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Charkaoui and Secret Evidence

Gus Van Harten*

I. INTRODUCTION

In its decision in *Charkaoui*,¹ the Supreme Court of Canada held that the process under the *Immigration and Refugee Protection Act*² — by which permanent residents and foreign nationals could be detained following their designation by the executive as inadmissible to Canada on security grounds, subject to review by a judge of the Federal Court — was unconstitutional. In its reasons,³ the Court found that this process impaired the individual’s right to life, liberty and security of the person and that this did not accord with the principles of fundamental justice as required under section 7 of the *Canadian Charter of Rights and Freedoms*.⁴ The Court concluded in particular that the Act’s provision for a judge to review secret evidence⁵ put forward by the executive to justify its designation and detention of the individual in question did not ensure a fair hearing because the absence of the individual from the proceeding undermined the judge’s ability to come to a decision based on all the relevant facts and law, while the judge lacked the full and independent powers to gather evidence that exist in an inquisitorial process, and because the individual’s right to know the case to meet had

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¹ *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] S.C.J. No. 9, [2007] 1 S.C.R. 350 (S.C.C.) [hereinafter “*Charkaoui*”].

² S.C. 2001, c. 27.

³ I refer to the reasons as those of the Court although the unanimous judgment was delivered by McLachlin C.J.C.

⁴ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter “Charter”]. Although not the subject of this article, the Court also concluded that the process subjected foreign nationals who are not permanent residents to arbitrary detention because it denied them a prompt hearing (in violation of s. 9 and s. 10(c) of the Charter and not saved under s. 1) and to address this the Court extended to foreign nationals the same access to adjudicative review as provided to permanent residents.

⁵ “Secret evidence” is the author’s term, not the Court’s, and it refers to evidence to which the individual (and the public) is denied access; “closed proceedings” means adjudicative proceedings that permit secret evidence.

been “effectively gutted”.⁶ Further, this infringement of section 7 was not justified under section 1 because the process did not provide for alternative procedural mechanisms to accommodate the use of secret evidence, such as the appointment of a separate counsel (as in the case of the Security Intelligence Review Committee or the Arar Inquiry) or special advocate (as in the United Kingdom) to represent the individual’s interests and challenge the state’s claims in closed proceedings. Thus, the Court struck down the existing review process and its reliance on a judge alone as the sole check on the executive in closed proceedings.⁷

At the core of *Charkaoui* is the Court’s confrontation with the dilemmas of secret evidence. The use of secret evidence threatens to erode the integrity of adjudicative decision-making in at least three ways. First, it increases the risk of error and injustice to the individual. Second, it undermines confidence in the administration of justice. Third, it dilutes the effectiveness of adjudication as a check against abuse of state power. In each of these respects, secret evidence contradicts a core goal and value of adjudication and, for this reason, courts must be steadfast in refusing to allow it where the encroachment on accuracy and fairness goes too far. In some adjudicative contexts, above all in criminal trials, dangers arising from the use of secret evidence cannot be remedied by procedural adaptation.⁸ On the other hand, the conflict of interest in hidden government⁹ also calls for judges and other adjudicators to review actively a range of executive decisions that rely on confidential information and that affect the rights or interests of an individual. In some areas outside the criminal context, such as government decisions to deny a request for access to privileged information or to authorize a search warrant or to deny security clearance to a person, the limitations arising from secrecy are necessary or even desirable because, without them, independent review of the executive would be impossible. For this reason, it is appropriate for these

⁶ *Charkaoui*, *supra*, note 1, at paras. 50 and 63-65.

⁷ *Id.*, at para. 34.

⁸ U.K., Joint Committee on Human Rights, *Counter-Terrorism Policy and Human Rights: Prosecution and Pre-Charge Detention* (2005-06 H.L. 240, H.C. 1576), at para. 105.

⁹ M. Rankin, “National Security: Information, Accountability, and the Canadian Security Intelligence Service” (1986) 36 U.T.L.J. 249, at 252; E.K. Yamamoto, “White (House) Lies: Why the Public Must Compel the Courts to Hold the President Accountable for National Security Abuses” (2004) 68 Law & Contemp. Probs. 285, at 288-89 and 315-16; Note, “The National Security Interest and Civil Liberties” (1972) 85 Harv. L. Rev. 1130, at 1219 [hereinafter “Note, ‘The National Security Interest’”].

limitations to be ameliorated, to the greatest extent possible, by adaptation of the adjudicative process.

In cases of immigration-based detention — the subject of *Charkaoui* — secret evidence is used to justify long-term incarceration of the individual, thus involving a clear deprivation of personal liberty. Given the context, one would expect the Court to elaborate in clear terms the limitations presented by secret evidence and to take a strong position against its use. In a number of respects the Court did just that. However, in other respects, its reasons are open to criticism. Although the Court clearly recognized and sought to address limitations that arise from the absence of the individual from closed proceedings, its reasons do not convey sufficient concern for other weaknesses arising from secret evidence, in particular: (1) the dependency of the judge and special advocates on the executive for access to the full record that underlies the secret evidence presented to the Court; and (2) the pre-eminence of the executive's institutionalized expertise in matters of national security confidentiality. This argument is presented via a broader examination of the limitations that characterize adjudication when secret evidence is permitted, which serves as a platform for evaluating the Court's identification of both the limitations and the procedural mechanisms that might ameliorate them. The argument leads to the conclusion that a more comprehensive consideration of the limitations arising from secret evidence calls not only for surrogate representation of the individual in closed proceedings but also for the provision of both independent expertise and an independent investigative capacity to enable more effective scrutiny of the executive by judges and special advocates alike.

II. THE LIMITATIONS OF ADJUDICATIVE DECISION-MAKING IN CLOSED PROCEEDINGS

Courts face various obstacles when confronted with secret evidence. In this article they are organized into four categories. The first includes those limitations arising from the denial of access by the individual to the evidence that is advanced by the state, and the corresponding inability of the judge to hear information and argument that can be put forward only if the individual is made aware of that evidence. The second category, similar to the first, includes limitations arising from the absence of the public from the proceeding and the inability of the court to hear facts and expertise that can be made available only by involving

persons who are not directly affected by the proceedings. The third category arises from the courts' special reliance on the executive, often including foreign governments, to supply and characterize confidential information and to justify the case for secrecy. Fourth is the dynamic of closed proceedings in the security context and its potential to influence judges to favour unduly the interests of secrecy and security over the demands of the adjudicative process for accurate and fair decision-making. Each of these categories is discussed in this section with reference to the Court's reasons in *Charkaoui*.

1. The Absence of the Individual

The first area of limitations in closed proceedings arises from the inability of the individual to present a reply to claims against him or her by probing or elaborating on the record and by disputing the state's factual and legal claims.¹⁰ The absence of the individual means that hallmarks of the adversarial process are "rendered impotent".¹¹ The court is deprived of the fruits of an independent, self-interested investigation in response to that of the executive.¹² It will not hear exculpatory evidence that the individual alone can provide or uncover and the state's witnesses will escape the disciplines of cross-examination by the other side.¹³ In terms of legal argument, the court will not hear the individual's perspective, properly informed, on issues such as the validity of the state's confidentiality claims, the admissibility of secret evidence, the appropriate weight to give to the evidence, and so on.¹⁴ As a result,

¹⁰ *Kanda v. Government of the Federation of Malaya*, [1962] A.C. 322, at 337 (P.C.), Lord Denning; *Engel v. The Netherlands* (1976), 22 E.C.H.R. (Ser A), 27 E.H.R.R. 647, at para. 91; *Charkaoui*, *supra*, note 1, at para. 54. Note, "Secret Evidence in the War on Terror" (2005) 118 Harv. L. Rev. 1962, at 1973-75 [hereinafter "Note, 'Secret Evidence'"].

¹¹ *Kiareldeen v. Reno*, 71 F. Supp. 2d 402, at 413 (D.N.J. 1999). E. Yaroshefsky, "Secret Evidence is Slowly Eroding the Adversary System: CIPA and FISA in the Courts" (2006) 34 Hofstra L. Rev. 1063, at 1066 and 1071 [hereinafter "Yaroshefsky"].

