

**In Search of Balance:
Must Canadians Choose Between Security & Freedom?**

By

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ABSTRACT

The problem this work will examine is the democratic deficit that currently exists in Canada in relation to oversight of the national security program. It is argued that the bodies tasked with monitoring security and intelligence activities are incapable of acting as an effective check on state power due to persistent under-resourcing and the absence of authority to issue binding recommendations. This project will present a legislative based oversight model that has the capacity to mitigate the risk posed by counter-terrorism investigations. As confidence in the existing oversight framework has been severely eroded as a result of the mishandling of the investigation involving Maher Arar it is clear the time has come to establish an accountability regime capable of ensuring that agencies are conducting security operations in a manner in harmony with the rule of law and international human rights standards.

Keywords: Canada; national security; oversight; civil rights; terrorism.

DEDICATION

To my mother who, like so many members of the Irish community in Britain, worked tirelessly to bring her children to North America where their potential could be realized and their ethnicity would be viewed as an asset rather than a liability. Her tenacity and foresight and above all her love of her culture continues to be an inspiration to her children and grandchildren.

"It is not those who can inflict the most, but those that can suffer the most who will conquer."

Terence MacSwiney
Lord Mayor of Cork
1879-1920

"The very word "secrecy" is repugnant in a free and open society; and we are as a people inherently and historically opposed to secret societies, to secret oaths and to secret proceedings. We decided long ago that the dangers of excessive and unwarranted concealment of pertinent facts far outweighed the dangers which are cited to justify it...Even today, there is little value in insuring the survival of our nation if our traditions do not survive with it."

John Fitzgerald Kennedy
35th President of the United States
1917-1963

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Many thanks to my sister and two brothers who have always been there for me with encouragement and humour.

LIST OF ABBREVIATIONS AND ACRONYMS

ACLU	American Civil Liberties Union
ATA	Anti-Terror Act
CBSA	Canada Border Services Agency
CIA	Central Intelligence Agency
CID	Criminal Intelligence Division
CSIS	Canadian Security Intelligence Agency
DHS	Department of Homeland Security
FBI	Federal Bureau of Investigation
FLQ	Front de libération du Québec
GAO	U.S. Government Accountability Office
ICE	Immigration and Customs Enforcement
ICRA	Independent Complaints and National Security Review Agency
INSET	Integrated National Security Enforcement Team
IOB	Intelligence Oversight Body
IRA	Irish Republican Army
ISC	Intelligence and Security Committee
OMB	Office of Management and Budget
PFIAB	President's Foreign Intelligence Advisory Board
PSEPC	Public Safety and Emergency Preparedness Canada
RCMP	Royal Canadian Mounted Police
RUC	Royal Ulster Constabulary
SIRC	Security Intelligence Review Committee
TRIP	Traveler Redress Inquiry Program
U.S	United States of America
U.K	United Kingdom

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INTRODUCTION

The events of September 11, 2001 have cast a long shadow over the first decade of the 21st century. Not since Pearl Harbor had such an audacious attack been executed on the soil of a nation in the northern hemisphere. Far from being an aberration, the years following 2001 have seen numerous spectacular strikes against western targets. At regular intervals Al Qaeda-inspired groups have unleashed terror on populated capitals. Most notably against the transit systems of Madrid and London. Understandably these deadly attacks, designed to cause large-scale civilian casualties, has led to an unprecedented sense of insecurity amongst the populace of western nations.¹ Public opinion polls consistently find that fighting terrorism is identified as a priority for government. Accordingly governments of all stripes are under tremendous pressure to respond in a manner that reassures their citizens and international partners that its nation's security infrastructure is capable of detecting and foiling terrorist plots.

Even though Canada has not been forced to endure the horror of a large-scale terrorist attack on its soil it is not immune to this new preoccupation with national security. Within weeks of September 11th, Parliament passed the Anti-Terror Act (ATA), which conferred sweeping new investigative and detention powers on police. Almost overnight Canada's national security policy was transformed. Possibly the

¹ Angus Reid, "Britons Most Fearful of a Terrorist Attack," *Angus Reid Global Monitor*, (August 27, 2007). http://www.angus-reid.com/polls/view/britons_most_fearful_of_a_terrorist_attack/ (accessed December 7, 2008)

single greatest change was the reemergence of the Royal Canadian Mounted Police (RCMP) as a significant player in the national security arena. For the first time since the findings of the McDonald Commission² inspired the transfer of much of its national security mandate to the newly formed Canadian Security Intelligence Service (CSIS) the RCMP saw its counter-terrorism budget undergo an enormous expansion.³ The RCMP, however, was not the only agency to see its national security duties grow. Virtually every agency with a nexus to travel, borders management, and immigration saw national security issues jump to the top of their mandates.⁴ Despite criticism from high profile members of the legal community and non-governmental organizations that Canada's new expansive approach to counter-terrorism was reactive and ill thought out, the legislation passed into law less than two months after being introduced by Anne McClellan.⁵

The one thing noticeably absent from all this policy review and legislative change was a serious consideration of whether existing oversight mechanisms were sufficient given the unprecedented expansion in the national security infrastructure. Currently the network of agencies mandated to engage in counter-terrorism activities

² In 1977 the McDonald Commission was convoked to examine allegations that the RCMP Security Service may have been involved in illegal activities. In 1981 the McDonald Commission issued its final report which contained the recommendation that a civilian security service separate from the RCMP should be created. Also recommended was the establishment of a separate civilian review body empowered to examine the civilian agency's activities. For further reading visit <http://www.csars-sirc.gc.ca/abtprp/ogsogc-eng.html> (accessed December 7, 2008).

³ Stephen J. Toope, "Fallout from '9-11': Will Security Culture Undermine Human Rights?" *Saskatchewan Law Review*, 65, no.2 (2002): 285.

⁴ Department of Finance Canada, *Budget 2001 - Enhancing Security for Canadians*, (2001): 4-7. <http://www.fin.gc.ca/budget01/pdf/bksece.pdf> (accessed October 6, 2008)

⁵ Parliament of Canada, "Status of the Bill – Bill C-36," *LEGISinfo: 37th Parliament-1st Session*, (Last updated December 3, 2008) <http://www.parl.gc.ca/LEGISINFO/index.asp?Language=E&Chamber=N&StartList=A&EndList=Z&Session=9&Type=0&Scope=I&query=2981&List=stat> (accessed December 8, 2008).

are subject to a patchwork of oversight processes that engage in varying degrees of scrutiny. While the dominant players, the RCMP and CSIS, are monitored by external review mechanisms, some like Canada Border Services Agency,⁶ Foreign Affairs Canada,⁷ the Communications Security Establishment Canada and Transport Canada⁸ are not subject to any kind of systematic oversight. External scrutiny for these agencies comes in the less predictable form of court challenges and audits conducted by the Office of the Auditor General.

Equally problematic is that little of the activity of oversight bodies or the information they review is accessible to the public given the perceived need for secrecy when dealing with national security matters. While investigations and hearings convoked to examine complaints against the RCMP take place in public, the past and present chairperson of the Commission for Public Complaints Against the RCMP have voiced frustration with the Force's repeated failure to provide the complaints body with the complete record of investigations.⁹ In contrast, the Security Intelligence Review Committee (SIRC) has complete access to all information held by CSIS but cannot convoke public hearings. The only characteristic all Canadian oversight agencies share is that none are empowered to issue binding corrective

⁶ Canada Border Services Agency national security role is outlined on its website: <http://www.cbsa-asfc.gc.ca/agency-agence/what-quoi-eng.html> (accessed October 6, 2008)

⁷ Foreign Affairs Canada, *Department of Foreign Affairs and International Trade: Report on Plans and Priorities 2007-2008*, (2007): 28-58. http://www.international.gc.ca/assets/about-a_propos/pdf/fait-aeci_e.pdf (accessed October 6, 2008)

⁸ Transport Canada, *Passenger Protect*, (2007), <http://www.passengerprotect.gc.ca/home.html> (accessed October 6, 2008)

⁹ Senate of Canada, *Proceedings of the Special Senate Committee on the Anti-terrorism Act, Issue 8 - Evidence - Afternoon Meeting, (April 18, 2005)* http://www.parl.gc.ca/38/1/parlbus/commbus/senate/Com-e/anti-e/08evb-e.htm?Language=E&Parl=38&Ses=1&comm_id=597 (accessed October 6, 2008)

recommendations if abuses of authority or inadequacies in policy or procedure are discovered.¹⁰

This lack of attention to the efficacy of oversight structures is surprising given the prominence that protection of civil liberties is given in the policy statement the Federal Government created to guide its national security program. *Securing an Open Society: Canada's National Security Policy*, released in 2004, states that a corner stone of the nation's approach to national security protection is a commitment to individual rights:

The first-ever policy of its kind in Canada, *Securing an Open Society* adopts an integrated approach to security issues across government. It employs a model that can adapt to changing circumstances over time. It has been crafted to balance the need for national security with the protection of core Canadian values of openness, diversity and respect for civil liberties.¹¹

As no changes were made to how oversight was conducted it is difficult to comprehend what the policy statement is referring to when it states that Canada's expanded national security model was "crafted" in such a way as to ensure that rights and freedoms are protected. As there is no entity or process charged with monitoring the impact this upsurge in counter-terrorism activity has on fundamental

¹⁰ Tim Riordan Raaflaub, *Civilian Oversight of the RCMP's National Functions*, (December 13, 2006): 5-6, <http://www.parl.gc.ca/information/library/PRBpubs/prb0409-e.pdf> (accessed October 6, 2008)

¹¹ Privy Council Office, *Securing and Open Society: Canada's National Security Policy*, (2004): vii, http://www.pco-bcp.gc.ca/docs/information/Publications/natsec-secret/natsec-secret_e.pdf (accessed October 6, 2008)

rights and freedoms we have no way of effectively assessing if the Government of Canada is balancing the need to protect national security and civil liberties.

One of the most significant problems with the current oversight regime for national security activities is that it is very atomized and produces little substantive commentary on civil liberties. The oversight agencies tasked with monitoring the RCMP and CSIS submit annual reports to parliament through the Minister of Public Safety. The annual reports offer little more than brief descriptions of cases that resulted in a public complaint and a very general overview of the agency's workload for that year. The lack of detail in reports submitted by the SIRC make it virtually impossible to seriously evaluate whether the operations of the CSIS have posed a threat to individual rights. The annual reporting of the Commission for Public Complaints Against the RCMP is primarily focused on overt examples of problematic behaviour such as allegations of excessive use of force or such operational issues as the quality of the RCMP's internal investigations. A perusal of the reports contain no evidence that capacity exists at the Complaint Commission to conduct a nuanced assessment of whether the Force's national security program is constituted in such a way as to protect or threaten Canada's core values. Moreover, the current chair, Paul E. Kennedy, makes it very clear in the most recent annual report to Parliament that the Commission, with its \$5.1 million budget, desperately lacks the resources to perform the most basic oversight duties of the Force's 26,000 employees and 4

billion dollar annual operating budget.¹² A similar resource disparity is very much apparent at SIRC. In its 2006-2007 report the commission disclosed that it was staffed by five committee members and twenty employees. In the same year its operating budget was just under three million dollars.¹³ In contrast, the CSIS annual budget for the same period was 356 million dollars and the agency employed 2449 people.¹⁴ While no one associated with SIRC has publicly commented on whether the Committee's efficacy is limited by a lack of resources there can be little doubt that its capacity to monitor the activities of more than two thousand people must be circumscribed by its staffing levels and funding.

