anathema in any country that observes the rule of law.”

Understanding the significance of how these terms of detention derogate the rule of law applies not only to the immediate context of the security certificate process, but also to the wider security practices of the “war on terror.” This is not because such practices are unique to the contemporary political landscape, but because the rationality used to legitimate them draws on the same kind of logic. Indeed, acts of deeming one to be a threat to national security take place within the panic regime of the “war on terror,” which likewise, and not coincidentally, is premised on uncertainty and the search for threats that are by definition elusive and indeterminate. This manner of sourcing the problem of insecurity allows legal measures to be carried out in the name of public security or protection. As a result, identifying threats is always “warranted by the one who acts, and the ‘deeming’ of someone as dangerous is sufficient to make that person dangerous and to justify his indefinite detention.”

This effectively works to “neutralize the rule of law in the name of security” because CSIS and the minister responsible for issuing the certificate, through mere conjecture, decisively attach the threat of national security to the accused. As a result, notwithstanding the presence of a presiding judge, both the original decision for detainment and the conditions for its continuance are largely satisfied by the discretionary judgment of executive officials and are heavily weighted by a political rationality that warrants the deeming of a person or group a threat, rather than establishing proof, sufficient to justify imprisonment. While originally touted as an exceptional circumstance, indefinite detention, which is therefore not only quite likely but also difficult to reverse, becomes normalized through this process. Consequently, preventative, indefinite detention, without charges, conviction, or the minimum standards of criminal jurisprudence is no less than an exercise of sovereign will. It produces the provisions for detainment of those only deemed to constitute a threat, allowing the state to extend its own domain of jurisdiction for action. This codifies such sovereign acts within the realm of law, while simultaneously evading the rule of law.

Indefinite and preventative detention also raises a broader question of how, outside of the quashing of the security certificate, a detainee can ever cease to be regarded as a threat. Certainly, not only is establishing guilt quite a different thing than establishing dangerousness, but the deeming of one as dangerous, “preempts any determination of guilt or innocence established by a (...) tribunal.” Not only are claims centered on probabilities by definition indeterminate and limitless, but the means by which to address supposedly sinister threats can be equally punitive, in the name of public security or protection. The mere declaration of a person being a security risk, regardless

48 CBC News Online, “Indepth”, supra note 34.
49 Butler, supra note 17 at 59.
50 Ibid. at 67.
51 Ibid. at 75.
of the Court’s determination, can be dramatically irrevocable, making detention under the security certificate highly likely to be indefinite pending removal, while also attaching a permanently damaging social stigma, and psychological distress to the detainee. As the Canadian Arab Federation and the Canadian Council on American-Islamic Relations note, the Maher Arar and Project Thread 2003 debacles are glaring examples in which innocent people were caused immeasurable suffering and lifelong damage due to the “sloppy work of the state” in relying on preemption and weakly grounded evidence in carrying out its national security objectives. 52

Evidence

Evidentiary procedures of the security certificate process under section 86 of the IRPA allow the Minister to apply for non-disclosure of evidence on the grounds that it would be injurious to national security or the safety of any person. 53 Not only have applications filed by the defence to gain disclosure generally been unsuccessful, but the presiding judge is merely charged with providing a summary of the case against the accused with no requirement that any specific details of evidence be released. The summary, Waldman notes, “does not generally assist the person concerned or counsel in understanding anything more than the most general aspects of the allegations,” rendering “the task of mounting a defence for the person concerned by counsel extremely difficult.” 54 It is also important to note that, as Justice McGill determined in Re Charkaoui, 55 the standard to reasonably inform accused foreign nationals is lower than that applicable to permanent residents. 56 Normally the defence will not be made aware of the judge’s procedure for review of the certificate and beyond the summary there are generally no witnesses, no cross-examination, and no available transcript. CSIS officials may be subpoenaed, but it is rare that the defence will be able to confirm which CSIS officers were involved in the case, and because of the national security imperative, officials are generally limited in what can be divulged. This process becomes more troubling given that, as CSIS is not permitted to directly gather information beyond the borders of Canada, it tends to rely on information from foreign security agencies that could be exercising their own agenda in offering information to Canadian authorities. 57