¹² *Charkaoui*, *supra*, note 1, at para. 50. J.K. Hugessen, "Watching the Watchers: Democratic Oversight" (Paper presented to the Canadian Institute for the Administration of Justice's conference on Terrorism, Law and Democracy: How is Canada changing following September 11?, March 25-26, 2002) at 384-85 [hereinafter "Hugessen"]. Council of Europe, Commissioner for Human Rights, *Report by Mr. Alvaro-Gil Robles, Commissioner for Human Rights, On His Visit to the United Kingdom 4th-12th November 2004*, Comm.D.H. (2005) 6 (8 January 2005), at para. 21.

¹³ *United States ex. rel. Knauff v. Shaughnessy*, 339 U.S. 537, at 551 (1950) (Jackson J., dissenting). Yaroshefsky, *supra*, note 11, at 1075 (highlighting the common law belief in cross-examination as "the engine that drives the trial process").

¹⁴ *Charkaoui*, *supra*, note 1, at para. 52; *Vaughn v. Rosen*, 484 F.2d 820, at 823-25 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974). Yaroshefsky, *id.*, at 1071.

essential safeguards of the adversarial process for ensuring the accuracy and completeness of adjudicative decision-making are lost.

Faced with these constraints arising from the absence of the individual, the judge in a closed hearing must attempt to challenge directly the executive's case on behalf of the individual.¹⁵ Thus, the judge must think both as arbiter and as litigant in the review of the written record, the questioning of state witnesses, and the search for additional evidence that benefits the individual. At each stage of the process, however, the judge will be less able than counsel would be, in representing the individual, for two reasons. First, the judge has no access to information that the individual would otherwise share with his or her counsel in privileged discussions about how to prepare for and present the case.¹⁶ The judge may not hear whether the accused benefits from an alibi at a key time or whether there is an innocent explanation for allegedly suspicious behaviour, for example.¹⁷ Second, unlike the individual's counsel, the judge must exercise restraint when probing the evidence and argument of the executive in order to protect the court's neutrality. A judge can compensate for this — by questioning the state's witnesses aggressively, for example — only at risk of undermining his or her position as ultimate decision-maker. As “the only person in the justice system whose sole obligation and loyalty is to the *defendant*”,¹⁸ an individual's own counsel is the only actor in the process whose duty is to focus completely on advocacy for the individual.

These limitations of closed proceedings were identified and elaborated by the Court in *Charkaoui*. In its discussion of what the principles of fundamental justice require in cases where section 7 is engaged, the Court found that closed proceedings precluded an impartial and independent magistrate, here the Federal Court judge, from making a decision based on all the facts and law. The Court stated that in a closed proceeding “the named person may be deprived of access to some or all of the information put against him or her, which would deny the person the ability to know the case to meet” and that as a result “the

¹⁵ P. Duff, “Disclosure of Evidence and Public Interest Immunity” (2007) 10 Scots L. Times 63, at 66.

¹⁶ Hugessen, *supra*, note 12, at 384.

¹⁷ *American-Arab Anti-Discrimination Comm v. Reno*, 70 F.3d 1045, at 1069 (9th Cir. 1995).

¹⁸ J.L. Dratel, “Ethical Issues in Defending a Terrorism Case: How Secrecy and Security Impair the Defense of a Terrorism Case” (2003) 2 Cardozo Pub. L., Policy & Ethics J. 81, at 81 (emphasis in original) [hereinafter “Dratel”].

named person may not be in a position to contradict errors, identify omissions, challenge the credibility of informants or refute false allegations”.¹⁹ In turn, the Court stated that the judge’s decision may not be based on all the relevant facts and, in terms of legal argument, that: “Similar concerns arise with respect to the requirement that the decision be based on the law. Without knowledge of the information put against him or her, the named person may not be in a position to raise legal objections relating to the evidence, or to develop legal arguments based on the evidence.”²⁰ Finally, the Court recognized that a judge, sitting alone in a closed proceeding, “simply cannot fulfill the vacuum left by the removal of the traditional guarantees of a fair hearing” because the judge “is ... not in a position to compensate for the lack of informed scrutiny, challenge and counter-evidence that a person familiar with the case could bring”.²¹

The Court thus made clear that the individual’s inability to access secret evidence prevented the judge from reaching a properly informed decision and that this was inconsistent with the requirement for a fair hearing consistent with the principles of fundamental justice. In light of this conclusion, the Court went on to discuss how the process of a closed hearing might be adapted in ways that would allow the state to rely on secret evidence in order to justify long-term detention, while also satisfying the minimal impairment standard under section 1 of the Charter. In its discussion of alternative procedural approaches, the Court mentioned several alternatives to represent more effectively the individual’s interests in closed proceedings, including use of the United Kingdom’s model of appointing a special advocate (described by the Court as “an independent agent at the stage of judicial review to better protect the named person’s interests”)²² or certain Canadian models including reliance on counsel to the Security Intelligence Review Committee or on *amicus curiae* (and commission counsel, presumably) to the Arar Inquiry. The Court did not endorse a specific alternative, describing the ones it listed only as “less intrusive alternatives” and as mechanisms that “illustrate that the government can do more to protect the individual while keeping critical information confidential”.²³

¹⁹ *Charkaoui, supra*, note 11, at para. 54.

²⁰ *Id.*, at para. 52.

²¹ *Id.*, at paras. 63 and 64, respectively.

²² *Id.*, at para. 3.

²³ *Id.*, at paras. 70 and 87.

The Government of Canada's response to *Charkaoui*, however, was to adopt in Bill C-3 the alternative of a special advocates regime,²⁴ leading naturally to the question whether special advocates can fill the gaps that are left in closed proceedings because of the absence of the individual. Undoubtedly, it is preferable that a special advocate be appointed than a judge left alone in the effort to compensate for the individual's absence. In particular, the special advocate is well-positioned to advance legal argument from the individual's perspective (although he or she remains hampered by the inability to seek specific instructions). They can also provide independent cross-examination of the state's case alongside the necessarily more circumspect scrutiny exercisable by the judge. Yet it is important to clarify why special advocates, like judges, cannot fulfil the ordinary role of counsel in an adversarial process.²⁵ They are unable to hear information, known only to the individual, that may exonerate the individual or otherwise weaken the state's case. Potential witnesses may not be contacted, important documents may not be uncovered and the individual's own investigation of the case will be limited to material disclosed by the government.²⁶ The individual will be "unable to explain himself ... and assist in his own defence" meaning that the surrogate counsel "cannot effectively use the evidence by asking her client questions pertaining to the evidence".²⁷ In light of this limitation, it is an open question whether the appointment of special advocates will satisfy the minimal impairment requirement under section 1 with respect to limitations that arise from the absence of the individual, not to mention other limitations of closed proceedings which special advocates are not well positioned to address, as discussed below. Ultimately, the special advocate is but another layer of procedural

²⁴ Bill C-3, *An Act to amend the Immigration and Refugee Protection Act (certificate and special advocate) and to make a consequential amendment to another Act*, S.C. 2008, c. 3. For an analysis of Bill C-3, see D. Dunbar & S. Nesbitt, "Parliament's Response to *Charkaoui*: Bill C-3 and the Special Advocate Regime under IRPA" (2008) 42 S.C.L.R. (2d) 415 [hereinafter "Dunbar & Nesbitt"].

²⁵ *Re MB*, [2007] U.K.H.L. 46, at para. 35 (U.K.H.L.) (Lord Bingham). U.K., H.C. Constitutional Affairs Committee, *The Operation of the Special Immigration Appeals Commission (SIAC) and the use of Special Advocates*, 7th Report, Sess. 2004-05, vol. 1, at 55 [hereinafter "Constitutional Affairs Committee"]; N. Blake *et al.*, Letter, *The Times*, February 7, 2004 [hereinafter "Blake *et al.*"].

²⁶ Yaroshefsky, *supra*, note 11, at 1073-74; Dratel, *supra*, note 18, at 90.