While the inadequacies of oversight have been discussed in academic circles for some time the issue was catapulted onto the front pages of the nation's newspapers when it became known that a Canadian citizen had been deported by the United States to a nation with a documented track record of inflicting torture on detainees.¹⁵ A commission of inquiry¹⁶ into the matter concluded that information gathered by the Government of Canada most likely contributed to the decision to declare him inadmissible to US territory. The perception of Canada as a leading proponent of human rights was seriously tarnished by the allegations that the RCMP and CSIS

¹² Commission for Public Complaints Against the Royal Canadian Mounted Police, "2006-2007 Annual Report," (2007):16, http://www.cpc-cpp.gc.ca/app/DocRepository/1/PDF/AR2007_e.pdf (accessed October 6, 2008)

¹³ Security Intelligence Review Committee, *Annual Report 2006-2007*, 57-59, http://www.sirc-csars.gc.ca/pdfs/ar_2006-2007-eng.pdf (Accessed October 6, 2008)

¹⁴ Canadian Security Intelligence Service, *Public Report 2006-2007*, 15 & 18, <http://www.csis-scrs.gc.ca/pblctns/nnlrprt/2006/rprt2006-eng.pdf> (accessed October 6, 2008)

¹⁵ United States Department of State, "Syria," *Country Reports on Human Rights Practices 2004* (February 8, 2005), <http://www.state.gov/g/drl/rls/hrrpt/2004/41732.htm> (accessed December 7, 2008).

¹⁶ On January 28, 2004 the Government of Canada established the Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar. Dennis O'Connor, Associate Chief Justice of Ontario, was appointed to head the Commission of Inquiry. The official report was released on September 18, 2006.

played a role in the mislabeling of Maher Arar as an Islamic extremist; thus, branding him a threat to western nations and bringing him squarely into the sights of our southern neighbour's existential war on terror. Much can be gleaned from the report of *The Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar* but one of the most glaring issues to emerge is that the agencies mandated to secure Canada's national security are not constrained by any clear guidelines or accountability frameworks concerning their responsibility to protect individual rights.

The situation could be dramatically improved if a single entity existed that possessed the capacity and authority to scrutinize all aspects of the operation of Canada's security and intelligence agencies. As weaknesses in the existing civilian oversight bodies have been made apparent by their inability to prevent the serious mishandling of the investigation involving Maher Arar it is clear the time has come to establish an accountability regime capable of ensuring that federal agencies are conducting operations in a manner in harmony with the vision set out in *Securing an Open Society*. If confidence is to be restored oversight must be constituted in such a manner that there is no uncertainty regarding its legislative authority to gain access to government record and witnesses. The only institution in Canada that has equal legal and moral authority to the nation's police force and intelligence service is Parliament. Given the vast resources of the federal agencies tasked with safeguarding national security, when compared to the oversight agencies, it is highly unlikely the Harper, or any subsequent, government will expand the budgets to the degree necessary to close the massive gap. Moreover, a resource infusion would do

little to address the oversight bodies lack of political capital which currently mitigates their ability to set standards for their target agency's operations. Only a parliamentary-based oversight committee with the power to enforce its recommendations can dramatically alter this crippling power differential.

As the O'Connor Inquiry has brought the national security program's impact on human rights and civil liberties to the fore the committee should produce an annual report card that specifically assesses the nation's security agencies conduct in regards to the fostering of Canada's core values. Undoubtedly such reports would be widely covered in the media and may prove effective at combating what appears to be a troubling dismissiveness regarding the protection of civil liberties when matters of national security are at play. One need only consider the broad coverage of Amnesty International's annual State of the World's Human Rights Report to appreciate the exposure such reporting invariably garners. There can be little doubt that agencies and their political masters would be loath to be subject to negative scrutiny in a document of this type. The independent oversight bodies should continue to operate on the micro level focusing their limited resources on handling public complaints and conducting mediation. Any complaint involving civil liberty or human rights issues should be referred to the parliamentary body for scrutiny.

CHAPTER 1: WHY DOES CANADA NEED A ROBUST NATIONAL SECURITY PROGRAM

Even though it has become banal to refer to Al Qaeda's attack on the United States of America in 2001 as a watershed event it is an inescapable fact that 9/11 changed everything. While Canada has often been the recipient of unflattering characterizations of its fiscally conservative approach to defence and international security commitments, after 9/11 such reprobations carried a more ominous tone. In the aftermath of the catastrophic strike on the United States none of its allies wanted to be seen as being weak concerning national security enforcement. The Bush administration buoyed by an outpouring of international support sent distinct signals to countries it did not believe were giving the war on terror the attention it required. Canada as the United State's closest neighbour and ally was expected to give continental security the highest priority. An undercurrent in American rhetoric, that many found unmistakable, was the notion that if Canada did not get tough on security risks the United States may have to play a more expansive role as continental protector.¹⁷ This new era was heralded by President Bush's now famous statement just days after the attacks "...Every nation, in every region, now has a decision to make. Either you are with us, or you are with the terrorists..."¹⁸ Many interpreted the glaring omission of Canada later in the same speech's lengthy list of

¹⁷ Stuart Farson, "What has been the impact of the Anti-Terrorism Act on Canada?" *The Views of Canadian Scholars on the Impact of the Anti-Terrorism Act*, (March 31, 2004), http://www.justice.gc.ca/eng/pi/rs/rep-rap/2005/rr05_1/a_03.html (accessed October 6, 2008)

¹⁸ George W. Bush, "Address to a Joint Session of Congress and the American People," (September 20, 2001), <http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html> (accessed October 6, 2008)

countries thanked for their support as a not too subtle message to the Liberal Government that it was not demonstrating the right degree of commitment to security. Fears for Canada's sovereignty over its own national security program and the economic impact of a fortified northern border led to a heightened sense of urgency in Ottawa regarding the necessity to project the correct level of concern and vigilance.¹⁹ Accordingly, Canada introduced an unprecedented number of border security programs and counter-terrorism initiatives.

Possibly the most overt sign to the United States that Canada was willing to see things the American way was the Martin Government's reconfiguration of Canada's national security infrastructure to mirror its counterpart in the United States. First came the creation of the behemoth Public Safety and Emergency Preparedness Canada (PSEPC) that bore more than a passing resemblance to the newly formed Department of Homeland Security. Next came the amalgamation of immigration and customs intelligence and enforcement with the creation of the Canada Border Services Agency (CBSA). This move seems to have been inspired by the formation of the Immigration and Customs Enforcement (ICE) agency. The decision to create the CBSA appeared to have more to do with allaying American fears than improving information sharing and border security as its creation came at a time when the media was full of commentary concerning the severe growing pains experienced by

¹⁹ Reg Whitaker, "Keeping up with the Neighbours? Canadian Responses to 9/11 in Historical and Comparative Context," *Osgoode Hall Law Journal*, 41, no.2&3 (2003): 252.

ICE and how integration failed to appreciably improve inter-agency communication or border enforcement.²⁰

Canada was not only facing considerable pressure from its continental counterpart but also from international partners. Within weeks of the attack on the United States the United Nations Security Council unanimously passed Resolutions 1368²¹ and 1373²² which called upon member states to immediately act to meet international standards in the realm of legislation designed to combat those who facilitate and/or perpetrate acts of terror and the fundraising so essential to its execution. The latter was of particular relevance to Canada as it did not have any legislation that specifically criminalized fundraising in support of terrorist entities. The absence of criminal sanction for financing activities had often been cited by commentators as support for the characterization of Canada as an operational base for terror groups. The importance of uniformity of response to terrorism related offences was raised by internationally recognized terrorism expert, Paul Wilkinson, before a Senate committee reviewing the ATA when it was still known as Bill C-36. Wilkinson put forth the view that the United Nation's anti-terror resolutions were designed to frame acts of terror in the same way as crimes against humanity. As terrorism at its core is an attack on the most basic of all human rights, the right to life, it was important that

²⁰ Jason Peckenpaugh, "The Ties that Bind," GOVEXEC, November 15, 2003, http://www.govexec.com/story_page.cfm?filepath=/features/1103/1103s4.htm (accessed October 6, 2008).

²¹ United Nations Security Council, "Resolution 1368," (September, 2001), <http://daccessdds.un.org/doc/UNDOC/GEN/N01/533/82/PDF/N0153382.pdf?OpenElement> (accessed October 6, 2008).

²² United Nations Security Council, "Resolution 1368," (September, 2001), <http://daccessdds.un.org/doc/UNDOC/GEN/N01/533/82/PDF/N0153382.pdf?OpenElement> (accessed October 6, 2008).

all countries ensure that their legislative frameworks respond in a uniform manner to terrorism to forcefully convey that employing violence to realize political goals is universally regarded as unacceptable. Canada's proposed legislation, according to Wilkinson, was necessary in order to bring the nation into line with its international counterparts.²³ Here too, in the international sphere, Canada was faced with the choice of demonstrating solidarity with external partners or be viewed as a state falling behind in the realm of counter-terrorism. It was in this charged atmosphere that the Government forged its strident legislative approach to combating terrorism which included the introduction of the *Proceeds of Crime and Terror Financing Act* and the *Anti-terrorism Act*, with legal measures previously unknown in Canada like preventative arrests and investigative hearings.²⁴

While some analysts believe that Canada's far-reaching policy response to September 11th was largely due to the external pressures discussed above a case can be made that the existing approach to counter-terrorism was outdated and in need of revision and this fact was also an important policy driver. In his much quoted collection of essays regarding the Anti-Terrorism Act, Kent Roach makes the argument that Canadian criminal law was far from short on offences that made acts associated to terrorism illegal.²⁵ While this is most certainly true the problem some legal scholars have identified with the pre-9/11 legal regime is that it was designed,

²³ Paul Wilkinson, *Testimony Before the Special Senate Committee on the Subject Matter of Bill C-36*, (October 24, 2001): 46, <http://www.law.utoronto.ca/c-36/october24.pdf> (Accessed October 6, 2008).

²⁴ Kent Roach, "Untitled," *Views of Canadian Scholars on the Impact of the Anti-Terrorism Act*, Ed. Thomas Gabor (March 31, 2004), http://www.justice.gc.ca/eng/pil/rs/rep-rap/2005/rr05_1/a_05.html (accessed December 7, 2008).

²⁵ Kent Roach, "The New Terrorism Offences and the Criminal Law," *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill*, (2001):152

like most criminal law, to come into play after the crime had taken place. Obviously in the case of terrorism government has a responsibility to forge a legal response that is proactive rather than just reactive. It is this reactivity that David Paciocco, professor of law at the University of Ottawa, cites as a central weakness in relying on criminal code offences for murder and criminal conspiracy when combating terrorism. Paciocco asserts that it was inevitable that Canada would pass legislation like the Anti-Terrorism Act. Like Wilkinson, Paciocco cites the fact that for some time before 9/11 terrorism was widely seen as a global problem and discussion of establishing international standards for terror legislation was well underway before 2001 and the events of that year simply sped the process along.²⁶ Paciocco does not believe that the ATA was superfluous legislation introduced to solely address an image problem but "Its focus on association, planning, assistance, financing, espionage, investigative method, and on the protection of investigations by preventing the disclosure of some information, was both predictable and inevitable."²⁷

In addition to opposing the ATA on the grounds that it needlessly infringes Charter rights, Kent Roach also offers a more philosophical argument that sees the legislation placing Canadian sovereignty at risk. With ample references to George Grant's *Lament for a Nation*, Roach expresses regret that Canada chose to demonstrate deference to the United States rather than forging a Canadian

²⁶ David Paciocco, "Constitutional Casualties of September 11: Limiting the Legacy of the Anti-Terrorism Act," *Supreme Court Law Review*, 16, no.2 (2002):186-187.