Thus, while the requirement in Canada that the Court provide the accused with a summary of the case so as to give the defendant an

53  Waldman, supra note 7 at 7.309.
54  Ibid. at 7.270, 7.267.
56  Waldman, supra note 7 at 7.270-7.271.
57  Ibid. at 7.273.
opportunity to be reasonably heard, such an opportunity is largely foreclosed due to the trial procedures. The defence is formally given an opportunity to be heard by replying to the case summary, but not “to examine any state witnesses or in any other meaningful way test the reliability and credibility of the evidence” as neither the nature nor the source of the evidence is disclosed. In effect, the defence is expected to mount a defence, argues Waldman, by “hypothesizing as to what is the basis for the allegations and then respond to these without ever being certain as to the nature of the evidence which is being used against [them].”

Likening the use of secret evidence to that described in Kafka’s *The Trial*, in which the protagonist will only successfully prevail if he can disprove undisclosed evidence, the Federal Appeals Court for the District of Columbia on Secret Evidence in *Rafeedie v. INS* noted that, “[i]t is difficult to imagine how even someone innocent of all wrongdoing could meet such a burden.” Consequently, while the courts in Canada have legitimated the practice of non-disclosure, similar practices elsewhere have not been upheld. “The plea that evidence of guilt must be secret is abhorrent to free men,” contends US Supreme Court Justice Jackson, “because it provides a cloak for the malevolent, the misinformed, the meddlesome, and the corrupt to play the role of informer undetected and uncorrected.”

The way in which the security certificate process lends itself to the superseding frame of national security is further palpable by how civil or criminal rules of evidence are not applicable and the designated judge is at liberty to consider any evidence deemed reliable. The standard of proof for “reasonableness,” while expected to be credible and trustworthy does not meet a balance of probabilities standard, such that the evidence must only be deemed to be “probably” true. The test of reasonableness, however, does not rest solely on the presentation of actual evidence, but on “credible” opinion. As Justice Dubé notes, “[t]he question of the reasonable and probable cause depends in all cases, not upon the actual existence, but upon the reasonable bona fide belief in the existence of such a state of things.” Clearly, this test of reasonableness is unique, noted Justice Dube, in that it “is more than a flimsy suspicion, but less than the civil test of balance of probabilities. And, of course, a much lower threshold than the criminal standard of ‘beyond a reasonable doubt.’ It is a bona fide belief in a

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58 Ibid. at 7.273.
59 Ibid.
60 *Rafeedie v. INS*, 880 F.2d 506 (D.C. Cir.1989).
61 Ibid. at 516.
63 Waldman, *supra* note 7 at 7.292. The standard of proof applied is simply that “the evidence must disclose reasonable grounds that the person falls within the inadmissible section” (sections 76-78 of the *IRPA*); *ibid.* at 7.274; *Re. Farahi-Mahdavieh* 63 F.T.R. 120 (T.D. 1993).
64 Waldman, *ibid.* at 7.290.
serious possibility based on credible evidence.\footnote{Ibid. at 7.289.} As relayed by the Mohammed Majoub case, and like others before it, it was only deemed necessary to prove that there are “reasonable grounds to believe certain facts as opposed to the existence of the facts themselves.”\footnote{Mahjoub v. Minister of Citizenship and Immigration Canada, [2005] F.C. 156.} The purpose of the judicial hearing is therefore not concerned with establishing proof of fact, but whether evidence is suggestive of the probability that an individual does or may constitute a danger to national security. It is thus reliant on forecasting future action. The reasonableness of the certificate, and more broadly, understandings of what constitutes a threat to security, rest to a considerable degree on executive opinion, propped up by the word of CSIS, and require that where evidence is insufficient to expose culpability, that the court base its determination on prediction.