²⁷ *Hamdan v. Rumsfeld*, 344 F.Supp.2d 152, at 168 (D.D.C. 2004) (quoting oral argument by Mr. Hamdan's counsel). N.W. Smith, "Evidence and Confrontations in the President's Military Commissions" (2005) 33 *Hastings Const. L.Q.* 83, at 92.

construction built upon a process that remains limited for other reasons related to secret evidence.

2. The Absence of the Public

The second category of limitations arises from the obvious point that the general public has no access to closed proceedings. The absence of the public raises concerns, not only for the accountability of the state to the electorate (an issue which is assumed here to be outweighed by the security interest) but also more directly for the adjudicative process. First, as in the case of the individual's absence, keeping the evidence secret means that third parties who have relevant information, but who can come forward only if they are made aware of the evidence, cannot do so. They will not hear about the case from the individual, from the media, or otherwise, and this poses the risk, beyond that in open proceedings, that the adjudicative decision will be founded on an incomplete or inaccurate record. Revealing the evidence to a representative of the individual (or even to the individual directly) on condition of confidentiality does not permit third parties to be uncovered by follow-up investigation or to come forward of their own accord.

Second, the absence of the public interferes with the judge's ability to look behind the state's case and its reasons for secrecy. The necessity of systematic secrecy in matters of national security necessarily means that courts are less able to hear from independent experts, for the simple reason that very few people outside of government can develop sophisticated and specifically informed expertise in the field, even if they were permitted to comment on the evidence and the rationales for secrecy that are put forward in a closed proceeding. The executive becomes by default the judge's guide to the exotic world of security and intelligence and it is tasked, as such, with the critical function of outlining the state's security priorities, the details of its information-sharing practices, the motivations of foreign governments, the strengths and weaknesses of investigative techniques, and so on. Of course, there are experts in the field who may be retired from the security agencies or otherwise in a position to offer expertise that is credible because it is informed by years of exposure to the technical subject matter. That said, such experts may be tainted by past connections to government and, where they are not, it remains the case that the pool of experts from which to draw persons who can counter the expert evidence of the state is much smaller than for matters dealt with commonly in open

proceedings. This of course does not mean that sensitive information should be released in order to support the development of a wider base of expertise in the field. It simply constitutes another factor for the courts to consider in deciding whether it is right to allow the use of secret evidence and, if so, to adopt measures oriented to ameliorating the corresponding limitations.

Lastly, when proceedings are closed and when they are known by the participants to be very likely to remain closed for the long term, the discipline that openness otherwise delivers is eroded. Ultimately, openness is central to the legal process because it impels everyone involved, including the judge, to be aware that their arguments and reasoning can be read and picked apart by anyone, so that they will more assuredly consider the implications of what they do or decide for their reputation and for that of the system. In closed proceedings, the executive may be tempted to adopt positions that de-emphasize the rights or interests of individuals, or that presents the facts or law in ways that would not be feasible in an open proceeding, for reasons of openness. And, where an adjudicator or adjudicative tribunal is otherwise perceived (rightly or wrongly) as predisposed to favour the state's interests, closure of the proceedings will accentuate the challenge to public confidence in the process. Bentham described publicity as "the very soul of justice ... the keenest spur to exertion and the surest of all guards against improbity"²⁸ and there is likewise no surer spark for cynicism about public decision-making than the knowledge that those in power can lawfully conceal what they do from outside scrutiny.²⁹ It is for this reason that allowances for secrecy require rigorous mechanisms of accountability and, where the risk of error or abuse is too great, for the outright prohibition of secret evidence.

In *Charkaoui*, the Court does not discuss overtly these issues arising from the absence of the public, although it is arguably inherent in the Court's finding that closed proceedings deny the judge access to relevant facts and law. Also, it is perhaps understandable that the Court would not discuss in detail these concerns given that the Court's decision to allow closed proceedings, with sufficient safeguards, where a section 7 right is engaged carries with it the implication that the absence of the

²⁸ J. Bentham, "Draught of a New Plan for the Organization of the Judicial Establishment in France" in *The Works of Jeremy Bentham*, vol. 4 (Edinburgh: Tait, 1843), at 316.

²⁹ Note, "Keeping Secrets: Congress, the Courts, and National Security Information" (1990) 103 Harv. L. Rev. 906, at 910-14.

public is not a sufficient reason in itself to bar the use of secret evidence. The Court clearly sees a role for secret evidence where required in the security interest to satisfy “the imperative of the protection of society”.³⁰ Yet the absence of the public should not be ignored from a section 7 perspective given the central role of openness in advancing the claims of adjudication to accuracy and fairness. It is a necessary feature of the individual’s absence that his or her own investigation of the state’s case — which might otherwise identify members of the public of whose testimony the court should be made aware — cannot happen. However, special advocates are likewise precluded from canvassing third parties for relevant information, whereas some of the other alternatives canvassed by the Court in *Charkaoui*, including SIRC and commissions of inquiry, could address these concerns to a greater degree because of their access to a more established repository of information and general expertise on matters of security confidentiality, whether by tapping their internal expertise (in the case of SIRC) or outside sources (in the case of an inquiry). As with the absence of the individual, the limitations following from the absence of the public cannot be rectified completely, but they can be minimized to a greater extent than by the appointment of special advocates.

3. The Dependence on the Executive

The third category follows from the special dependency of the adjudicative process on the executive in closed proceedings. The court depends on the executive, and above all its security arm, to be fair and forthcoming in supplying confidential information, in depicting how the information was acquired and vetted, and in producing additional information that is in the state’s custody and that may be beneficial to the individual. There are cases in which the courts’ trust on these matters has been betrayed.³¹ For example, in the aftermath of the Arar Inquiry, it

³⁰ *Charkaoui*, *supra*, note 1, at para. 61.

³¹ Dratel, *supra*, note 18, at 100; M. Scaperlanda, “Are We That Far Gone?: Due Process and Secret Deportation Proceedings” (1996) *Stan. L. & Policy Rev.* 23, at 28; D. Cole, “Enemy Aliens” (2002) 54 *Stan. L. Rev.* 953, at 1001-02; S.M. Akram & K.R. Johnson, “Race, Civil Rights, and Immigration Law after September 11, 2001: The Targeting of Arabs and Muslims” (2002) 58 *N.Y.U. Ann. Surv. Am. L.* 295, at 324-25; N.T. Saito, “The Enduring Effect of the Chinese Exclusion Cases: The ‘Plenary Power’ Justification for On-Going Abuses of Human Rights” (2003) 10 *Asian L.J.* 13, at 19-20; Note, “Secret Evidence”, *supra*, note 10, at 1979-80; J. Lu, “How Terror Changed Justice: A Call to Reform Safeguards That Protect Against Prosecutorial Misconduct” (2006) 14 *J. L. & Policy* 377, at 379-80.

was revealed that the Royal Canadian Mounted Police had misled a court on the likelihood that secret evidence obtained from Syrian military intelligence, and used to support an application by police for a warrant, was the product of torture.³² This was disclosed to the public only after the Inquiry litigated the issue and obtained a Federal Court ruling that authorized disclosure, over the objections of the federal government, which had blocked disclosure for more than two years on security grounds. Judging from this experience, it can be surmised that, where an executive agency has misled a court about the reliability of secret evidence, the truth is unlikely to emerge without concerted pressure by an independent force. Without independent review of specific cases of possible misrepresentation by the executive, it is difficult for those on the outside, including the courts, to know how widespread and how serious the misuse of secrecy powers may be.³³

Yet one need not suspect that security officials have actively misled a judge in a particular case in order to accept that judicial review of the executive in the national security context is shaped by how officials present their activities and how they vet the information they have collected before putting it before the court, and by their own vulnerability to errors that open proceedings would be likely to uncover or prevent.³⁴ Even where officials act in good faith in the identification and characterization of security concerns, they are more likely than not to favour maintaining secrecy and guarding security.³⁵ However, the integrity of adjudicative decision-making depends on the assurance that, if an official succumbs to the temptation to spin or vet evidence in a way that is misleading, there are ways for this to be detected. The one-sided nature of closed hearings dilutes such assurances because, as discussed,

³² Commission of Inquiry into the Actions of Canadian Officials Relating to Maher Arar, *Report of the Events Relating to Maher Arar — Addendum — Disclosure of information authorized by the Federal Court of Canada in accordance with Sections 38.04 and 38.06 of the Canada Evidence Act* (Ottawa: 2007), at 127-28. See also *e.g.*, *United States v. Moussaoui* (No. Crim. 01-455-A), 2002 W.L. 1311718 (E.D. Va., April 17, 2002); *United States v. Koubriti*, 336 F. Supp. 2d 676, at 679, n. 3 (E.D. Mich. 2004).