²⁷ *Ibid.*, 187.

response to terrorism that is distinctive and measured.²⁸ What the analysis of Wilkinson and Paciocco cogently point out is that it would be difficult for Canada to forge an independent path in the area of terrorism, as it is a transnational phenomenon that requires an integrated approach that ensures that no country inadvertently becomes a safe haven due to legislative shortcomings. Also problematic is Roach's assumption that a distinctive Canadian approach would necessarily be moderate. A consideration of how Canada has reacted to threats to national security throughout its history does not support this notion. Reg Whitaker examined Ottawa's response to security risks since 1940 and concluded that a characteristic Canadian approach is anything but moderate. Canada has invariably reacted forcefully to security risks with few restraints. When Igor Gouzenko revealed that a spy ring controlled by the Soviet Union was operating in Canada the government of the day was quick to react. Empowered by a secret Order in Council issued under the authority of the *War Measures Act* the police entered homes without warrant, detained suspects without charge, and conducted interrogations without counsel. Detainees were then brought before a secret tribunal and told that they must answer all questions. The tribunal failed to also advise that the law protected them against self-incrimination. The detained were then turned over to the courts for trial. All those who had incriminated themselves before the tribunal were found guilty while those who resisted were acquitted. The next significant security crisis arose in the 1970s with the kidnappings of British Trade Commissioner James Cross and Quebec Labour Minister Pierre Laporte by the violent separatist group Le

²⁸ Kent Roach, *September 11: Consequences for Canada*, (Montreal: McGill-Queen's University Press, 2003), 22-25. Kent Roach, "Did September 11 Change Everything? Struggling to Preserve Canadian Values in the Face of Terrorism", *McGill Law Journal*, 47, (2002): 893.

Front de Liberation du Quebec. Once again the government sought extraordinary powers through the War Measures Act. Martial law was declared in Quebec and searches without warrants began as did detentions and interrogations without charges. As in the Gouzenko affair right to counsel was ignored. In the aftermath of the crisis the RCMP and the Quebec and Montreal police continued the battle against those within the separatist movement they believed would resort to violence. Subsequent commissions of inquiry, most notably the McDonald Commission, found the tactics employed abusive and, in some instances, not legally supported. These findings ultimately led to the removal of the Security Service from the RCMP and the creation of the CSIS with a very specific legal mandate. As neither of these two incidents had a significant American component the manner in which Ottawa reacted cannot be seen as dependent on external variables or pressures.²⁹ When we view the response to 9/11 in this historical context one can actually say that Ottawa's response was uncharacteristically measured. As in the past Parliament reacted to a threat by seeking to enhance the state's legal powers but it then broke from tradition by refraining from dramatically exercising its new found might. The extraordinary powers which caused such concern on the part of civil libertarians have, to date, never been used.

Finally, with the emergence of a powerful extremist movement, like Al Qaeda, with its glorification of murder suicide, it must be realized that laws punishing terrorism have no deterrent value for its followers. In the face of such nihilism anti-terror laws cannot be simply reactive but must confer upon law enforcement the authority to act

²⁹ Whitaker, 242-251.

decisively before an attack is carried out. Accordingly the new legislation introduced a variety of new investigative powers designed to allow police to preempt rather than merely respond. Furthermore the ATA clearly defined what constitutes criminal conspiracy in relation to facilitation of acts of terror. In this way the new terror legislation fills a gap in the criminal code that allows not only for the disruption of a particular attack but the dismantling of a support structure that if left unaddressed could simply move elsewhere and continue to threaten lives with future plots.

Of course opponents to the Anti-Terrorism Act and the attendant expansion of security related activities have sought to counter legal arguments like those offered in the last section by stating that expansive laws to combat terrorism went too far as Canada's reputation as a base of operations for terrorist groups is greatly exaggerated. This view is rejected by many of the nation's leading security specialists. In 1998 the Director of CSIS, Ward Elcock, garnered extensive media coverage when he declared before a senate committee that his agency was investigating the activities of fifty terrorist groups and 350 individuals. Elcock went on to say "...With perhaps the singular exception of the United States, there are more international terrorist groups active [in Canada] than any other country..."³⁰ Some may think the CSIS director has a vested interest in putting forth a perception of Canada as a country rich in targets for his agency. However, Elcock's view is supported by noted academic commentators on security like Wesley Wark,

³⁰ Canadian Security Intelligence Service, "Submission to the Special Committee of the Senate on Security and Intelligence by Ward Elcock, Director of the Canadian Security and Intelligence Service," (June 24, 1998), <http://www.csis.gc.ca/nwsrm/spchs/spch24061998-eng.asp> (accessed October 6, 2008)

professor of international relations at the University of Toronto, and Martin Rudner, former director of Carleton University's Canadian Centre of Intelligence and Security Studies. When asked to comment on Elcock's statement, Wark offered the following: "We have an 'alphabet soup' of terrorist organizations in Canada...There are Tamil Tigers in Toronto, and a variety like bin Laden's Al Qaeda, Hisbullah, and Hamas in both Toronto and Montreal."³¹ In 2002 Rudner succinctly summarized the importance of Canada as a base of operations for international terrorist groups:

Terrorist organizations typically maintained a presence in Canada in order to raise and transfer funds, to create false identities for operatives, to procure weaponry and material, to set up operational sanctuaries, and to support infiltration across the border to the United States or overseas. Local cells of groups like Al-Jihad engaged in financial fraud and theft, identity and document forgery, and people smuggling in support of their parent terrorist networks. Some terrorist groups, like the Liberation Tigers of Tamil Eelam, became extensively involved in criminal racketeering to generate financing for their insurgency war in Sri Lanka. Terrorist criminal syndicates were active in drug trafficking, immigrant smuggling, commercial fraud, and extortion from homeland residents in this country and elsewhere.³²

Of course Canada's experience with terrorism also goes beyond the operational support outlined by Rudner. Prior to 9/11 one of the world's deadliest terrorist attacks was planned and executed on Canadian soil. In 1985 members of the Sikh

³¹ Mark Clayton & Gail Russell Chaddock, "Terrorists Aided by a Leaky US-Canada Line," *Christian Science Monitor*, (Sept 19, 2001), <http://www.csmonitor.com/2001/0919/p3s1-woam.html> (accessed October 6, 2008)

³² Martin Rudner, "The Globalization of Terrorism: Canada's intelligence response to the post September 11 threat environment," *Canadian Issues*, 24 (September 2002), <http://proquest.umi.com.proxy.lib.sfu.ca/pqdlink?index=1&did=345523761&SrchMode=1&sid=2&Fmt=3&VInst=PROD&VType=PQD&RQT=309&VName=PQD&TS=1214890740&clientId=3667> (accessed October 6, 2008)

extremist group, Babbar Khalsa, placed bombs on two Air India jetliners as a reprisal for India's assault on the Golden Temple of Amritsar. Even after the much publicized trial and inquiry it is not uncommon to come across discussion of terrorism in Canada that claims the country does not have a significant record of being targeted by terrorism. Those responsible for the bombing of Air India 182 did not simply plan a bombing on Canadian soil but directly attacked Canada, as 280 of the 329 casualties were citizens of this country.³³ More recently, nineteen men in Toronto were arrested for allegedly plotting to execute an Al Qaeda inspired multiple attack scenario against Canadian institutions. While a verdict has yet to be delivered it appears that the plotters had the intent and a viable plan to acquire the means to conduct attacks in Canada. Taped conversations just released in court record two of the accused discussing detonator specifications and weapons acquisition.³⁴ Finally, the numerous statements credited to Osama bin Laden naming Canada as a justified target given its deployment of troops to Afghanistan must also be included when assessing the magnitude of the threat posed by Canadian based terrorist activity. Given the number of terror groups present in Canada, some of whom look to Al Qaeda for direction, and the history of attacks being planned here it is entirely reasonable that the Federal Government would seek to enhance security and provide greater protection for public safety.

³³ Canadian Broadcasting Corporation, "The Bombing of Air India Flight 182," (Sept 26, 2006), <http://www.cbc.ca/news/background/airindia/bombing.html> (accessed October 6, 2008).

³⁴ Colin Freeze & Dakshana Bascaramu, "Tapes expose tension amongst terror suspects," *National Post*, (June 5, 2008), <http://www.theglobeandmail.com/servlet/story/LAC.20080605.TERROR05/TPStory/TPNational/Ontario/> (accessed October 6, 2008).

As the consequences of terrorism are so devastating to victims and the national psyche of affected countries, security policing and related intelligence gathering is an essential aspect of a properly functioning state apparatus. At the same time such activities are invariably intrusive and secretive. When combating terror, agencies must employ such tools as surveillance, covert operations, source recruitment, and wiretapping. Without appropriate checks and balances the use of such techniques can undermine the democratic principles Canadians not only hold in high regard, but also assume will guide all aspects of the federal government. For citizens to accept the expansive powers accorded to security agencies they must be assured that they are under the firm control of the democratic institutions designed to check state power. While it is not difficult to argue that national security agencies, like the RCMP and CSIS, are performing a necessary function it is less certain whether they consistently operate in a manner consonant with democratic norms and standards.

CHAPTER 2: WHEN COUNTER-TERRORISM PROGRAMS GO TOO FAR - THE EXPERIENCE OF GREAT BRITAIN AND THE UNITED STATES OF AMERICA.

The unfortunate truth about the threat posed by terrorism is that it invariably elicits a visceral reaction from both the public and those who are tasked with its prevention. Politically it can be devastating for a government to be perceived as standing by while citizens are maimed or murdered. Similarly, it can be ruinous to the career of members of the police or intelligence services if they fail to recognize the threat or were out maneuvered by an extremist group. The pressure cooker environment those tasked with terrorism prevention work within was forcefully captured by a chilling Irish Republican Army (IRA) communiqué released after the group's plan to blow up a hotel in Brighton, housing the entire British cabinet, was thwarted: "Today we were unlucky. But remember; we only have to be lucky once. You have to be lucky always."³⁵ As a consequence of the pressure, so succinctly communicated by the IRA, counter-terrorism investigations are a unique policy and operational environment where failure can prove deadly.

As Whitaker's analysis conveyed Canada's sporadic experiences with terrorism have demonstrated the fragility of the nation's commitment to human rights and civil liberties in a time of crisis. With the Maher Arar incident it seems clear this commitment remains as tenuous as it was in the 1950s and the 1970s. What is less

³⁵ J.F.O McAllister, "London Gets Lucky," *Time*, (July 24, 2005), <http://www.time.com/time/magazine/article/0,9171,1086106-2,00.html> (accessed October 6, 2008).

clear is how Canada would fare if it were forced to endure a prolonged period of domestic insecurity. Was the immoderate official response to the Gouzenko Affair, the FLQ Crisis, and the Arar investigation due to the exceptional circumstances an untested security infrastructure found itself in or is there something more complex at play that must be countered by a system of safeguards? Most Canadians probably believe, like Kent Roach, that Canada would forge a distinctive approach tempered by a respect for the rule of law and human rights if faced with an ongoing public safety crisis. As we cannot look to history to determine how Canada would behave over time we must look to the experience of two close allies for insight. As the political and legal institutions of Great Britain and the United States of America are guided by the same liberal democratic principles as Canada's they are obvious choices for a case study of the toll threats to national security can take on rights conscious states.