Amounting to a diminished quality of jurisprudence on the nature of submitted evidence,\footnote{Waldman, supra note 7 at 7.299.} the security certificate is seen to constitute an exceptional case, in which normal legal rules for criminal redress can be put aside. This is consistent with contemporary counter terrorism strategies that lay claim to the need to redefine standards of jurisprudence to secure Canada from internal enemies. Tellingly, a recent statement on the legitimacy of the \textit{Anti-Terrorism Act} by former Attorney General and Minister of Justice, Irwin Cotler, reads, “we are not dealing with your ordinary domestic criminal, but with the transnational super-terrorist: not with ordinary criminality, but with crimes against humanity; not with your conventional threat of criminal violence, but with a potential existential threat to the whole human family.”\footnote{Hon. Irwin Cotler, “Speech by the Hon. Irwin Cotler, Minister of Justice and Attorney General of Canada on the Occasion of an Appearance Before the Special Committee of the Senate on the Anti-Terrorism Act” (21 February 2005), online: Department of Justice, Canada <http://www.canada.justice.gc.ca/en/news/sp/2005/doc_31398.html>.} As exemplified by this logic, it is not required that Federal Court judges, unlike the Security Intelligence Review Committee that formerly handled such proceedings, examine state witnesses, nor are they provided with independent counsel, the right to cross-examine any state witness, or access an expurgated transcript, with which to test the state’s case.\footnote{Waldman, supra note 7 at 7.283.} Without the opportunity to hear independent experts on the issues at hand, the contextual basis for the court to assess the extent to which the secret evidence is reliable or credible is highly compromised.

This heavily imbalanced process, whereby the judge is required to test the reliability of evidence alone, along with a diminished capacity to weigh the credibility of conflicting evidence, means that “the state’s case is accepted as implicitly true.”\footnote{Ibid.} This quagmire posed by secret trial proceedings was critically exposed by one Indian Supreme Court Justice who noted that without the requirements of proper adjudication to deliberate over conflicting material, “[t]he adjudication made would cease to be an
objective determination and be meaningless, equating the process with mere acceptance of the *ipse dixit* of the central government." \(^71\) Signaling the structural bias built into security certificate proceedings in *R v. Hadju*, \(^72\) Canada’s Justice Barr noted that "[i]f the facts are in dispute the requirement that the Crown’s version be taken up in its best light must mean that the Crown’s version will always prevail." \(^73\) Thus, the necessity of challenging evidence is made all the more imperative given the problematic structure of the secret trial and the liberty of the judge to accept any secret evidence deemed appropriate. Despite this parcel of relative judicial freedom to accept secret evidence, the process is accompanied by a loss of certainty that the proceedings are fair and impartial. Made to feel like a “fig leaf” by participating in the ex parte proceedings of the security certificate review, Federal Court Justice James K. Hugessen laments: “We really miss (...) our security blanket which is the adversary system that we were brought up with and that (...) is for most of us, the real warranty that the outcome of what we do is going to be fair and just.” \(^74\)

**Sovereign spaces and enemy others**

As a component of Canada’s contemporary national security endeavors, the legal provisions of the certificate override respect for the basic political rights for accused persons and deny protection afforded to people under criminal law. This amounts to a situation in which emerging discretionary legal actions suspend established law by eroding the principle of the rule of law. Effectively a suspension of law-by-law, a form of sovereign power is enacted that subverts normal juridical procedures of argument and evidence, and affords security and executive officials significant power, independent of establishing culpability, to initiate detainment (which then usually becomes indefinite), and to heavily influence the outcome of the trial. This opening of a sovereign realm of “extra-legal authority,” treats law as a tactic of governmental rule in the name of security. \(^75\) Such a tactical treatment compromises the independence of law, framing governmental power as indivisibly sovereign and rendering the “rule of law,” the “rule of men.” Much like the conditions of Guantanamo Bay, the security certificate’s overwhelming reliance on executive will harkens back to a time before the modern precondition for the separation of powers. Rendered an exercise of prerogative power, the sovereign power of the state becomes disarticulated in the security certificate process, losing the legitimacy of impartiality, and


\(^75\) Butler, *supra* note 17 at 60.
becomes a means by which “the state extends its own domain, its own necessity, and the means by which its self-justification occurs.”