³³ The U.S. Foreign Intelligence Surveillance Court recently condemned the Federal Bureau of Investigation for giving false or misleading evidence in 75 security warrant cases under the *Foreign Intelligence Surveillance Act: In re Sealed Case*, 218 F.Supp.2d 611, at 620 (2002), *revd*, 310 F. 3d 717, at 735 (2002). D.V. Ward, “Confidential Informants in National Security Investigations” (2006) 47 Boston College L. Rev. 627, at 631-32 [hereinafter “Ward”].

³⁴ E. Margulies, “Above Contempt?: Regulating Government Overreaching in Terrorism Cases” (2005) Southwestern U. L. Rev. 449, at 476 [hereinafter “Margulies”]; G.E. Rosen, “Remarks of Judge Gerald E. Rosen — The War on Terrorism in the Courts” (2004) 21 T.M. Cooley L. Rev. 159, at 168; Note, “The National Security Interest”, *supra*, note 9, at 1134.

³⁵ Blake *et al.*, *supra*, note 25, at 7.

neither the individual in question nor the public can comment on the state's claims. In closed hearings, the only experts (whether legal or non-legal) who are present in the room are persons with exclusive access to and control over the information under consideration, and thus an incomparably specialized expertise in the most arcane of fields.³⁶ Where a judge is not swayed by "nightmarish tales of national security problems",³⁷ he or she will face much difficulty peeling away any layers of obfuscation or uncovering any subtle bending of the truth on the part of the executive.

This is illustrated by the case of informer evidence. Information from human sources must be assessed not just in terms of the informer's reliability — whether he or she has invented a story because of a grudge or an interest to avoid prosecution or deportation³⁸ — but also in light of other information held by the state that undermines the informer's credibility. To carry out such an assessment in a closed proceeding, the judge must hear about the circumstances of the informer's relationship with police or security agents, the accuracy of information supplied in the past, information from other sources that supports or undermines the informer's account, and so on. The judge relies entirely on the executive to be forthcoming on these questions. Moreover, in some instances, the executive itself will not be in a position to provide reliable answers, even where it is intent on doing so, where for example the agency does not itself have a significant relationship with the informer, he or she being located abroad, or where the informer is passing on information heard from other sources with which the agency has no contact at all.

Limitations arising from a special dependency on the executive are recognized by the Court in *Charkaoui*, if somewhat tangentially. For example, this concern is probably implicit in the following statement by the Court (also excerpted above):

The judge ... simply cannot fill the vacuum left by the removal of the traditional guarantees of a fair hearing. The judge sees only what the ministers put before him or her. The judge, knowing nothing else about the case, is not in a position to identify errors, find omissions or assess the credibility and truthfulness of the information in the way the named person would be.

³⁶ Margulies, *supra*, note 34, at 465.

³⁷ R.P. Salgado, "Government Secrets, Fair Trials, and the Classified Information Procedures Act" (1988) 98 Yale L.J. 427, at 429 and 438.

³⁸ Ward, *supra*, note 33, at 636-37 and 652. R.M. Bloom, *Rattling: The Use and Abuse of Informants in the American Justice System* (Westport, CT: Praeger, 2002).

Likewise, the judge is described by the Court as being “placed in the situation of asking questions and ultimately deciding the issues on the basis of incomplete and potentially unreliable information”.

What is not clear in the Court’s reasoning, however, is whether it speaks in these passages of the dependency of the judge *as caused simply by the absence of the individual* or whether it speaks more generally of the special vulnerabilities of courts to executive manipulation where secret evidence is allowed, vulnerabilities which may or may not be removed by alternative mechanisms that aim to substitute for the individual’s absence but that do not necessarily address the wider dependency.

In its reasons, the Court intertwined dependency on the executive with the absence of the individual although, as argued here, these may be regarded as separate concerns. For example, in this statement, the Court may be read as having merged the two sets of limitations:

The judge is not afforded the power to independently investigate all relevant facts that true inquisitorial judges enjoy. At the same time, since the named person is not given a full picture of the case to meet, the judge cannot rely on the parties to present missing evidence. The result is that, at the end of the day, one cannot be sure that the judge has been exposed to the whole factual picture.³⁹

Again, it is unclear whether the Court’s lack of confidence as to whether the judge “has been exposed to the whole factual picture” arises from the individual’s absence alone or from the judge’s inability to investigate the underlying informational base of the case as in a genuinely inquisitorial process. One possible reading of *Charkaoui* is that the demands of minimal impairment will be satisfied if the concerns arising from the absence of the individual are adequately addressed, regardless of related concerns arising from a wider dependency on the executive.

On the other hand, there are suggestions in some parts of the Court’s reasons of a greater concern about dependency beyond that conveyed by the *Charkaoui* decision as a whole. This comes especially in the Court’s discussion of whether the process under the *Immigration and Refugee Protection Act*, relying on review by a Federal Court judge, allowed for review by “an independent and impartial magistrate”. The Court concluded that the process satisfied this component of the requirement

³⁹ *Charkaoui*, [2007] S.C.J. No. 9, [2007] 1 S.C.R. 350, at para. 51 (S.C.C.).

for a fair hearing (although it did not satisfy the component of a decision based on all relevant facts and law) on the basis that judges of the Federal Court can and do conduct a searching review of the state's claims. In doing so, however, the Court framed its conclusion in lukewarm terms, saying that "a non-deferential role for the designated judge *goes some distance* toward alleviating the first concern, that the judge will be perceived to be in the camp of the government".⁴⁰ This conveys at least a residual concern that the judge's position in a closed proceeding entails a troubling dependence on the executive.

In fact, regardless of their commitment to doing so, judges frequently are not well equipped to carry out a reliably thorough review of the executive's claims in closed proceedings. To borrow a phrase used to describe the past role of the Federal Court in security certificate proceedings, judges are reliant on the executive in their ability to "closely examine the information to look for the presence or absence of corroboration, and carefully scrutinize the credibility of human sources",⁴¹ because the use of secret evidence entails a decision by the executive to put forward some but not all the confidential information it holds and to present the evidence it does advance in ways that support the state's case. This handicap is inherent to closed proceedings in the security field because, by definition, the evidence that must be presented secretly has originated in places that are also closely guarded from outside scrutiny; dependency is the unavoidable outcome of restricted access. Whether this poses insurmountable obstacles for the adjudicator in a specific proceeding depends in part on the executive's claims and the nature of the evidence advanced to support them. Without vetting the informational base, however, it will be very difficult for a court to know with any confidence whether the case is indeed one in which the executive has something to hide.

To emphasize the intractability of this dependency, let us consider the use of secret evidence of an intelligence report that is received from a foreign government subject to a commitment by the receiving state on the promise it be kept confidential. Such foreign-sourced information presents a special quandary. Faced with it, a court must scrutinize not only its own agencies but also those of the foreign government that supplied the report and the ultimate human or technical sources on which the report is based. In reviewing the role of each actor, and there are

⁴⁰ *Id.*, at para. 42.