Britain Responds to the Troubles in Northern Ireland

A consideration of Great Britain's thirty-year battle with Irish Republican Army produces a litany of egregious human rights abuses all done in the name of public safety and national security. What started as a civil rights movement in 1968 quickly sparked three decades of violence that came to be known as the Troubles. Decades of frustration with what they viewed as institutionalized discrimination led the nationalist community, drawn from the Roman Catholic minority, to initiate a campaign of civil disobedience. Within a year nationalists and unionists began to regularly stage rival demonstrations and parades. Invariably violence ensued and the Royal Ulster Constabulary (RUC) proved hopelessly ill equipped to restore public

order. Moreover, when the smoke cleared the vast majority of injuries, arrests, and costs associated to property damage were inflicted on the nationalist community. This added fuel to the fire of the nationalist campaign for equality. With each violent episode it became increasingly clear to the Northern Ireland Government at Stormont that the RUC lacked the training and resources to reverse the downward spiral of violence gripping Ulster. A sense of a building crisis took hold in government circles and led to a series of disastrous decisions that would ultimately create the most serious threat to British national security since the German Blitz of World War II.³⁶

As the situation worsened the Stormont government decided to request that the British government deploy troops to Northern Ireland. At first this development was welcomed in Roman Catholic areas as they saw themselves as being under siege from unionist groups and did not trust the RUC to protect them and their property. The fact that General Frank Kitson was placed in charge was viewed positively as he had authored military strategy documents emphasizing the importance of winning the hearts and minds of those engaged in violence.³⁷ Furthermore the British government was pushing Stormont to deliver a reform program to address the concerns of the nationalists.³⁸ The goodwill evaporated almost instantly as a shocked population found that in spite of all the discussion of a political solution the security strategy for Northern Ireland was to be dominated by the military. The British army strictly enforced a curfew, searched Catholic neighbourhoods, established no-go

³⁶ David McKittrick and David McVea, *Making Sense of the Troubles*, (Belfast: The Blackstaff Press, 2000), 53-55.

³⁷ Steve Hewitt, *The British War on Terror*, (London: Continuum Books, 2008), 16.

³⁸ McKittrick and McVea, 61.

areas in Belfast and Londonderry and deployed engineers to create impassable craters at the border crossings with the Republic of Ireland. Catholic areas became increasingly isolated as barriers were erected and public transit service broke down. In addition to establishing strict military control of urban areas, Kitson created an intelligence network that aggressively recruited informers. This would come to be considered one of the most controversial aspects of Britain's military presence in Northern Ireland.³⁹

Prior to the militarization of Britain's response to civil unrest the Irish Republican Army had little support amongst the Catholic population of Northern Ireland. Membership was small and the group was viewed as a fringe element of the nationalist movement.⁴⁰ When the arrival of the military resulted in a greater sense of insecurity in Catholic dominated areas support for the IRA began to climb. When order was not restored the Northern Ireland government made a second ill-fated decision. On August 9, 1971 Stormont implemented an internment policy with the support of the British government. Three thousand soldiers were deployed to round up over three hundred people on suspicion they were involved in paramilitary activities. The use of internment was viewed with dismay by the British ambassador to Dublin, Sir John Peck, who wrote: "Internment attacked the Catholic community as a whole. What was worse, it was directed against the Catholics, although there were many Protestants who provided just as strong grounds for internment."⁴¹ Within a few days 105 people were released for either having nothing to do with

³⁹ Hewitt, 16-17

⁴⁰ Colin Knox and Rachel Monaghan, *Informal Justice in Divided Societies: Northern Ireland and South Africa*, (Houndmills: Palgrave Macmillan, 2002), 58.

⁴¹ McKittrick and McVea, 70.

violence or being wrongly identified. News quickly spread that the detainees were claiming that they had been subject to physical and mental abuse in custody. It was later learned the army employed an approach to questioning known as the “Five Techniques” which were based on methods used against British soldiers in the Korean War.⁴² Innocent people claiming to have been forced to wear hoods, deprived of sleep, denied food, subjected to disorienting ‘white noise’ and required to lean against a wall on their fingertips for extended periods was met with outrage and despair.⁴³ In the first six months over two thousand people were subject to internment. The Ministry of Defence denied the abuse allegations and defended its use of arrest without charges as a necessary countermeasure to IRA violence. In 1977 the Republic of Ireland brought the matter before the European Court of Human Rights and it was found that detainees were subject to inhumane and degrading treatment during internment.⁴⁴

The oppressive nature of military policing coupled with the use of internment mobilized opposition to Britain’s involvement in Northern Ireland and inspired an event that many see as one of the worst incidents of state violence against civilians. On January 30, 1972 the Northern Ireland Civil Rights Association staged a march protesting the policy of internment without trial in Londonderry. The march abruptly erupted into chaos when the Parachute Regiment moved in to control the scene and opened fire on the crowd. Thirteen people were killed and another thirteen were injured. As condemnation mounted the army claimed that the regiment came under

⁴² Hewitt, 17.

⁴³ Adrian Guelke, “The Northern Ireland Peace Process and the War Against Terrorism: Conflicting Conceptions?” *Government and Opposition*, 42, no.3, (2007): 279.

⁴⁴ McKittrick and McVea, 68

intense attack from gunmen and nail bombers. Nationalist paramilitary groups quickly denied that they took part in the protest. The fact that no soldier was injured and no weapons were recovered seemed to cast doubts on the official version of events. The coroner, Major Hubert O'Neill, concluded " '...the army ran amok that day without thinking what they were doing. They were shooting innocent people...' "

⁴⁵ Given Major O'Neill's comments it is not hard to understand why the event became known as Bloody Sunday. In four short years the nationalists had been subjected to an unprecedented level of state coercion involving tactics such as internment, coercive interrogation, and murder. As violence escalated, governments in Belfast and London increasingly set aside discussion of the political factors that sparked the conflict and began to view the situation in Northern Ireland as a public security situation best dealt with by the military. The central policy goal became the defeat of nationalist paramilitary groups. One of the most significant byproducts of this military approach to the unrest was to inspire a large number of nationalists to support and join the paramilitary movement. Rather than seeing the troops and the RUC as agents of public order, contact was to be feared and avoided. As its ranks swelled the IRA became increasingly ruthless in its assault on British targets. A British study conducted in 1980 found that 60 per cent of IRA members interviewed stated that they joined the group because of what they perceived as the humiliating treatment meted out by the British government and military. Prior to Britain's taking

⁴⁵ Knox and Monaghan, 58.

control of Northern Irish security these respondents had not been associated in any way to paramilitary groups.⁴⁶

Not only did Bloody Sunday boost IRA membership it also led the group to move its terror campaign to British soil. The group's leadership believed this change in tactics would intensify pressure on Britain to withdraw from Ulster. When the IRA began its bombing campaign in 1972 the government and police services had never faced a serious and sustained threat from terrorism on its soil. In spite of arrests and mass denunciation, the IRA continued to execute soft target attacks throughout the United Kingdom. Accordingly counterterrorism squads were set up in most major British cities. The government of Harold Wilson set about increasing police powers with the *Prevention of Terrorism Act*. Like its modern day equivalents the central enhanced power accorded to police was the power to detain without charge for seven days. Similarly, individuals could be apprehended and deported without a hearing. The legislation also gave the government the authority to outlaw membership in specific groups. This legislation remained in force until the Blair Government decided that tougher measures were needed to combat the threat posed by Al Qaeda and its affiliate groups.⁴⁷

Many of these newly formed counterterrorism squads appeared to be very effective as arrests seemed to follow attacks at a surprisingly rapid rate. In 1974 six men were arrested in Birmingham following a bomb blast at a nightclub. In the same year attacks on Guildford and Woolwich were quickly followed by the round up of four

⁴⁶ Hewitt, 18.

⁴⁷ Ibid., 19-20.

men and a support cell of seven people; as was the IRA bombing of a coach containing soldiers and their families, which resulted in the arrest of Judith Ward. The police scored a notable success again in 1982, with the apprehension of Danny McNamee who was later incarcerated for building the explosive device that killed four soldiers and seven horses of the Queen's Household Cavalry in Hyde Park.⁴⁸ For years after the subsequent convictions of the Birmingham Six, the Guildford Four, the Maguire Seven, and bomb-makers Ward and McNamee human rights groups waged campaigns contending all were wrongly convicted as a result of coerced confessions and circumstantial or worse, fabricated evidence. The use of coercion seemed particularly obvious in the case of the Birmingham Six as the accused appeared in court for their first arraignment bearing the unmistakable signs of a serious assault. The presiding judge accepted the contention of the investigating officers that the men were in that condition when they were taken off the boat train on their way to a funeral in Northern Ireland. Similarly, the courts dismissed Ward's defense that her extensive history of mental illness rendered her confession unreliable.⁴⁹

After years of public campaigns on behalf of the prisoners the tide finally turned in 1989 and the British courts began to grant leave to appeal the convictions. Over the

⁴⁸ John Steele, "Irishman Jailed for Hyde Park Bomb Plot Wins Appeal," *Telegraph*, (December 18, 1998), <http://www.telegraph.co.uk/htmlContent.jhtml?html=/archive/1998/12/18/nira18.html> (accessed October 6, 2008).

⁴⁹ Beverley Schurr, "Expert Witnesses and the Duties of Disclosure & Impartiality: The Lessons of the IRA Cases in England," (paper presented at Law, Medicine and Criminal Justice Conference, July 6-8, 1993), <http://search.aic.gov.au/search/search.cgi?collection=aic&form=simple&query=schurr>, [Last modified on January 16, 2004, 2-3]. (accessed October 6, 2008).

next nine years all of these high profile convictions were overturned. During the lengthy appeals process the courts were presented with volumes of disclosure regarding breaches of the rules governing evidence handling, gross mistreatment of prisoners and manipulation of forensic test results.⁵⁰ Clearly the pressure to respond quickly to brutal crimes that elicited a high degree of public fear and outrage seemed to fuel a sense of desperation that led the police forces involved to resort to an approach to targeting that was little more than ethnic and religious profiling.

Just as the British public was becoming aware of the litany of human rights abuses perpetrated by their domestic police services it became clear that the situation in Northern Ireland was much worse. In 1989 a commanding officer of the Cambridgeshire Constabulary, John Stevens, was tasked with examining whether there was any evidence of collusion between British security forces, the Royal Ulster Constabulary and loyalist paramilitary groups in Northern Ireland. The inquiry⁵¹ was convoked in response to reports from Northern Ireland that Loyalist groups had leaked state intelligence documents pertaining to IRA membership. This 'publication' of background documents on members of the nationalist community was allegedly done to prove that their murders, by paramilitary hit teams, were justified as they were linked to the IRA by the British government. Clearly a serious security breach had occurred if members of Loyalist groups had secured access to top-secret British

⁵⁰ Ibid.,2-3.

⁵¹ The Stevens Inquiry was convoked in 1989 by the Conservative government of Margaret Thatcher. Sir John Stevens conducted his investigation in three phases and released a public report on April 17, 2003.

security records. It became apparent very quickly to the inquiry team, however, that the records were not acquired by force or theft.⁵²

At the outset no one associated with the first Stevens Inquiry was aware that collusion had become such an integral part of Britain's campaign against Northern Irish terror suspects that it would take three inquiries and fourteen years to investigate the extent of the abuse of power in Northern Ireland. When the process concluded in 2003, Stevens and his staff had conducted 15,000 interviews, accepted 9256 written statements and directly brought about ninety-eight convictions for collusion related offences.⁵³ The findings of the Stevens Inquiry coupled with the steady stream of innocent people being released after wrongful convictions imparted the stark reality that much of the United Kingdom's national security infrastructure had been operating for decades in an environment where civil liberties were often suspended in the name of expedience.