The unique standards by which the security certificate provisions function can also be understood as an exceptional space “devoid of law”. To employ legal instruments in a manner that bolsters executive decision-making power, rather than affirms its limit and separation from the juridical sphere, retracts legal jurisdiction in all but name. As Schmitt argued, what characterizes the emergence of the exception is the unfolding of unlimited authority that comes with the continued presence of the state, with the recession of law. The frame of law may remain, but the principles that define the juridical order, that is, the rule of law, are suspended. These exercises of sovereign will are legitimated through situations that are deemed to be exceptional, by opening a space by which to invalidate the established juridical order so as to selectively discipline those whom suspicion is effected on to. Certainly, a moment of exception does not require that executive authority suspend the constitution as a whole, but that there are specific laws and statutes which may readily take exception to particular groups on the basis of arbitrary criteria such as citizenship status (which has no definable relationship to criminality), under conditions of “national security” or as Schmitt put it, “urgent necessity.”

A process that operates on the basis of secret evidence and non-disclosure, that omits cross-examination, that relies on judges to alone test the credibility of evidence, that does not meaningfully allow for defendants to confront their accusers, and that does not rely on the establishment, but only likelihood of facts, also suggests that the erasure of the rule of law from the security certificate process has transformed the meaning of the trial itself. To borrow from Butler’s examination of the juridical situation at Guantanamo Bay, trials that make a mockery of evidentiary standards, she argues, “nullify the trial most effectively by taking on the name of the ‘trial.’” To be called a trial that has no commitment to impartiality or fairness suggestively marks the limit of the juridical sphere. It means that those subjected to the secret trial are ostensibly situated outside the law because they effectively lose their ontological status as political beings. In an important sense the status of detainees is rendered “irreducible to law.”

To be deprived the (citizens’) rights that are normally accrued to a political subject situates such subjects in “a suspended zone, neither living in the community and bound by law, nor dead

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76 Ibid. at 55.
77 Agamben, supra note 17 at 50.
78 Carl Schmitt, Political Theology: Four Chapters on the Concept of Sovereignty (Cambridge, Massachusetts: MIT Press, 1985) at 12 [Schmitt, Political Theology].
80 Schmitt, Political Theology, supra note 78 at 8.
81 Butler, supra note 17 at 69.
82 Ibid. at 94.
and, therefore, outside the constituting condition of the rule of law.”83 When treated as a tactic, divorced from the legitimating grounds of the rule of law, the trial thus serves an end that is altogether different than the customary purpose of establishing guilt or innocence. It is instead to remake the boundaries of the nation and to identify those subjects who cannot make claims within it. The legitimacy of such action rests on addressing indeterminate risks to Canada supposedly occasioned by the presence of foreign, “dangerous” others.

As seen by a foremost concern with detecting and eliminating an enemy from within, the provisions of the security certificate function through friend-enemy logic. In a reduction of political distinctions to that of friend and enemy, the enemy for Schmitt constitutes “the other, the stranger; and (...) in a specially intense way, existentially something different or alien.”84 Taking on an existential understanding of threats, the political, according to this view, is conflated with an ever present likelihood of conflict that unequivocally leads to a characteristic manner of behaviour and thinking.85 Like other aspects of anti-terrorism law, the legal framework of the security certificate seeks to recognize an enemy other by broadening the elements of an offence beyond the act and accompanying intention to include who one is believed to be, what one is believed to believe, and who one associates with. As acts that are designated as terrorist have been illegal for far longer than the identication of terrorism as a pressing concern, the security certificate is necessarily tied, not to actions, but to people; that is, foreign others. Thus, the blindness or neutrality of the law is betrayed by the constitution of certain forms of criminal behaviour as terrorist that “invites law enforcement agents to take who the person is and what they believe into account when laying a charge.”86 The use of security and the threat of terrorism as a special realm for extra-legal authority can take exception to foreignness or non-citizenship status as an arbitrary political basis upon which to revoke legal protection. Indeed, the legal approach taken by the security certificate process relies on the discriminatory distinction between citizens and non-citizens, rather than on the activity itself.87 “Foreignness,” thus serves as an opportunity for disciplinary intervention and regulation. Indeed, what has effectively been a suspicion of people of South Asian and Arab background, argues Butler, has taken the form of an “objectless panic” that serves as a “virtual mandate to heighten racialized ways of looking and judging in the name of national security.”88 Criminal acts designated as terrorist acts are