⁴¹ Dunbar & Nesbitt, *supra*, note 24, at 419.

many at play, the court must assess whether information was passed on erroneously, whether relevant material was withheld at some point in the chain of information-sharing, whether unreliable or unacceptable methods of interrogation or surveillance were utilized, whether the foreign government or the ultimate source may have an interest to deceive the receiving state or the court for its own ends, and so on. However, in pursuing this assessment, it may be impossible for a court, or even its own state's agencies, to know with any confidence how the foreign government acquired the information or whether it was filtered through other sources. The court has little if any power to look behind the information directly because the state that receives it has no coercive authority in the territory of the state or states in which the information was elicited and conveyed. Could one ever hope to discover the original message in a game of telephone by asking questions only of the final recipient of the call?

With respect to *Charkaoui*, it is important to distinguish the limitations arising from dependency on the executive from those arising from the absence of the individual in order to evaluate alternative mechanisms that could be used to satisfy the requirement of minimal impairment under section 1. It is especially important, in light of Bill C-3, to clarify that a special advocate is likewise dependent on the executive to be forthcoming and accurate about the confidential information in its custody.⁴² Special advocates must look to the executive to disclose information that may undermine the state's case, to characterize accurately the nature and relevance of the executive's investigation, to engage in good faith information sharing with other governments, to insulate their use of confidential information from other interests of the state, to eschew unacceptable methods of information gathering, to reveal activities of an informer that undermine the informer's credibility, to carry out internal review and fair redaction of materials for purposes of disclosure and to act to prevent unofficial leaks against the individual. A special advocate has no way to audit the executive by probing its files, by formulating a wider view of state investigations, or by inquiring more deeply into the reliability of foreign-sourced information.

The presence of a special advocate thus makes it more likely that probing questions will be asked in closed proceedings, but it does

⁴² C. Forcese & L. Waldman, "Seeking Justice in an Unfair Process — Lessons from Canada, the United Kingdom, and New Zealand on the Use of 'Special Advocates' in National Security Proceedings" (Study for the Canadian Centre for Intelligence and Security Studies, August 2007), at 40-43.

comparatively little to enhance the court's ability to rely on the veracity and completeness of the answers given by the executive. The special advocate depends as much as the judge on the executive to account for the individual's interest at each stage of the process, from the earliest delineation of lines of investigation, to the posing of questions to informers and foreign governments, to the selection of witnesses, to the presentation of evidence to the court, to the formulation of any public comment on the court's ultimate decision. Moreover, special advocates are also more constrained in this respect than at least two other alternative mechanisms identified by the Court in *Charkaoui*, including review by SIRC and by the Arar Inquiry. Both of these alternatives allowed for an independent investigation to be conducted into the full record of confidential information that is held by the executive, based on the issuance of an order to produce relevant documents or require officials to testify under oath. Special advocates lack the same capability, nor is there any express authorization in Bill C-3 for a court to grant such authority to a special advocate or some other entity on a case-by-case basis.

In the English case of *Re MB*, the nature of the special advocate's dependency was elaborated more clearly by Sullivan J. of the High Court.⁴³ The case involved the use of secret evidence to justify a decision by the U.K. Secretary of State under the *Prevention of Terrorism Act 2005* to issue a non-derogating⁴⁴ control order against an individual for suspected involvement in terrorism. As part of his decision in that case that the process for court review of the Secretary of State's decision was not consistent with the right to a fair hearing under Article 6 of the *European Convention on Human Rights*, Sullivan J. made this comment

⁴³ *Re MB*, [2006] E.W.H.C. 1000 (U.K., Q.B., Admin.) (Sullivan J.). Ultimately, in *Re MB*, *supra*, note 25, a majority of the House of Lords concluded that closed proceedings in which special advocates were employed could be made consistent with the right to a fair hearing in a civil context under Art. 6 of the *European Convention on Human Rights*. However, the majority also expressed concern about the implications for procedural fairness, with Lord Bingham in particular speaking at para. 35 of the "grave disadvantage" for the individual and of the role of the court in specific cases "to decide, looking at the process as a whole, whether a procedure has been used which involved significant injustice to the controlled person". See also para. 66 (Baroness Hale) and para. 90 (Lord Brown).

⁴⁴ Under the *Prevention of Terrorism Act 2005* (U.K.), 2005, c. 2, s. 2, a derogating control order may be issued that is not subject to the U.K.'s obligations under the *European Convention on Human Rights* as implemented by the *Human Rights Act 1998* (U.K.), 1998, c. 42. Alternatively, as in the circumstances of *Re MB*, *id.*, a non-derogating control order may be issued that is subject to those obligations.

on the employment of special advocates to ameliorate the unfairness of closed proceedings:

While the special advocate can explore, for example, whether the closed materials placed before the Secretary of State ignored any lines of inquiry which were obvious at that time and which should have been pursued ... he is not required to examine what was actually known to the Secretary of State's informant, the Security Service, or whether any of the closed material on which the Secretary of State based his suspicion was in fact true ... In particular, the Special Advocate does not have a roving commission to ascertain whether there might be new exculpatory material, or whether, for example, viewed in the light of the respondent's explanations which were not available to the Secretary of State, a different interpretation might be given to the closed material.⁴⁵

This statement elucidates the root dependency of special advocates (and judges) in closed proceedings. It is a dependency that stems from the foreclosure of any independent investigation (whether or not by the individual and his or her counsel) of the underlying base of information from which executive officials have selected the material put before the court. By this process of selection, the evidentiary record is shaped in a potentially one-sided way and it is tenuous to allow the detention of an individual based simply on the executive's duty "to act in utmost good faith and ... make full, fair and candid disclosure of the facts, including those that may be adverse to its interests".⁴⁶ In its decision to uphold the process of closed review (subsequently struck down by the Supreme Court of Canada) in *Charkaoui*, the Federal Court of Appeal made much of the court's ability to review effectively the state's case based, in significant part, on the good faith of the executive. However, without a meaningful prospect that the executive's choices in framing the subject matter and evidentiary record of closed proceedings can be reviewed — via an independent audit that is at least as likely to reveal misrepresentation by the executive as would be the case in analogous open proceedings — it is doubtful that a judge can deliver a reliably thorough review, even when the court is assisted by a special advocate.

⁴⁵ *Re MB* (Q.B.), *supra*, note 43, at para. 98.

⁴⁶ *Charkaoui v. Canada (Citizenship and Immigration)*, [2004] F.C.J. No. 2060, [2004] F.C.A. 421, at para. 79 (F.C.A.), citing *Ruby v. Canada (Solicitor General)*, [2002] S.C.J. No. 73, [2002] 4 S.C.R. 3, at para. 47 (S.C.C.).

4. The Dynamic of Closed Proceedings

A final aspect of closed proceedings in the security context is that unlike other proceedings (including other confidential proceedings) they may take on a dynamic that conditions or impels the judge, sometimes in subtle ways, to favour the position of the executive over that of the individual and, more broadly, over the administration of justice. This conditioning of the adjudicator is in part the outcome of the various sets of limitations already discussed — absence of the individual and the public, and dependence on the executive — which also contribute to the creation of an adjudicative environment in which security concerns are allocated a privileged status because of their more direct and enabled representation before the court. Besides this, however, the courts may lean toward the executive's position for more diffuse reasons arising from the dynamic of the proceedings itself and from the nature of the issues that are likely to arise in the security field.⁴⁷

Let us first consider the atmosphere and dynamic of closed proceedings. Other than the judge and a handful of court staff, the hearings will be attended by government counsel, government witnesses and government observers. The executive's presence looms large before the judge, physically and psychologically, serving as a steady and highly visible reminder of the state's overarching interest. This need not influence the judge such that he or she consciously decides that executive priorities should crowd out other concerns. But it can create home field advantage for the state in terms of the atmosphere of the hearing room and it will put more pressure on the judge who seeks actively to question the state's claims. Closed proceedings are necessarily a bunkered space, reflecting the security realm in general, populated by those whose mission is to identify and counter threats and whose training and working life understandably presses in favour of secrecy over the need to disclose confidential information (or abandon a legal claim) in order to respect the integrity of adjudication.