Possibly the most striking aspect of the findings of the Stevens Inquiry is how rapidly the state's offensive against terrorism adopted the very methods of the groups it sought to eradicate. An operational environment formed where officers in the police and army believed they were justified in using whatever tactics they thought would defeat the IRA. So long had the state actors worked without guidelines or limits that when it came time to interact with the Inquiry great difficulty was encountered in securing the cooperation of the key ministries. Throughout the fourteen-year

⁵² British Irish RIGHTS WATCH, "BIRW Response to Stevens 3," (April 24, 2003), <http://www.birw.org/BIRW%20response%20to%20Stevens%203.html> (accessed October 6, 2008).

⁵³ Sir John Stevens QPM, DL, "Stevens Enquiry: Overview and Recommendations," (April 17, 2003), 15.

investigative process Stevens and his team faced considerable obstruction by members of the Ministry of Defence and the Royal Ulster Constabulary. Substantial concealment and destruction of evidence took place as well as leaks of sensitive information including warnings to individuals slated for arrest.⁵⁴

The United States and its War on Terror

Even after the much-publicized experience of Britain and the excesses of its campaign against the IRA, history appeared to be repeating itself in the United States in the aftermath of 9/11. Immediately following the destruction of the twin towers of the World Trade Center it became accepted wisdom that the diffuse quality of the nation's intelligence and law enforcement infrastructure had directly contributed to the failure of federal authorities to recognize that Al Qaeda had successfully placed a large cell of suicide bombers within US territory. The 9/11 Commission outlined in exhaustive detail the many indicators that an attack was imminent. The problem was that no one entity existed to monitor the incoming reporting and forge a response.⁵⁵

As a result of the failure to predict and prevent the attacks the Bush Administration moved quickly to put in place an approach to homeland security that would involve reconfiguring the nation's legislative and institutional framework for combating terror. On the legislative front the Patriot Act was drafted and passed overwhelmingly into law by Congress. A massive institutional change occurred with the creation of the

⁵⁴ Stevens, 13.

⁵⁵ Jack Clarke, "The United States, Europe, and Homeland Security: Seeing Soft Security Concerns Through a Counterterrorist Lens," *European Security*, 13, no.1 (2004): 118.

Department of Homeland Security (DHS). This agency would operate all federal programs focused on domestic security. Not surprisingly, in a nation with a history of distrust of consolidated state power, many were wary of this shift of emphasis away from the protection of individual rights to an all-consuming preoccupation with public safety. Fears were further fueled when it became public that numerous provisions of the Patriot Act seemed to address issues that were not even raised by the 9/11 attacks. For instance, Article 215 of the act allows access to a vast array of records like medical, bookstore, library, and tax records.⁵⁶ Consequently, Jean-Claude Paye argues, key to the passage of the Patriot Act was the Bush Administration's deft characterization of the far-reaching measures in the legislation as exceptional and necessary given the emergency situation the country found itself in as a result of the asymmetric threat posed by Al Qaeda.⁵⁷ Concerns regarding the act's broad expansion of government power seem to have been greatly allayed by the fact that it expired at the end of 2005 and could only be renewed if supported by Congress.⁵⁸

It did not take long for the dark side of the Patriot Act to emerge and confirm the worst fears of civil libertarians. Within days of the passage of the act, John Ashcroft approved the aggressive use of the legislation's authority to detain non-citizens. Congress approved this new power in the event that the detention was urgently needed to prevent an imminent terrorist attack. The Patriot Act gives the DHS the power to arrest and detain foreign nationals on American soil for up to seven days

⁵⁶ Brian T. Yeh & Charles Doyle, "USA PATRIOT Improvement and Reauthorization Act of 2005: A Legal Analysis," *CRS Report for Congress*, (December 21, 2006): 2.
<http://www.fas.org/sgp/crs/intel/RL33332.pdf> (accessed October 6, 2008).

⁵⁷ Jean-Claude Paye, "A Permanent State of Emergency," *Monthly Review*, (November 2006): 29.

⁵⁸ *Ibid.*, 30-31.

without specific charges. If the DHS is unable to deport the person the Attorney General can certify that the individual be held for six months as a threat to national security. Every six months a re-certification must be sought.⁵⁹ Less than a month after the passage of the act the Department of Justice announced that 1182 people had been arrested as part of the investigation into 9/11. In spite of pressure from the media and civil liberty organizations the government refused to release the names of those arrested or where they were being held. It was later learned as a result of a court challenge that 751 of those detained were arrested for immigration violations. After seven months seventy four remained in custody. The rest had either been released or deported.⁶⁰ Only one individual was charged for being involved in the 9/11 conspiracy.⁶¹ Given the paucity of terror related charges the proviso that detentions take place to prevent an imminent attack appears to have been cast aside with surprising celerity.

As there is no existing legal authority for keeping detentions secret a group of civil liberty organizations brought a lawsuit to challenge the secrecy of the proceedings. The federal government cites the need to protect terrorism investigations as the reason for nondisclosure. As the majority of charges invariably result from immigration violations or other non-terrorism related offenses this has proved a tough sell. With most of the detained being of Middle Eastern origin the Council on

⁵⁹ Kate Martin, "Non-Citizens in the United States since September 11th," *Refuge*, 20, No.4, (March 25, 2002): 24.

⁶⁰ Neil A. Lewis, "Judge Order U.S. to Release Names of 9/11 Detainees," *New York Times*, (August 3, 2002), <http://209.85.141.104/search?q=cache:oMdQi6X1ufsJ:www.commondreams.org/headlines02/0803-02.htm+1182+people+detained+ashcroft&hl=en&ct=clnk&cd=2&client=safari> (accessed October 6, 2008).

⁶¹ Martin, 24.

American-Islamic Relations were quick to question the sweeping approach to post-9/11 terrorism investigations and worry that the targets are simply singled out for their “race, ethnicity or religion.”⁶² The DHS’ prodigious use of the detention provisions of the Patriot Act has spawned countless lawsuits seeking to lift the veil of secrecy and prevent what advocacy and community groups believe has become an institutionalized use of ethnic and religious profiling.⁶³

An equally contentious byproduct of the Patriot Act is the terror watch list maintained by the Federal Bureau of Investigation’s Terrorist Screening Center. Much has been reported about the Kafkaesque world one becomes a part of as a result of placement on a terror watch list. As of May 2007, 755,000 people are listed for national security reasons. If your name matches a list entry you are automatically subjected to questioning by law enforcement. Between 2003 and 2007 over 53,000 people were stopped and scrutinized by DHS for having a name that matched a listing. Most encounters resulted in questioning and release. According to the United States Government Accountability Office (GAO) the FBI and the intelligence community are to “use standards of reasonableness”⁶⁴ for nomination of an individual for listing. Nowhere in the GAO’s report or DHS publications are these standards expanded upon so it is impossible to assess if the test used is in fact reasonable.⁶⁵

⁶² Ruth Reitan, “Human Rights in U.S. Policy: A Casualty of the ‘War on Terrorism?’” *The International Journal of Human Rights*, 7, no.4 (Winter 2003): 57. Executive Director, Nihad Awad, of the Council of American-Islamic Relations is quoted.

⁶³ Ibid., 57 & Martin 25-26.

⁶⁴ United States Government Accountability Office, *Terrorist Watch List Screening: Recommendations to Promote a Comprehensive and Coordinated Approach to Terrorist-Related Screening*, (November 8, 2007): i.

⁶⁵ Ibid., 2-3.

As Nelson Mandela and the president of Bolivia, Evo Morales, are listed suggests that the grounds for listing may be somewhat broader than necessary.⁶⁶

Early on audits were revealing that the terror lists had become completely unmanageable. In 2003 the GAO concluded that the listing process was plagued by a lack of standardization and that the DHS had allowed a needlessly decentralized system to take shape. It was discovered that the terror list was actually twelve lists maintained by nine agencies. The GAO recommended that DHS create a standardized listing process and a more integrated approach to list management. Matters had clearly not improved by 2004 as the Inspector General of DHS released a report documenting the department's failure to take centralized control of the lists, which resulted in an absence of oversight or a strategic approach to watch list consolidation.⁶⁷ Internal management and oversight emerged again in 2007 with Congress' passage of the *Implementing the Recommendations of the 9/11 Commission* bill. In this legislation the DHS was instructed to create a single, effective complaints process for travelers effected by the list. DHS responded by creating The Traveler Redress Inquiry Program (TRIP). Complainants can contact DHS via a secure website and lodge a complaint or make a case for their removal from the list. Just after the first anniversary of TRIP's creation the Committee on Homeland Security wrote to DHS head, Michael Chertoff, in order to emphasize the need for effective redress and to express the committee members concerns that TRIP was simply not working as intended. In spite of being legislated to operate an

⁶⁶ American Civil Liberties Union, "Why are there so many names on the U.S. government's terrorist list?" <http://www.aclu.org/privacy/spying/watchlistcounter.html> (accessed October 6, 2008).

⁶⁷ American Civil Liberties Union, "ACLU Backgrounder of Watch Lists," (June 10, 2006), <http://www.aclu.org/safefree/general/27013res20061006.html> (accessed October 6, 2008).

effective redress mechanism the letter states that TRIP was non-operational for two months. The letter followed a briefing the committee received from the DHS about TRIP. It is clear that the briefing was far from satisfactory as the letter contains a lengthy list of areas where more detailed information is required. Most notably, the Committee wished to know how many of the 14,000 requests for redress had been adjudicated and what was the time standard for complaint processing.⁶⁸ As these obvious issue areas were not covered in the official briefing it is not unreasonable to wonder whether such vital operational statistics were not proffered as they were far from impressive. Support for this assertion is provided by the American Civil Liberties Union report on watch lists, which states that securing a de-listing is proving very difficult. As a result numerous individual and class action lawsuits have been filed due to repeated examinations from law enforcement and problems attempting to board flights.⁶⁹

While secret detentions and rapidly expanding terror lists have garnered a great deal of public attention the Patriot Act affects individual freedom in the United States in a myriad of ways. Its far reaching articles push the boundaries in a number of areas which have traditionally been subject to much legal contestation like search and seizure, wiretaps, and records access. Most worrisome is the erosion of the role of the judiciary in scrutinizing when individual freedoms should be breached in the course of a terror investigation. Also of concern is that most articles only require that

⁶⁸ Bennie G. Thompson, "Briefing of The Department of Homeland Security Traveler Redress Inquiry Program," Letter to Michael Chertoff, Secretary of the Department of Homeland Security, (October 30, 2007). <http://homeland.house.gov/SiteDocuments/20071030125721-66028.pdf> (accessed October 6, 2008).

⁶⁹ American Civil Liberties Union, "Why are there so many names on the U.S. government's terrorist list?" <http://www.aclu.org/privacy/spying/watchlistcounter.html> (accessed October 6, 2008).

reasonable grounds be established that the target is involved with terrorism. Even after a brief review of the Act's central powers the potential for abuse of this legislation is abundantly apparent.