83 Ibid. at 65.
85 Ibid. at 34.
86 Sheraze & Podur, supra note 10.
88 Butler, supra note 17 at 76, 77.
thus suspiciously occasioned by the fact that all the current security certificate detainees are Muslim, Arab or South Asian, signaling how particular markers of foreignness are inscribed into the method by which officials identify enemies and threats to Canada. Indeed, if certain people or individuals are understood as dangerous, rather than dangerous acts operating as the criteria for which dangerousness is determined, then the security certificate takes on a preemptive character, making it logically permissible to remove people from the regular jurisdiction of law, subject them to indefinite detention and to the procedures of the secret trial. The attachment of foreignness to danger extends beyond the security certificate provisions, shows security practices that posit a state of exception to the rule of law and can also become the criteria that shape legal statutes generally. Compared to the former Immigration Act, for instance, the IRPA is overlaid with concerns over how refugees and immigrants might be enemies of the state, criminals or undesirables. The double concern with recognizing immigrants as sources of prosperity and cultural enrichment, as well as sources of danger or burden is precisely as basis for the assertion of “strategies of discipline, normalization, and regulation” argues Ali Behdad. Encoding risks of criminality, terrorism and enemies of the state into the governance of non-citizens is a double move which, similar to executive pronouncements of the “dangerousness” of Guantanamo detainees, “establishes the conditions for the state’s preemption and usurpation of the law.” The IRPA thus constitutes a “horizon of democratic possibility” in which the image of the legitimate foreigner or “supercitizen immigrant” is counter posed to the threatening or troublesome foreigner, encoding a legitimate basis for the assertion of sovereign authority through the security certificate.

What also becomes apparent is that the condition of possibility for the assertion of sovereign authority over non-citizens is no different than that which serves as the prerequisite for the creation and possibility of law itself. By simply calling on the imperative of national security, the opportunity for actions that are outside of the realm of routine governance strategies is made available. This is because the very decision on what constitutes a security concern, and what is therefore outside of the realm of regular law, is to decide on what constitutes the exception to the rule. And to decide on the exception is to simultaneously codify what is normal. Because the exception makes possible the suspension of normal rules and delimits the moment in which rules can be withdrawn, moments of exception tell us significantly more about the character of contemporary politics than the rule. In this sense, the concerns of national security do not merely point to the

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89 Such concerns are clearly relayed in the IRPA, supra note 3, c.27, s.3.
91 Butler, supra note 17 at 76.
extremities of rule, but to the realm of possibility for rule in liberal states. As Schmitt made clear, it is the exception, and not the rule, that confirms everything. The sovereign exception therefore stands as the condition of possibility for juridical rules, because in order to have the moment of exception in which sovereign power can be forcefully asserted, it must first initiate the rule.

Consequently the rule of law, and the independence and liberty that it proscribes, while upheld as foundational to liberal democracy, provides only a partial account of the tradition of liberal political rule. As Barry Hindess argues, authoritarian rule, or the “government of unfreedom”—has always played an important part in the government of states committed to the maintenance and defence of individual liberty. A cursory glance at the developmental rationality that guided history of western colonialism, and its use in today’s governance of poor, homeless and immigrant communities shows that, rather than anti-liberal moments, such governance practices are integral to the development of liberal societies. Such moments of authoritarian rule for select groups, as seen by the treatment of security certificate detainees, are not simply justified as necessary illiberal moments, but rather are “justified on the liberal grounds of freedom”. As Canada’s former Justice Minister proclaimed, anti-terrorism laws are fundamentally aimed at “the safeguarding of democracy itself”. Equally foundational to liberal governance is the rule of law and sovereign will, even if the latter is primarily exercised on marginalized populations. This point is especially important to examining the implications of the security certificate for the meaning of political freedom.