The challenge springs to a large extent from the significance and sheer complexity of evaluating secret evidence, predicting how its release could harm security, weighing this risk against the importance of openness and fairness (or of allowing the state's legal case to proceed), devising ways to maximize disclosure without allowing the minutiae of document review to overwhelm the process, and regulating compliance

⁴⁷ Margulies, *supra*, note 34, at 459.

with orders to release information. In examining these questions, the courts must be acutely sensitive to the difficulties faced by the security agencies. They must scrupulously avoid the danger of “unnecessary and amateurish interference”⁴⁸ given that a single ill-timed disclosure can destroy years of work and planning. On the other hand, the courts must also not be over-awed; judges, as Narain put it, “ought not to panic at the mere mention of national security and abdicate their inherent power in common law”.⁴⁹ It is the courts that have the expertise and the ultimate duty to ensure that the magnetic attraction of national security does not lead to an erosion of legal principles, outside of situations of genuine national emergency.⁵⁰ A security agency does not have the expertise required to avoid and manage the dangers that secrecy brings to adjudicative decision-making, and its views as to whether and how a rule or principle should be altered in order to facilitate closed proceedings on security grounds will naturally be affected by its responsibilities to counter security threats.

Yet in the security context, especially in closed proceedings, the courts are encumbered by a well-recognized lack of relevant expertise and capability,⁵¹ explaining much of the courts’ tendency to accept executive appeals for deference in this area.⁵² Security concerns, including the implications of releasing confidential information, are often extraordinarily multi-faceted, requiring careful vigilance and frequent re-assessment, and the nature of security threats will be much clearer to those officials who have a dedicated and focused mandate to protect security. It would be exceedingly difficult, if not simply unrealistic, to expect a judge to be well versed in the full panoply of threats from diverse organizations and countries, and how best to respond to them. The issues may range from the novelty of investigative techniques, to the effectiveness of data-mining software, to the conditions of a witness’ imprisonment in a foreign country, to the

⁴⁸ B.J. Narain, “Confidentiality, National Security, and the Right to Know — The Spycatcher Decision” (1988) 39 N. Ireland Leg. Quarterly 73, at 73-74.

⁴⁹ *Id.*, at 84.

⁵⁰ S. Brown, “Public Interest Immunity” (1994) Public Law 579, at 589.

⁵¹ *United States v. Curtis-Wright Export Corp.*, 299 U.S. 304, at 319-20 (1936); *Curran v. Laird*, 420 F.2d 122, at 129 (D.C. Cir. 1969).

⁵² For example, *R. v. Secretary of State, ex parte Council of Civil Service Unions (G.C.H.Q.)*, [1985] A.C. 374, at 401-403 and 412; *Secretary of State for the Home Department v. Rehman*, [2003] 1 A.C. 153 (U.K.H.L.). R.P. Deyling, “Judicial Deference and De Novo Review in Litigation Over National Security Information Under the Freedom of Information Act” (1992) 37 Vill. L. Rev. 67, at 69 [hereinafter “Deyling”].

motivations of a foreign agency to share information, to the immutability of caveats, and so on.⁵³ More broadly, the terrain of inquiry in national security has an especially opaque and high stakes quality in that the threats are often not very clear to anyone, including the security agencies, and yet are easily recognized as carrying potentially catastrophic consequences.

This context for decision-making has the potential to amplify a judge's sense of inadequacy and unpreparedness to overrule the executive in security matters. Faced with the complexity and urgency of the security interest, a judge may accept the state's claims in part because he or she is not positioned to generate a credible alternative from his or her own knowledge and expertise. It may appear futile or hazardous, in particular, for the judge to attempt to determine the outcome of a decision to disclose confidential information after balancing the various interests that call for disclosure or for secrecy. This points to the difficulty of relying on judges alone to address all of the factual and legal dilemmas that arise where the state brings a claim against an individual based on secret evidence. Designating judges who have a background in national security to sit in such cases may enhance a court's ability to scrutinize effectively the state's evidence and argument (while also raising questions of impartiality) but it is not a substitute for the systematic acquisition of dedicated knowledge and expertise over years of focused and comprehensive work on the assessment of security concerns. This first element of the dynamic of closed proceedings, then, is the positioning of the judge in an environment that is dominated by representatives of the security interest and that requires the judge, in order to ensure accuracy and fairness in the process, to be prepared to reject the executive's characterization of complex factual and expert evidence which itself demands great deference in light of security threats.

Added to this is the opportunity for the executive to pit the complexities and uncertainties of national security interest against the judge's ability to maximize disclosure to the individual and to the public. A judge will only be able to decide that confidential information can be released, over the arguments of the executive, after a time consuming

⁵³ Note, "Executive Privilege and the Freedom of Information Act: The Constitutional Foundation of the Amended National Security Exemption" (1976) *Washington Univ. L.Q.* 609, at 660-62.

and probably testing interaction with executive officials in secret.⁵⁴ The process may begin with an inquiry by the court into the various pieces of information in question and the rationales for secrecy in each case; with the executive called upon to elaborate its position on the various rationales advanced for secrecy — the protection of informers, the protection of investigative interests, the honouring of caveats to foreign states — and how each rationale plays out with respect to different units of fact or evidence that the executive seeks to withhold. As well, to the extent that any secrecy is permissible in the relevant legal context, consideration will need to be given to the different methods available to enable disclosure, to the extent possible, including the release of an adequate portion or summary of the evidence.⁵⁵ Where the evidence as a whole is voluminous, the court may elect to reach decisions about disclosure in terms of classes rather than individual items of information, in which case the court's decisions will then need to be applied to the precise language of relevant documents, transcripts, recordings and so on.

Thus, the review of the state's confidentiality claims in a closed proceeding is detailed and laborious. It calls for the meticulous study, vetting, and classification of the alleged facts, other information produced by the executive, and other relevant information not uncovered or produced by the executive (such as media reports). Myriad factual and legal issues will arise as proposed rationales for secrecy are applied to different subject matter. The relationship between the reasons for and against disclosure may well be fluid, requiring ongoing review as knowledge of the risks evolves or as additional information finds its way onto the public record (whether by official release, government leaks, whistle blowing, or otherwise).⁵⁶ The process can be infuriatingly cumbersome and complex, all the more so where the executive encourages the unfolding of a contest of attrition in which the judge is disadvantaged.⁵⁷ Moreover, the judge has a responsibility to resolve the case within a reasonable time frame, a responsibility of which the executive will be aware and able to exploit. The danger is that the judge,

⁵⁴ C. Stracher, "Eyes Tied Shut: Litigating for Access under CIPA in the Government's 'War on Terror'" (2003) 48 N.Y. L. Sch. L. Rev. 173, at 179-80.

⁵⁵ Australian Law Reform Commission, *Keeping Secrets: The Protection of Classified and Security Sensitive Information*, Report no. 98 (2004), at c. 11 (recommendations 11.203, 11.204, 11.211, and 11.262); Note, "Secret Evidence", *supra*, note 10, at 1982.

⁵⁶ For example, *Attorney-General v. Guardian Newspapers Ltd.*, [1987] 1 W.L.R. 1248, at 1284 (U.K.H.L.) (Lord Bridge).

⁵⁷ Deyling, *supra*, note 52, at 94 and 108-109. P. Shenon, "Judge Critical of Secrecy in Terror Case Prosecution" *New York Times*, April 4, 2003.

sitting in secret and facing a daunting struggle with the executive, will over time be deterred from undertaking the exhaustive review that is required to tailor release in the interests of maximum disclosure and, by extension, accuracy and fairness.⁵⁸ Thus, the dynamic of closed proceedings may prompt the judge to choose secrecy over disclosure as a practical option to contend with a seemingly endless stream of security concerns. Where the court's sails begin to tack in this direction, who other than the executive will see the change?