The Enhanced Surveillance Procedures section of the *Patriot Act* conferred an unprecedented level of surveillance powers on government agencies. Article 206 allows authorities to conduct "nomad" or roving wiretaps without having to obtain court approvals for each installation of a wiretap. Significantly, it does not have to be established that the investigation target is known to use the phone or electronic device being tapped. Article 213 allows authorities to obtain a "sneak and peak" warrant which authorizes entry to a home or business without the owner's knowledge. In order to secure Senate approval the White House compromised and added the proviso that the subject of the warrant must be notified in thirty days of the warrant. During the secret visits agents may examine computers, take photos and install devices that record all computer activity. Article 214 authorizes the capture of electronic and telephone data as long as it is related to an ongoing terrorism investigation. Data capture does not require a warrant. Before passage of the Patriot Act such surveillance was only possible if the government could prove the target was a non-US citizen and an agent of a foreign power. As previously mentioned Article 215 significantly expanded the type of records FBI officials could access. All of the activities mentioned above are made possible by the drafting of an administrative subpoena called a National Security Letter rather than seeking a judicial warrant. A Department of Justice review of the use of these letters found that

the FBI issues anywhere between 39,000 to 56,000 letters per year.⁷⁰ While there can be little doubt that the US is heavily targeted by terrorist groups it seems hard to believe that the FBI would be justified in utilizing such highly intrusive methods over 40,000 times per year.

The lesson to be learned for Canada from the British and American experience with counter-terrorism is that no matter how embedded in the fabric of a society is respect for the rule of law, civil liberties and human rights the barbarity of terror attacks can result in a rapid abandonment of even the most elevated values and norms. Accordingly it is essential that a rigorous system of controls is in place before a country's resolve is tested. Only then can the demoralizing failures of Britain and the United States to live up to their own fundamental principles and international human rights conventions can be avoided by other liberal democracies.

⁷⁰ U.S. Department of Justice - Office of the Inspector General, *A Review of the FBI's Use of National Security Letters: Assessment of Corrective Actions and Examination of NSL Usage in 2006*, (March 2008): 110. <http://www.usdoj.gov/oig/special/s0803b/final.pdf> (accessed October 6, 2008).

CHAPTER 3: A SYSTEM OF ACCOUNTABILITY - THE ESSENTIAL ELEMENTS OF DEMOCRATIC CONTROL & OVERSIGHT

As a result of the O'Connor Inquiry it seems almost certain that Canadian national security agencies are going to find themselves subject to enhanced oversight. While Justice O'Connor put forth a model involving a reconstituted external oversight agency, little is known regarding whether this model found favour with the Harper government or if the Conservatives intend to take more substantive action to address the clear deficit of oversight that currently exists. Before considering the current state of oversight in Canada and the various changes being proposed it is necessary to step back and consider what are the central components of effective democratic oversight. The focus of this chapter will then turn to an assessment of how close the oversight systems of the United Kingdom and the United States of America came to this model during the time period when the excesses of these nations' national security programs were so much in evidence.

Any theoretical discussion of democratic oversight is bound to rely heavily on the writings of Hans Born. With various collaborators Born has produced a significant body of analysis on accountability of security and intelligence agencies. Throughout his works Born emphasizes that security and intelligence agencies perform an indispensable service to democratic societies as they are at the forefront of protecting national interests and mitigating risks to public safety. At the same time the fact that these agencies are authorized to work clandestinely makes it all the

more important that they operate in a manner that is accountable and firmly within the rule of law. Born, with Ian Leigh, outlined the five core elements of an effective oversight framework: internal control, executive control, legislative oversight, judicial review, and independent scrutiny.⁷¹ This model of oversight is valuable as it can assist in the evaluation of the efficacy of accountability mechanisms by providing a standard by which to compare national practices.

At the core of this accountability framework is an equal amount of control and oversight. Often these terms are used interchangeably but they should be kept distinct as they refer to very different spheres of activity. The responsibility for control falls to the executive, the responsible minister in parliamentary systems, who has the authority to direct the agency through operational guidelines and priority setting. There is also administrative control exercised by bureaucrats who conduct internal supervision. Oversight, on the other hand, is the purview of the legislative branch and/or external entities. Rather than involving themselves directly in the management of the agency, oversight bodies scrutinize the efficacy and propriety of the agency's conduct. When elements of control and oversight work together an accountability framework emerges.⁷²

⁷¹ Hans Born and Ian Leigh, *Making Intelligence Accountable: Legal Standards and Best Practice for Oversight of Intelligence Agencies*, (Oslo: Publishing House of the Parliament of Norway, 2005): 13-15.

⁷² Marina Caparini, "Controlling and Overseeing Intelligence Services in Democratic States," *Democratic Control of Intelligence Services: Containing Rogue Elephants*, ed. Hans Born & Marina Caparini (Aldershot: Ashgate, 2007): 8-9.

Internal Control

At the first layer of Born and Leigh's model accountability structure is the agency itself. It is here that professional standards and general guidelines for the agency's activities are set. In the national security realm the central agencies of concern are the police and intelligence services. As police organizations occupy a unique place in a civil society due to the fact they can exert an extraordinary degree of coercive power over the public it is necessary for special safeguards to be in place to ensure that officers and/or their leadership do not abuse these powers. In order to guarantee that respect for the rule of law informs all investigations, police agencies must institute a strict and explicit code of conduct and ethics. An essential element of this code should be the principle of proportionality. Use of force or the scope of intrusive investigative techniques should never exceed what is necessary to achieve a legitimate objective. Internal bureaucratic accountability functions must be in place to investigate allegations of misconduct and public complaints in addition to conducting random compliance audits.⁷³

Similarly, intelligence services require strict internal controls to protect the public and political opponents of the government. As threats to a state's security are considered of extraordinary importance, agencies are typically granted greater powers than those accorded to law enforcement to respond to ordinary criminal activity. Invariably these special powers have the potential to seriously impact civil liberties. With ever improving technological tools the main methods of information gathering,

⁷³ Hans Born, *Parliamentary Oversight of the Security Sector: principles, mechanism and practices*, (Geneva: Geneva Centre for the Democratic Control of Armed Forces, 2003): 61-62.

surveillance and wiretapping, make the agency's powers of intrusion virtually limitless. Richard Best in a report prepared for the US Congress presents a list of extraordinary powers customarily conferred on national security agencies:

- record and trace information gathered by surveillance,
- conduct searches of enclosed spaces or closed objects,
- open mail or consignments without the consent of the sender or addressee, use false or fraudulent identities,
- employ special software or signals to clandestinely enter, copy or corrupt databases,
- receive, record or monitor conversations, telecommunication or data transfer,
- request from telecommunication providers user information as well as traffic that has taken place or will take place,
- install observation devices.⁷⁴

A government facing a threat, that if undefeated could weaken its hold on power, may find it difficult to resist using such broad clandestine powers in an abusive manner. As the world of intelligence is one of secrecy and limited judicial scrutiny there is a very real possibility that an abuse of intelligence capabilities could take place and go undetected. Once again a clear legal mandate, explicit standard operating procedures, strict adherence to government record rules and an effective system of internal checks and balances is required to keep the public and political system safe from extra-legal intelligence operations.⁷⁵

Even in circumstances where the use of such special powers is justified it is essential that there are clear guidelines regarding who can authorize their use and

⁷⁴ Born and Leigh, 37. Richard Best's *Intelligence Issues for Congress (12 September 2001)* is quoted.

⁷⁵ Hans Born, *Parliamentary Oversight of the Security Sector*, 61-65.

detailed reporting should be on record so that accurate internal and external audits can be conducted. The McDonald Commission proposed a useful set of general principles that should form the basis of standard operating procedures for security intelligence agencies:

- the rule of law should be observed at all times,
- investigative techniques should always be proportionate to the security threat under investigation and weighed against the possible damage to civil liberties and democratic structures,
- less intrusive means should be utilized wherever possible discretionary control should be layered so that the greater the intrusiveness of methods the higher the level of authorization required.⁷⁶

Executive Control

In a democratic system internal safeguards as outlined above should work in tandem with control exerted by the elected official or representative of the state responsible for the agency. The minister or secretary should have direct control over priority setting, tasking, and resource allocation. Given the sensitivity of the work of national security agencies it is necessary for much of their operations to be shielded from public view by liberal use of the official secrets legislation. In order to ensure that there is no political accountability deficit as a result of operating behind the veil of secrecy the executive must take seriously its role as an important agent of democratic control. Along with maintaining a tight grip on the agency's operational structure the executive must have a comprehensive knowledge of the agency's activities. At any time the government may be called upon by the legislature, the

⁷⁶ Born & Leigh, 39-40. The findings of the McDonald Commission are quoted.

media or the public to give an account of the agency's use of its broad powers and resources. If the government is not able to satisfy concerns about the conduct of national security investigations or related intelligence gathering it runs the risk of eroding the public's confidence in its ability to perform the all important balancing act of responding to risk while respecting individual rights and freedoms. Fear and distrust of the national security apparatus is what one expects to find amongst the populace of totalitarian states and is untenable in a democratic one. Further complicating matters is the necessity that national security agencies operate in a manner that is independent of its political masters. An agency at all costs must avoid being drawn into the political battles of the government or its minister. There are a number of mechanisms that can be established to ensure that the minister remains in firm control and that the agency has the ability to resist any attempts at executive misuse of its powers. All executive orders, tasking and policy statements should be made in writing and maintained in accordance with government record rules. This creates a paper trail that can be examined in detail by the legislature, oversight agencies or an independent inquiry. Enabling legislation should require the agency to report regularly to the minister and provide a right of access for agency heads to the minister when deemed necessary. Any actions of a politically sensitive nature should require ministerial approval. For instance, interaction with foreign governments or investigations that may impact fundamental rights. In this way it will be politically hazardous for a minister to seek plausible deniability by remaining at an

arm's length from the operation of a national security agency as he/she will be held responsible by the legislature for its actions.⁷⁷

The Legislature

The legislature provides another layer of control by passing the enabling legislation of the agencies concerned as well as authorizing budgetary appropriations. A key element of any accountability framework is legislation that clearly delineates the mandate and scope of activities of the national security agency. As previously stated national security agencies are accorded extraordinary powers that are to be utilized in exceptional circumstances. To ensure that these powers are not used in situations where expedience, rather than threat level, is the driving force it is important that legislation clearly articulates what activities are considered threats to a state's security. The use by the Bush Administration of the *Patriot Act's* enhanced detention powers against hundreds of immigration law violators is a perfect example of what happens when security related legislation contains imprecise language. It is readily apparent that this was not what Congress had in mind when it discussed imminent threat to the nation's security. The European Court of Human Rights has acknowledged the danger of open-ended language in the enabling legislation of national security agencies and advocates that only six types of activities should be viewed as threats to a state's security: espionage, terrorism, incitement to or approval of terrorism, subversion of a parliamentary democracy, inciting disaffection of military personnel and separatist extremist organizations which threaten the security of a state by violent or undemocratic means. The Council of Europe has

⁷⁷ Ibid.,55-59.

also weighed in on this issue and considers the following threats to be of such magnitude that they too can be classified as risks to national security: external threats to the economic well-being of a state, money laundering on a scale that the banking and monetary system could be undermined, cyber attacks on electronic networks linked to the vital interests of the state, and organized crime on a scale that it could impact a substantial portion of the public.⁷⁸ The legislature can play a significant role in this aspect of accountability as members of parliament can make it known that they will only vote for the passage of security legislation that employs exacting language and limits the use of extraordinary powers to matters involving serious threats to national interests and public safety.