Political freedom and the logic of the “war on terror”

The unique criteria of the security certificate and its potentially devastating implications, have led to a number of legal and political challenges by groups claiming that it violates basic rights and freedoms outlined in the Canadian Charter of Rights and Freedoms and undermines international human rights codes, such as the International Covenant on Political and Civil Rights (specifically articles 9 and 14), to which Canada is a signatory. Amnesty International has called on the Canadian government to “take immediate steps to reform the security certificate to bring it into full compliance with Canada’s international human rights obligations,” as

93 Schmitt, Political Theology, supra note 78 at 15.
94 Ibid. at 15; Agamben, Homo Sacer, supra note 79 at 19.
96 Ibid. at 94.
97 Hon. Irwin Cotler, supra note 68.
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The organization further argues that international standards, including the *UN Body of Principles for the Protection of all Persons under any Form of Detention or Imprisonment*, adopted by the UN General Assembly in 1988, as well as the *Basic Principles on the Role of Lawyers* adopted in 1990, require access to detailed reasons for detention, a fair and substantive hearing to determine the lawfulness of the detention, full access to relevant evidence, and provisions for an “effective opportunity” to be heard. The security certificate process has also been argued to violate principles of fundamental justice because it authorizes the government to arrest and indefinitely detain non-citizens while denying them access to the information used for the issuance of the certificate.

Some activists have tried to demonstrate the degree to which the recent round of certificates is a politically motivated endeavor, while others have argued that they are intensely damaging to Canada’s political climate. The organizations Homes not Bombs and the Muslim Council of Montreal argue that the timing of the arrests for two current detainees appear as tactical maneuvers designed to signal Canada’s commitment to anti-terrorism efforts, and to the US-led “war on terror.” The arrest of Adil Charkaoui, they argue, seemed to be purposefully delayed by days to coincide with international news reports on Canada’s anti-terrorism efforts, while Mohamed Harkat’s arrest suspiciously coincided with Solicitor General Easter’s trip to Washington to report on Canada’s commitment to cracking down on terrorism. Emphatically opposing the use of security certificates, the Canadian Muslim Lawyers Association argues that Canada’s anti-terrorism efforts, through the issuance of recent security certificates and the introduction of the *Anti-terrorism Act*, are producing a self-perpetuating culture of fear based on secrecy and allegation that is igniting discrimination and profiling of Muslims and Arabs. The Canadian Council on American-Islamic Relations and the Canadian Arab Federation note stereotyping of Arabs and Muslims as “fifth columnists” and as “threats to national security” that has involved “increased scrutiny by security agencies and police, racial and religious profiling, and discrimination in daily life” as well as a “palpable chill” of attendance at community events and activities due to fears that “they may unwittingly attract the scrutiny of state agents, or worse still, be criminally charged for terrorism offences”. In both a directly legal sense, as well as in cultural terms, human rights and social justice advocates contend that there is a noticeable erosion of human rights brought on by the use of security certificates, the advancement of anti-terrorism legislation and a general culture of suspicion that they evoke, for those directly entangled in

100 *Supra* note 11.
101 *Supra* note 11.
103 *Thompson, supra* note 16.
105 *Supra* note 52 at 3-4.
national security measures as well as for Muslims and Arabs in Canada generally.

While some Federal Court judges have refused to entertain concerns over the constitutional validity of detention under the security certificate process, others, on more than one occasion, have legitimized the use of security certificates on the basis that s. 7 of the Charter does not guarantee the same procedural rights to detainees under immigration law as it does to those imprisoned under criminal law. The courts have also determined that the interests at stake and the context affect how the principles of fundamental justice ought to be interpreted. In the Charkaoui case, it was determined that sections 76 to 85 of the IRPA, when applied to a permanent resident, are consistent with the Charter. Similarly, in Ahani v. Canada the constitutional validity of sections 76-78, used to refer and rule on the certificate’s reasonableness, was upheld in the case of Convention refugees and non-permanent residents. The judge also determined that it was unnecessary to even decide “whether section 7 was engaged because the process was consistent with fundamental justice as being a proper balancing between the interests of the individual and the interests of protecting national security.”