On the dynamic of closed proceedings, the Court in *Charkaoui* does not elaborate concerns along the lines of the issues discussed here. Indeed, the Court rejects the argument that the circumstances of closed proceedings "may give rise to a perception" that the judge "may not be entirely independent and impartial as between the state and the person named"⁵⁹ on the basis that Federal Court judges do not adopt an overly deferential approach and may be said to possess relative expertise over the minister (although not, presumably, other security officials) on the matters at issue. Thus, the Court found that, although the judge is "the only person capable of providing the essential judicial component of the process" and although the hearing may take place "with only the judge and the government lawyers in the room", this was not inconsistent with the requirements of independence and impartiality in a fair judicial process.⁶⁰ Even so, as noted earlier, the Court was somewhat circumspect in its concluding statement on this point that "a non-deferential role for the designated judge *goes some distance* toward alleviating the first concern, that the judge will be perceived to be in the camp of the government".⁶¹ These statements suggest that the Court, even if it saw a possibility for the dynamic of closed proceedings to favour the state's interest, it was not so troubled by this possibility as to found a violation of section 7 on this limitation alone.

Further, the appointment of a special advocate will make an important difference in counteracting this limitation arising from the use of secret evidence. His or her presence allows someone other than the judge to bear the burden of confronting the state, thus reducing concerns that the judge might otherwise be deterred by the complexity and uncertainty of national security or otherwise shy away from an

⁵⁸ Deyling, *id.*, at 105. Groner, "Iran-Contra Trial Snagged on Classified Documents" *Legal Times*, April 18, 1988, at 3.

⁵⁹ *Charkaoui*, *supra*, note 39, at para. 36.

⁶⁰ *Charkaoui*, *id.*, at paras. 34-35 and 42.

⁶¹ *Id.*, at para. 42 (emphasis added).

exhausting battle with the executive over disclosure. The special advocate is there to emphasize the individual's interests where the executive prefers them to be suppressed, and to check the judge from becoming too hesitant or comfortable in his or her working relationship with the executive's counsel and witnesses. Appointment of a special advocate allows a clearer separation of the roles of judge and surrogate representative and provides an alternative to the pre-eminence of the executive in the hearing room.

Even so, the dynamic of closed proceedings remains an important factor, especially when the court is dealing with a complex case involving a large amount of confidential information (including the underlying information base held by the executive). Special advocates are, like judges, unlikely to have the specialized knowledge and expertise that is required to counter the executive's position in the intricacies of national security, and are also vulnerable to obstruction and exhaustion in the contest of attrition over the state's confidentiality claims.⁶² Unlike in other proceedings, special advocates are precluded from turning to colleagues for advice on factual or legal issues that arise unexpectedly after a case is underway. They cannot access outside expertise or investigative resources, and are limited in their ability to develop their own expertise or assemble evidence in a systematic way as the process unfolds.⁶³ The special advocate's ability to counter possible tendencies in favour of secrecy and security thus depends not only on his or her dedication to advocate relentlessly for the individual, but also on his or her access to additional resources, including administrative and research support.

III. CONCLUSION

In *Charkaoui*, the Court adopted a qualified position against secret evidence. It referred to the need to rely on confidential information, and withhold evidence from the individual in immigration detention cases, as a "reality of our modern world".⁶⁴ It also emphasized that the Charter does not require a system of ideal procedural fairness, but rather one that minimally impairs the rights of the individual. The Court accepted the

⁶² Blake *et al.*, *supra*, note 25, at 6-8.

⁶³ Constitutional Affairs Committee, *supra*, note 25, at 56-57.

⁶⁴ *Charkaoui*, *supra*, note 39, at para. 61.

need for accommodation even where a person's liberty is at stake⁶⁵ in order to meet "the imperative of the protection of society".⁶⁶ Yet the Court also applied constitutional controls on secret evidence as required to satisfy "the basic principles that underlie our notions of justice and fair process".⁶⁷ It required the state to justify closed proceedings under section 1 of the Charter, and declined to incorporate security priorities as a balancing factor within the concept of fundamental justice under section 7. Further, the Court identified clearly a number of serious limitations arising in adjudication when the individual is denied access to the evidence, and clarified that relying on a judge alone to scrutinize the state's case is insufficient for a fair process. This set the groundwork for the Court's discussion of procedural adaptations to counter these limitations, including the appointment of special advocates.

On the other hand, the Court was less attentive to other adjudicative weaknesses following from secret evidence, including the difficulties of countering the executive's expertise due to the systemic absence of the public, the prospect that a judge may be influenced to favour secrecy and security in the face of the complexities and uncertainties of security threats or in the contest of attrition with the executive over disclosure. Most critically, the Court suggests, but does not elaborate on, a concern that the judge is entirely dependent on the executive's good faith in its selection and depiction of secret evidence from other relevant information over which the executive may have custody. Moreover, some of these additional limitations, especially dependency on the executive, apply to special advocates as well as judges in closed proceedings. As such, the appointment of a special advocate in some respects simply redistributes the burden of acquiring countervailing expertise or resisting dependency to another actor who is as ill equipped and vulnerable as the judge. Put differently, it is not enough to ask whether special advocates can sufficiently compensate for the absence of the individual from closed proceedings (even if they can never address this weakness completely). One must also consider whether they, as well as the judge, have access to credible expertise to rival that of the security agencies and whether there exists a meaningful prospect for the full record held by the executive to be reviewed independently. In these respects, some of the other mechanisms discussed by the Court in

⁶⁵ *Id.*, at paras. 24 and 59.

⁶⁶ *Id.*, at para. 61.

⁶⁷ *Id.*, at para. 19.

Charkaoui, namely review by SIRC or by a commission of inquiry, are better equipped than special advocates because of their ability to access institutionalized expertise and because of their statutory powers of investigation.⁶⁸

Other instruments may be available to courts to strengthen their review capacity or that of special advocates. Courts can look to outside expertise to counter the executive's pre-eminence in security matters by appointing friends of the court, temporary advisors, or special masters, for example.⁶⁹ The Federal Court in particular can appoint expert counsel to attend closed hearings and offer advice alongside that of the executive.⁷⁰ In the United Kingdom, panels of the Special Immigration Appeals Commission normally include a member who has worked in the security agencies and has relevant expertise. These measures differ from appointment of a special advocate in that they do not aim to compensate for the individual's absence, but rather for the lack of a well-informed security perspective other than that of the security agencies. In themselves, however, these measures are a partial step because they are ad hoc and case specific, and thus limited in their potential to provide compelling and up-to-date advice.

Another option is to establish a standing body tasked with developing independent expertise on matters of national security confidentiality. The role of such a body — let us call it an independent advisory body — would be to support the courts in cases where the executive proposed to rely on secret evidence to support a claim that an individual poses a security threat. The body might also be called on to generate proposals for the redaction or summarizing of evidence in closed proceedings, or to organize contentious documents in order to identify representative material for in-depth review by the court and by a special advocate.⁷¹ In this respect, the body would allow the courts to avoid getting bogged down in the myriad options for disclosure of individual items of evidence, and thus to insulate themselves from the potential contest of

⁶⁸ On the other hand, it is proper to ask whether special advocates may outperform these alternatives in other respects — such as in their level of institutional independence from the executive — in characterizing one's expectations of the required procedural adaptations.

⁶⁹ Note the U.S. courts' occasional appointment of "special masters" to assist with narrowing the legal and factual issues in closed proceedings under the *Freedom of Information Act*: e.g., *Washington Post v. United States Department of Defence*, 766 F.Supp. 1, at 4 (Civil Action No. 84-3400-LFO) (D.D.C. 1991). M. Silverman, "National Security and the First Amendment: A Judicial Role in Maximizing Public Access to Information" (2003) 78 Ind. L.J. 1101, at 1126.

⁷⁰ *Khadr v. Canada (Attorney General)*, [2008] F.C.J. No. 47, [2008] F.C. 46 (F.C.).

⁷¹ Deyling, *supra*, note 52, at 110.

attrition. On matters of security confidentiality generally, the body could offer a detached perspective on the use and reliability of secret evidence, and on the appropriateness of secrecy in different legal contexts. As a standing body, it could develop as a repository of specialized expertise in matters of security confidentiality which the courts and special advocates could call on as they saw fit, including expertise on whether and how to disclose different types of information in different legal contexts. The body would be in a stronger position than the courts or special advocates, or *amicus curiae* and temporary advisors, to acquire a broad view on security confidentiality, for instance via systematic research on policies and practices in different jurisdictions. It would, as such, lessen the tendency toward undue deference that arises from dependence on the executive, by allowing courts to hear well-informed advice that is highly credible, when put alongside those of the executive, because it originates in an established body and, importantly, because it is segregated from the executive's conflict of interest in hidden government.