In many western democracies the legislature is not only a place to look to for legislation and budget approval but also oversight. While intelligence and security agencies have a lengthy history, formal oversight is a relatively new phenomenon. Prior to the 1970s most countries' national security functions were not exposed to any kind of legislature based scrutiny. The secrecy with which security agencies operated was simply not questioned. Possibly the first significant realization that western security and intelligence agencies had the potential to operate in an anti-democratic manner, if left unchecked, came in 1975 when Seymour Hersh reported that the Central Intelligence Agency (CIA) was destabilizing foreign governments and conducting illegal intelligence operations on thousands of American citizens opposed to the Vietnam War. In response, the US Congress created the Church and Pike Committees to investigate the extent of the CIA's illegal operations and the

⁷⁸ Ibid.,30-33.

overall efficiency of the agency and its cost to taxpayers. After uncovering a series of headline grabbing transgressions by government agencies the Church Committee issued a damning final report that strongly recommended that a legislative-based oversight body be created to monitor the activities of American intelligence operations. Accordingly, the Select Committee on Intelligence was created. The much publicized American experience with abuse of intelligence techniques and assets seems to have inspired an era of reform activity as the next two decades saw many democratic nations put their security agencies under the lens and decide that they also had to put safeguards in place.⁷⁹ By the 1990s security and intelligence oversight had become the norm in most democratic countries as had basing it in the legislative branch of government.⁸⁰

There are two main approaches to oversight - functional and institutional. The functional approach involves one oversight body reviewing the activities of all the state's security and intelligence agencies. The functional approach has become the international norm for democratic oversight. The central strength of this approach is that it reflects the reality of national security investigations. As most security investigations are multi-agency undertakings it makes sense that the oversight mechanism should have the legal ability to scrutinize all agencies involved. In contrast, the institutional approach only empowers the review body to look at a specific agency. Oversight constituted in this way invariably finds itself limited by its

⁷⁹ United States Senate, "Church Committee Created," http://www.senate.gov/artandhistory/history/minute/Church_Committee_Created.htm (accessed October 6, 2008).

⁸⁰ Ian Leigh, "More Closely Watching the Spies: Three Decades of Experiences," *Who's Watching the Spies? Establishing Intelligence Service Accountability*, ed. Hans Born, Loch Johnson & Ian Leigh (Washington: Potomac Books Inc., 2005): 4-5.

narrow legal range of operation.⁸¹ For instance, in Canada, the Security Intelligence Review Committee can only consider the conduct of CSIS. If this agency works with the RCMP or Foreign Affairs Canada and something problematic occurs as a result of this interaction SIRC is unable to exercise its subpoena powers over the other agencies. If the partner agency involvement was extensive this would effectively shut down the review exercise as SIRC would have no way of circumventing this legal obstacle. Also, with an atomized approach it is very difficult for the public or parliament to develop a complete picture of how the security intelligence sector conducts itself in relation to particular broad based issue areas like human rights. The functional approach, on the other hand, allows for assessment of any number of factors, including rights and freedoms, at the micro and macro level.

While the benefits of the functional approach over the institutional is quite clear there are other characteristics of oversight that are more difficult to compare and assess. Some oversight bodies are given access to operational files while others are limited to focusing exclusively on policy and finance. Some bodies, like the Parliamentary Control Panel of the German Bundestag, may examine matters of policy or operations. On the surface such expansive mandates lend greater credibility to the security intelligence sector as it is subject to thorough scrutiny. On the other hand it means that certain aspects of the work of the Control Panel must take place behind closed doors given the extreme sensitivity of operational files. By necessity oversight in such systems must often operate hived off from the rest of the legislature. As a result parliament and the public must, on certain occasions, have blind faith in the

⁸¹ Born & Leigh, 77-80.

oversight body. The dilemma of broader mandates leading to greater secrecy is often cited by supporters of narrowly focused oversight like that which takes place in the United Kingdom. This nation's Intelligence and Security Committee (ISC) confines itself to matters of administration and policy and has very limited access to operational matters.⁸² Of course the danger of affording only limited access to operational records means an oversight body may only be able to develop a superficial knowledge of the agency's inner workings. Many may view this as a greater threat to accountability than closed-door hearings and issuance of classified reports. In the Born and Leigh model a broad approach to scrutiny is clearly favoured as they offer as a best practice a mandate that includes: legality, efficacy, efficiency, budgeting and accounting, conformity with relevant human rights conventions, and policy/administration.⁸³ In the words of the authors "...no area of state activity should be a no-go zone for parliament....."⁸⁴

Concerns about the recourse to secrecy can be greatly mitigated if the membership of the parliamentary oversight body is drawn from all elected parties. In this way the public can be assured that the sitting government is not taking advantage of the need for secrecy to conceal interference in the operation of oversight. It is preferable that membership should be appointed by parliament rather than the government. Similarly, the chairperson should be selected by parliament or the committee itself rather than by the ruling party. Government ministers should be barred from membership. In nations with a large or complex security intelligence infrastructure it

⁸² Ibid.,78-83.

⁸³ bid.,80-84.

⁸⁴ Ibid.,77.

may be necessary to create specialized subcommittees that develop an expertise in select issue areas. The rules of membership outlined above should extend to such bodies.⁸⁵

One of the most important powers of an oversight body is its authority to call for people, papers and records. In addition to having the legal power to initiate an investigation the oversight body must be able to gain complete access to information concerning the issue or activity under consideration. This information gathering process should involve the power to summon witnesses. In exchange for unfettered access to government record and personnel the oversight body must put in place stringent information protection and disclosure procedures. Any disputes regarding access or disclosure should be referred to the legislature or some other type of independent audit entity for review. Even though information protection is of immense importance in the realm of national security the oversight body must engage in regular reporting to parliament and the government. It is only through the issuance of reports that confidence in the oversight body can be cultivated and maintained. At the very least an annual report should be submitted directly to parliament. In some nations the reporting procedure involves the report being given to the government for review prior to release to parliament. Born and Leigh contend that it is preferable for the committee's reporting relationship to be directly with the legislature as it emphasizes parliament's ownership of the committee. If the latter arrangement is in place then the government should be directed by legislation to release the report, in full, in a timely manner. The determination of the classification

⁸⁵ Ibid.,84-90.

of reporting should be made by the committee rather than the government. When the reporting relationship is with parliament then it is preferable that the government be given an opportunity to challenge release of specific information into the public realm.⁸⁶ If the agencies and the government are not assured that they can legitimately oppose release it may foster distrust that could lead to non-disclosure or concealment of relevant information.

The Judiciary

After the legislature the next most important layer of external accountability is the judiciary. By scrutinizing the exceptional powers of the security and intelligence agencies and prosecuting breaches of the law by government employees the courts can exert a considerable amount of influence. In both the United States and the United Kingdom the judiciary has emerged as the highest profile opponent to the regularized use of the special powers so much in evidence post-9/11. The Bush Administration's aggressive pursuit of expanded executive powers in the name of national security has repeatedly faced opposition in the courts at the state and national level. Most notably in relation to the use of military tribunals, the enemy combatant designation without the approval of Congress, and denial of habeas corpus. Even when the administration's policies are not overturned the judiciary has played an important oversight role by repeatedly forcing the White House to justify

⁸⁶ Ibid.,91-95.

its use of extraordinary powers in court. This has allowed the public to gain greater access to how the Administration is conducting its war on terror.⁸⁷

While British judges have not opposed expanded executive powers as often as their American counterparts there have been a number of landmark rulings that have curbed the powers sought for the national security program. In the aftermath of the attacks on the United States the Blair Government introduced *The Anti-Terrorism, Crime and Security Act*. In what was seen as a significant policy reversal the legislation reintroduced the controversial power to detain threats to national security without charge or trial. In 2004 the Law Lords quashed the detention section of the state's anti-terrorism legislation on the grounds that it was inconsistent with Article 5 of the European Convention on Human Rights and Fundamental Freedoms, which protects the right to personal liberty.⁸⁸ Less than a year later the House of Lords issued another ruling, viewed as a serious blow to the Government's anti-terror campaign, that banned the use of evidence gained by torture.⁸⁹ More recently the Lords ruled that the anti-terror legislation's reconstituted detention provisions would have to be eased to bring them into line with the standards set out in human rights conventions.⁹⁰ While the governments involved expressed dismay and even outrage with these judicial decisions and invariably claimed that they would hamper the

⁸⁷ Michael Freeman, *Terrorism and Civil Liberties in the United States: How to Have Both Freedom and Security*, *Democracy and Security*, 2, no.2, (December 1, 2006):242-244.

⁸⁸ Laraine Hanlon, "UK Anti-Terrorism Legislation: Still Disproportionate?" *The International Journal of Human Rights*, 11, no.4 (December 2007): 481-482.

⁸⁹ Nigel Morris, "Law lords ban evidence gained under torture," *The Independent*, (December 9, 2005), <http://www.independent.co.uk/news/uk/crime/law-lords-ban-evidence-gained-under-torture-518719.html> (accessed October 6, 2008).

⁹⁰ Peter Walker, "Control orders breach human rights, law lords say," *Guardian*, (October 31, 2007), <http://www.guardian.co.uk/uk/2007/oct/31/terrorism.politics> (accessed October 6, 2008).

ability of the state to safeguard the public they exemplify the oversight role one should expect to see performed by the judiciary in a time of real or perceived emergency.

Civil Society

Finally, civil society groups like the media, think tanks, and civil liberties associations form the final layer of accountability by making formal complaints and publicizing agency excesses.⁹¹ In the case studies of national security programs, offered earlier, the watchdog role played by non-governmental groups was very much in evidence. Civil liberty organizations in particular have been at the forefront of the battle against erosion of rights in the name of security in the United States. The ACLU, for instance, has used its significant legal resources to challenge many aspects of the post-9/11 national security program including secret detentions, terror watch lists and the denial of legal representation.⁹² Similarly, community groups in Britain, most notably British Irish RIGHTS WATCH, were instrumental in publicizing the endemic human rights violations in Northern Ireland. The efforts of this group significantly contributed to the push for inquiries into the murders of civil rights lawyers, collusion activities and the Bloody Sunday incident.⁹³ Equally instrumental is the media who has proved quick to publicize questionable government practices in the national security realm. Fortunately terrorism related reporting rarely fails to draw a large audience. The average member of the public is far more likely to learn about human

⁹¹ Born & Leigh, 15.

⁹² American Civil Liberties Union, "Safe and Free, Restore our Constitutional Rights," <http://www.aclu.org/safefree/index.html> (accessed October 6, 2008).

⁹³ British Irish Human RIGHTS WATCH, "About BIRW," <http://www.birw.org/about.html>. (accessed October 6, 2008).

rights abuses, like those perpetrated at Guantanamo Bay detention camp, from media than it is from a Congressional subcommittee's transcripts or an official website. Even though the activities of civil groups is less defined and predictable than the other layers of the accountability model, their impact can often be greater than all the others combined.

Born and Leigh are quick to state that this multi-faceted accountability model is not offered as a fail-safe method of oversight. However, if all five layers work interdependently it is not unrealistic to expect that a high degree of accountability will be exerted.⁹⁴ Having outlined the model in some detail the next step is to consider once again the national security programs of the United Kingdom and the United States of America. The degree to which each accountability element is present and influential in regards to the two national security programs will be evaluated. By applying the Born and Leigh accountability model in this way we can better assess whether its components possess the capacity to effectively check state power and protect fundamental rights and freedoms.