Such determinations make apparent a clearly deferential system of justice for citizens and non-citizens that efface the rule of law on the basis of status. The imperative of national security that underpins Canada’s anti-terrorism endeavours relies on the arguably irrelevant distinction between citizens and non-citizens and serves as the conditions under which the lives of non-citizens cease to qualify for basic civil and human rights protections and freedoms. Janet Drench, Executive Director of the Canadian Council for Refugees, notes that not only is immigration detention not recognized as “a serious breach of the right to liberty (...) [t]he principle that non-citizens have rights is in itself controversial.” But a deeper limitation on rights protections for non-citizens is justified, argues Dyzenhaus, by an emerging expectation in the post 9/11 period that judges “give greater weight than they would have in the past to government arguments that national security considerations should weigh more heavily in the justification both of statutory limits on Charter-protected rights or freedoms and of decisions by executive officials that do the same.” Accordingly, there is a marked loss of judicial independence. Indeed notes Dyzenhaus, “if there were no damage to the rule of law, then judges would not need to rethink their interpretive

108 Supra note 55.
110 Waldman, supra note 7 at 7.318.
111 Ceric, supra note 87.
112 ICLMG, supra note 1 at 78.
113 Dyzenhaus, supra note 27 at 29.
practices,” when ruling on Charter-protected rights. The assertion of national security to pre-empt, as much as respond to terrorism, is not only the frame through which the rule of law can be effaced, but also the frame through which officers of justice are expected to understand and apply political rights, or restrict them altogether.

But such wrangling over the erosion of freedom misses the way in which freedom is also presented as ultimately protected by national security measures such as the security certificate. As a moment of sovereign exception, the security certificate also serves as an opportunity for the productive configuration of political freedom. As an opportunity for the securitization of immigrants and refugees, the security certificate is not carried out on a terrain of logic that claims to oppose freedom, but rather represents it in a particular way. Freedom is treated as protected by, as opposed to limited by, the security certificate process because it works through a pervasive and increasingly legitimated rationality that claims to be protecting “our” freedom from “them.” The suggestion here is that the security certificate ought to be seen as one way in which the imperative of national security and the assertion of sovereign authority do not only imply an erosion of rights and freedoms, but an active articulation of what their contents ought to be. This is not to suggest that the meanings of freedom have ever attained a settled status, but that the problem of the security certificate represents a situation in which freedom is as much configured as it is revoked.

Again, this points to the way in which the negation of the “rule of law” signals how sovereign power is not simply the alterity of the rule of law, but is actually implicated in its foundational possibility. If the rule of law serves as the basis upon which individuals exercise independence and protection from arbitrary state coercion and the means by which the state can be held to account, it is therefore also the basis from which liberal notions of rights and freedoms are derived. Simultaneously, the security certificate shows us that the rule of law can be subject to exception on the basis of national security by relying on arbitrary distinctions (between citizens and non-citizens) that are largely irrelevant in the task of addressing the actual activity of terrorism. Consequently, refashioning the authority and independence of law through the assertion of sovereignty must be recognized as a moment in which the very meaning of rights and freedoms becomes susceptible to revisioning alongside the security interests of the state within a specially configured legal framework for Canada’s role in the “war on terror.”

Considering the implications of the security certificate and the “war on terror” for freedom through this lens offers a deeper means to address how the principles of liberal jurisprudence can legitimize the use of security certificates and make possible the “war on terror.” The war on terror and the exercise of sovereign power are not simply a deviation from the pillars of liberal democracy, but are rather an emphasis on one of liberalism’s, albeit

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114 Ibid.
extreme, conditions of possibility. As Jef Huymans shows, inquiring into the function of the exception reveals the outer limits of political power employed by the liberal democratic model.\textsuperscript{115} As much as the exception may be worth defending against in the name of protecting fundamental rights, its manifestation also shows the limits of established (liberal) rights. What is exceptional (i.e. terrorism) in one instance, can serve as the basis for a new rule (i.e. anti-terrorism legislation) in another.