Even so, neither a special advocate nor an independent advisory body addresses satisfactorily the weaknesses arising from dependence on the executive. To do so, these entities would require the ability to look behind executive claims by auditing the full record that is accessible to the state. In the security context, there is a unique need for investigative audits of this sort because of the degree to which executive claims turn on material that is not, and often will never be, on the public record. To be effective, such investigations would require backing by the coercive authority of the courts. Given this reliance on the courts' authority, and the need to protect against overuse, such investigations should be authorized by the court subject to a specific mandate that focuses on issues of concern in the case at hand. The purpose of an investigation would not be to disprove the state's case, but to examine security-related facts or issues that are significantly in dispute between the executive and either the special advocate or the individual. These might involve the completeness of disclosure, the reliability of information produced, the admissibility of foreign-sourced information, and so on.

Again, the objective is not to preclude the use of secret evidence outright even if in some contexts its use will indeed be irreparably unsafe and unfair. The aim is rather to facilitate adjudicative review that minimizes the risks of error arising from secret evidence, and offers robust checks against abuse, by employing well-tailored procedural adaptations. Where viable mechanisms exist to strengthen the capacity of the courts for effective review of secret evidence, those mechanisms

should be put in place, above all where a fundamental right or freedom is at stake, as it was in *Charkaoui*. Likewise, the full range of limitations arising from secret evidence should be identified and assessed carefully in order to inform the design of these procedures to guard against the inherent sacrifice of accuracy and fairness. If governments elect to put forward secret evidence and if, in doing so, they rely on the courts to deliver the requisite checks, then they should be required also to equip the courts properly for the task.

IV. POSTSCRIPT

The Supreme Court of Canada's second *Charkaoui* decision⁷² was released shortly after this article was completed. The decision is significant because its reasoning acknowledges and seeks to address certain limitations arising from the use of secret evidence that relates to the interview notes of Canadian Security Intelligence Service ("CSIS") officials and especially from the unique dependency of judges on the executive in closed proceedings.

The relevant facts of this second *Charkaoui* decision were as follows. The security certificate issued by two ministers against Mr. Charkaoui pursuant to section 77(1) of the *Immigration and Refugee Protection Act* in May 2003 led to his arrest and detention until February 2005, when Noel J. of the Federal Court authorized Mr. Charkaoui's conditional release following a fourth review of his detention. Prior to this fourth review, government counsel revealed to the judge that a document that should have been disclosed to Mr. Charkaoui in May 2003 had not been disclosed because of an oversight. The document was a summary of two CSIS interviews with Mr. Charkaoui in 2002.

After receiving a summary of the information, Mr. Charkaoui requested disclosure of the complete notes and recordings of the CSIS interviews. The government replied that there were no recordings in the file and that notes of CSIS interviews are, according to CSIS policy, systematically destroyed once the CSIS officers complete their reports. In light of this, Mr. Charkaoui applied for a stay of proceedings and requested that the security certificate against him be quashed. Justice Noel dismissed the application, noting that CSIS was not a police agency and that it was not subject to the disclosure duties of a police force under criminal law. This decision was upheld by the Federal Court of Appeal.

⁷² *Charkaoui v. Canada (Minister of Citizenship and Immigration and Solicitor General of Canada)*, [2008] S.C.J. No. 39, 2008 SCC 38 (S.C.C.) [hereinafter "*Charkaoui No. 2*"].

The Supreme Court allowed Mr. Charkaoui's appeal in part. It found that CSIS breached its duty to retain and disclose information pursuant to the *Canadian Security Intelligence Service Act*.⁷³ It found also that existing case law on the disclosure and retention of information under section 7 of the Charter required CSIS to retain all the information in its possession relating to security certificate investigations and to disclose that information to the relevant ministers and to the designated judge.

It was argued in the present article that, in a closed proceeding, the judge is uniquely dependent on the executive to characterize and select information that is introduced as secret evidence. The judge is not in a position (nor is the individual, of course) to review the full record of information held by the executive. As a result, greater opportunity for error or abuse on the part of the executive arises than would be the case if an extensive disclosure duty applied or if expanded opportunities for independent investigation of the underlying record were available. In *Charkaoui*, these concerns were exacerbated by the fact that the original interview notes were destroyed and no recordings made, requiring the judicial review process to rely only on interview summaries prepared by CSIS officials.

These concerns were acknowledged, and steps were taken to address them, in the reasons of LeBel and Fish JJ. for the Court. First, it was concluded that CSIS's policy to destroy original interview notes violated the CSIS Act and that such notes are "a better source of information, and of evidence, when they are submitted to the ministers responsible for issuing a security certificate and to the designated judge who will determine whether the certificate is reasonable".⁷⁴ Retention of the notes would "make it easier to verify the disclosed summaries and information based on those notes".⁷⁵ Notably, LeBel and Fish JJ. observed that CSIS was criticized in an earlier decision of the Security Intelligence Review Committee ("SIRC")⁷⁶ after a report submitted to SIRC by the Department of Foreign Affairs was found to be inaccurate and misleading because information provided by CSIS had been inaccurate and incomplete. Justices LeBel and Fish cited this statement from paragraph 72 of the SIRC decision:

⁷³ R.S.C. 1985, c. C-23.

⁷⁴ *Charkaoui No. 2*, *supra*, note 72, at para. 39.

⁷⁵ *Id.*

⁷⁶ *Bhupinder S. Liddar v. Deputy Head of the Department of Foreign Affairs and International Trade and Canadian Security Intelligence Service*, File No. 1170/LIDD/04 (June 7, 2005), at para. 72.

The issue of what was said during security screening interviews is a perennial source of argument in the course of the Review Committee's investigation of complaints. Complainants frequently allege that the investigator's report of their interview is not accurate: that their answers are incomplete, or have been distorted or taken out of context.⁷⁷

Second, LeBel and Fish JJ. concluded that, although CSIS was not a police agency, it was subject to a duty of disclosure going beyond mere summaries of information relevant to security certificate proceedings. Such proceedings were not criminal trials but, given that "[t]he consequences of security certificates are often more severe than those of many criminal charges", the procedural fairness requirements under section 7 required "a procedure for verifying the evidence adduced against [the individual]"⁷⁸ centring on review by the designated judge. According to LeBel and Fish JJ.:

... If the original evidence was destroyed, the designated judge has access only to summaries prepared by the state, which means that it will be difficult, if not impossible, to verify the allegations. ...

As things stand, the destruction by CSIS officers of their operational notes compromises the very function of judicial review. To uphold the right to procedural fairness of people in Mr. Charkaoui's position, CSIS should be required to retain all the information in its possession and to disclose it to the ministers and the designated judge. The ministers and the designated judge will in turn be responsible for verifying the information they are given. ...⁷⁹

Lastly, LeBel and Fish JJ. linked these findings to the Court's conclusion regarding closed proceedings in the first *Charkaoui* decision, that "[d]espite the judge's best efforts to question the government's witnesses and scrutinize the documentary evidence, he or she is placed in the situation of asking questions and ultimately deciding the issues on the basis of incomplete and potentially unreliable information".⁸⁰ This supports the view expressed in the present article that the first *Charkaoui* decision also acknowledges, even if only implicitly, the unique dependency of the judge on executive officials in closed proceedings and the corresponding weaknesses of adjudication in the face of secret evidence.

⁷⁷ *Charkaoui No. 2, supra*, note 72, at para. 40.

⁷⁸ *Id.*, at paras. 54 and 56.

⁷⁹ *Id.*, at paras. 61-62.

⁸⁰ *Id.*, at para. 60 quoting *Charkaoui*, [2007] S.C.J. No. 9, [2007] 1 S.C.R. 350, at para. 63 (S.C.C.).