Similarly, not only is it troubling that the citizen who is accrued the civil and human rights for a fair, publicly scrutinized trial has an essential abject counterpart—the non-citizen, secret trial detainee—but an analysis of power displays the remarkable proximity of the exception to the rule, as seen by security certificate’s inclusion in Canada’s legal statutes and recent legislative attempts to broaden the elements of inadmissibility. To illustrate, while currently reserved for the non-citizen, there have been three attempts in Canada to introduce security certificate provisions that would authorize the government’s use of secret evidence in order to strip Canadians of their citizenship status and deport them to their country of previous citizenship. While in the last attempt this proposed bill, C-18, was killed before passing in the fall of 2003, civil rights advocates expect that the contents of the bill will re-appear in the future.\textsuperscript{116} Such efforts suggest that anti-terrorism legislation can serve as fruitful basis for inventing new arbitrary categorizations of status that broaden the link between foreignness and danger and progressively normalize relations of non-rights between people and the state. The use of the security certificate as a means for effecting suspicion onto immigrants and refugees therefore also needs to be seen as a process for reinventing the parameters of citizenship, and utterly exposing the contingent, but also commensurate, relationship between the perpetual problem of securing the nation-state and the limits of liberal freedom.

\textbf{Conclusion}

This article has shown that the terms of preventative and indefinite detention, and the evidentiary standards of the security certificate rely upon the discriminatory criteria of citizenship status so as to efface the rule of law and usher in the exercise sovereign discretionary power. In a profoundly troubling sense the security certificate shows the extent to which the imperative of national security, as it is currently mobilized to respond to the illusive threat of terrorism, can harness a state of exception that works to suspend the rule of law and to limit and deny basic rights and freedoms for non-citizens. Such moves treat law as a tactic for national security and freedom as a form of state protection from indeterminate threats in accordance with national security objectives. This article has sought to show that while this assertion of sovereign power is currently exercised principally on non-citizens, an inquiry into the condition of possibility for the security

\textsuperscript{115} Huymans, supra note 17 at 325.

\textsuperscript{116} ICLMG, supra note 1 at 82.
certificate reveals the democratic limitations of the principles that guide
Canadian liberal governance and the starkly sinister possibilities for freedom
posed by Canada’s participation in the “war on terror.”

Résumé
Cet article examine les valeurs que la procédure de certificats de sécurité de la Loi
sur l'immigration et la protection des réfugiés attache à la vie de non-citoyens ainsi
que ses conséquences sur le pouvoir étatique et la liberté politique. Sous l’impératif
de la sécurité nationale et la « guerre au terrorisme », le certificat de sécurité
constitue un moment d’exception du pouvoir souverain et légitime. Ceci met en
cause l’État de droit alors que la protection légale fondamentale est déniée à des
détenus qui ne sont pas citoyens canadiens. Dans une première partie, les
mécanismes et procédures du certificat de sécurité sont présentés, avec une attention
particulière portée à la détention et aux exigences de preuve qui illustrent la
dérogation des garanties légales. L’article aborde ensuite comment cette érosion de
l’État de droit ouvre un espace d’exception à l’exercice souverain du pouvoir
étatique fondé sur des critères discriminatoires du statut de citoyenneté afin
d’associer étrangeté et danger. La dernière partie enfin montre comment le certificat
de sécurité conçoit la liberté dans le cadre des objectifs nationaux de la « guerre au
terrorisme » et les limites de la liberté libérale en lien avec le pouvoir de l’État
moderne.

Abstract
This article examines the values ascribed to the lives of non-citizens by the
Immigration and Refugee Protection Act’s security certificate process and its
implications for state power and political freedom. Under the imperative of national
security and the “war on terror,” the security certificate functions as a moment of
legal exception for the assertion of sovereign power and legitimation. This
compromises the rule of law and denies basic legal protection to non-citizen
detainees. The first section of the article addresses the mechanisms and procedures
of the security certificate. Special attention is paid to the use of detention and
evidentiary standards in order to illustrate the manner in which the security
certificate derogates the rule of law. The second section considers how eroding the
rule of law opens a space of exception for the exercise of sovereign, unmitigated
state power that is grounded in the discriminatory criteria of citizenship status so as
to implicate foreignness in the production of danger. The final section addresses how
the security certificate configures freedom as commensurate with the national
security objectives of the “war on terror”, exposing the limitations of liberal freedom
in relation to modern state power.

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