Accountability in the United Kingdom – A Matter of Executive Privilege

Just as Britain's poor track record on human rights, in relation to the conflict in Northern Ireland, was coming to light in the late 1980s a number of cases challenging the activities of security intelligence agencies were brought before the European Court of Human Rights. As a result the Court delivered a series of

⁹⁴ Hans Born, "Parliamentary and External Oversight of Intelligence Services," *Democratic Control of Intelligence Services: Containing Rogue Elephants*, ed. Hans Born & Marina Caparini (Aldershot: Ashgate, 2007): 167.

decisions that cited the United Kingdom's lack of statutory basis for its national security program and the absence of legal mechanisms for dealing with public complaints as being in contravention of the European Charter of Human Rights. These judicial decisions, not the mounting evidence of wrongful convictions and collusion coming into public view, proved to be the catalyst for reform of the security sector as the Government set to addressing the deficiencies cited by the Court almost immediately.⁹⁵

Reflecting back on Born and Leigh's model it is not surprising to find the courts at the forefront of opposition to a lack of accountability amongst national security agencies. As previously discussed the judiciary in both the United Kingdom and the United States have repeatedly cast a skeptical eye on the post-9/11 preoccupation with strident security measures. At the same time it must be acknowledged that British judges throughout the 1970s and 1980s did not significantly oppose the manner in which the security intelligence services were constituted. In addition to being silent on the legislative foundation, or lack thereof, of the relevant agencies, domestic courts had been resistant to granting leave to appeal in terror conviction cases. Even in instances where defense lawyers, non-governmental groups and the media had compiled extensive evidence of the use of questionable investigative and forensic techniques the judiciary stood firmly with the Government and law enforcement. This stalwart support of the national security program was a striking feature of the first twenty years of Britain's campaign against Northern Irish

⁹⁵ Greg Hannah, Kevin O'Brien, & Andrew Rathmell, *Intelligence and Security Legislation for Security Sector Reform*, (2005): 14-16.
http://www.rand.org/pubs/technical_reports/2005/RAND_TR288.pdf (accessed October 6, 2008).

terrorism. As this is also an era of unprecedented civil rights abuses it does not seem too farfetched to propose that the unwillingness of the judiciary to play a meaningful oversight role contributed to the sense of impunity amongst security intelligence agencies so apparent during this era. There can be little doubt if more meticulous standards were applied to evidence gathering in criminal cases and complainants had recourse to domestic courts, rather than the more removed European Court of Human Rights, the judiciary would have been viewed as a crucial check on state power.

Before the European Court highlighted the accountability problems successive governments had maintained a wall of secrecy regarding the operations of the security and intelligence agencies. Oversight of national security activities was the exclusive purview of the responsible ministers. It had become verboten for a minister to answer questions in parliament regarding national security. This secrecy even extended to the relevant agencies operating budgets. In order to shield the budget figures from Parliament the Government took the extraordinary measure of hiding operating costs in the budgets of related ministries.⁹⁶

As oversight was solely performed by the executive, given the all-encompassing secrecy surrounding security intelligence operations in the United Kingdom, it was all the more important that the responsible ministers and their subordinates in the public service maintained tight control and enforced rigorous operational guidelines. As appeal court decisions and inquiry reports have made clear, accountability was weak

⁹⁶ Tom King, "The Role of the Intelligence and Security Committee," *The Rusi Journal*, 146, no.3 (June 1, 2001): 26.

as officer conduct regularly fell far short of acceptable standards. If strict codes of ethics and professionalism were in place and enforced it is hard to believe that so many significant criminal convictions would have been overturned due to evidence manipulation, misinterpreted forensic findings and coerced confessions. It would be all too easy to see the mishandling of these cases as a by-product of over zealous front line officers determined to crack a case. However, if one pauses to consider the manner in which high profile investigations progress it seems very apparent that the problem was institutional rather than a matter of misconduct on the part of a small group of rogue officers. What was obviously lacking was an effective set of internal controls. Senior management would never have left rank and file officers run a terror file without receiving regular briefings given the degree of public outrage and media interest. It seems odd that experienced senior officers would not have noted failings in the cases so considerable that they would eventually lead to the overturning of convictions, significant embarrassment to the forces involved, and large compensation packages for the wrongly imprisoned. As senior officers are all too aware of their responsibility to report to the Chief Constable one would expect them to take every care to be apprised of all the relevant aspects of the investigation and ensure the methods employed by their officers would not draw any criticism from the upper echelons of their police service or bring any disrepute to the force in court. Correspondingly, one would also expect that the Chief Constable would have been receiving regular briefings and would have quickly noted glaring failures in procedure. Moreover, domestic terror cases are not customarily viewed as a regional policing matter but a national security concern. Accordingly the Home Office

would most likely demand regular reports regarding the progress of terror investigations. Here again at the highest level a failure to detect any problems with the cases occurred. If no briefings were requested it would be equally troubling as it could indicate that ministers wished to either ensure they had plausible deniability regarding the use of questionable tactics or that police forces were operating without the executive guidance they have a right to when a matter of national security emerges. Regardless of the degree of reporting received by the executive and senior management the fact remains that every layer of scrutiny and leadership failed on a number of occasions to discern that the evidence in pre-eminent terror cases was haphazardly gathered and in some cases simply fabricated. Also of great concern is the lack of response to obvious suspect abuse. In the case of the Birmingham Six the media ran photographs of the accused that clearly showed the suspects had sustained a serious beating. There is no evidence that the West Midlands Police or the Home Office made any effort to investigate or punish the officers who so obviously employed physical duress. Silence on such an obvious breach of professional standards and criminal law runs the very real risk of creating an operational environment where officers believe they have free rein to act as they see fit. As previously stated, any arm of government with the authority to exercise a high degree of coercive power over the public must be subject to strict internal safeguards working in tandem with direct executive control.⁹⁷ The fact that aspects of this accountability model were absent during critical periods can be viewed two ways. Possibly the lack of guidance from senior levels of the police forces and the

⁹⁷ Born and Leigh, 55-56.

Government was anomalous. This seems doubtful given the profile of the cases. The other, more likely, explanation is that successive British Governments had failed to establish a review process or formal accountability system to ensure that miscarriages of justice were not perpetrated in the course of national security investigations.

Domestic policing was not the only area where oversight was in chronic short supply. The conduct of the British military veered from democratic standards with disturbing frequency in the course of its thirty-year mission to maintain order in Northern Ireland. After nearly two decades of unquestioning support for the military's conduct in Ulster, the British Government found itself under increasing pressure from civil groups to investigate allegations of collusion between Unionist paramilitary members, the military and the RUC. Consequently John Stevens, in 1989, was tasked with investigating whether the authorities were complicit in sectarian murder. In his first report Stevens concluded that collusion had occurred but had only involved a small number of security forces officers. Unconvinced civil groups, most notably British Irish Human RIGHTS WATCH, kept up the campaign to publicize allegations that collusion had become institutionalized in Northern Ireland. The group's efforts attracted the interest of investigative journalists and a number of other rights organizations. In 1992 the BBC aired an in-depth report on the activities of military intelligence units and their Unionist paramilitary agents. Two years later Amnesty International published a report claiming that evidence was mounting of widespread collusion in Britain's security program. Lawyers joined the fray when 1100 signed a petition calling for a public inquiry. Finally in 1999 the United Nations

special rapporteur, Param Cumaraswamy, published a report criticizing the Chief Constable of the RUC over his force's apparent indifference to harassment complaints made by defence solicitors. Cumaraswamy specifically called for an inquiry into the murder of civil rights lawyer Patrick Finucane. In response to the report Marjorie Mowlam, Secretary of State for Northern Ireland, promised to address the issue. After discussions with Cumaraswamy the Blair Government tasked Stevens with investigating the murder of Finucane.⁹⁸

Just as in the appeal cases involving police services, the report of the three-part Stevens Inquiry, released in 2003, documented a litany of abuses perpetrated by the personnel of the Ministry of Defence and the Royal Ulster Constabulary. Stevens concluded that unlawful disclosure of intelligence documents to unionist agents had become endemic.⁹⁹ Numerous targeted killings appear to have followed directly on the heels of these disclosures.¹⁰⁰ Even though the Stevens Inquiry was given authorization by the government to examine the extent of collusion in Northern Ireland the investigation team faced a degree of obstruction that would have proved crippling had they not doggedly pursued their investigation for fourteen years. In all three of his reports Stevens documents this obstruction.¹⁰¹ Consequently no one associated to government or the police can contend that they were not aware that Stevens and his team were being stonewalled. The Ministry of Defense maintained for years that requested documents did not exist only to release them during the

⁹⁸ Martin Melaugh, *Collusion – Chronology of Events in the Stevens Inquiries*, *University of Ulster Conflict Archive on the Internet*. <http://cain.ulst.ac.uk/issues/collusion/chron.htm> (accessed October 6, 2008).

⁹⁹ Stevens, 10.

¹⁰⁰ *Ibid.*, 16.

¹⁰¹ *Ibid.*, 13-14.

third phase of the inquiry and only after it was made clear that criminal charges were going to be laid against the General Officer Commanding Forces in Northern Ireland. To pre-empt this embarrassing move the military finally released trolleys full of files to Stevens.¹⁰² Military officers also attempted to prevent arrests by warning their former Unionist agents when the team was about to take them into custody. The most spectacular example of obstruction, however, came with the torching of the investigation team's main office, located in a secure military base, in 1990. In spite of the official verdict that the fire was set by a cigarette in a wastebasket, Stevens contends this was a deliberate act of arson. The timing of the event seems to support Stevens' contention, as the team was about to arrest Brian Nelson, one of the military's most valued agents, for murder. Nelson was the agent primarily responsible for disseminating intelligence records to prove Unionists were not killing civilians. The investigating team recovered documents from Nelson whose existence was previously denied by the agent's handlers. After considering this material Stevens concluded that Nelson, with the assistance of his handlers, worked on hundreds of targeting files.¹⁰³

So troubled by the systematic denial of access, Stevens launched a separate line of investigation into what level of the organizations involved was impeding his disclosure requests. It was determined that the central force behind the obstruction was the Chief Constable of the RUC Sir Hugh Annesley. This was all the more shocking as it was Annesley who appointed Stevens to investigate whether there

¹⁰² John Ware, "What Will the Stevens Report Bring?" *Panorama*, (April 25, 2003).
<http://news.bbc.co.uk/1/hi/programmes/panorama/2953705.stm> (accessed October 6, 2008).

¹⁰³ Stevens, 13.

was any truth to the collusion allegations. Stevens also discovered that Annesley instructed Sir John Waters, head of the armed forces in Northern Ireland, to not provide any information about the military intelligence units responsible for handling agents like Nelson. It appeared that Waters disseminated this request as a member of the military intelligence unit testified that his section was told by their commanding officers to not be concerned about the inquiry as their files would not be released and they would not be interviewed.¹⁰⁴ Given the conduct of the military and police establishment towards the Stevens Inquiry one can conclude without hesitation that the internal controls so critical to ensuring proper conduct of a military mission and police personnel were seriously flawed. Officers at the highest levels of both the army and the RUC summarily cast ethical guidelines and the rule of law aside. So determined were these agencies to defeat Republican paramilitaries that extra-legal measures became standard operating procedures. This ethical misconduct was compounded by a broad based effort to cover up the collusion. Throughout the fourteen-year lifespan of the inquiry there is no record of any action take by the British Government to put an end to the obstruction campaign.

On the contrary, the Blair Government waged a formidable battle with witnesses and media outlets in what appears to be a desperate attempt to prevent publication of the facts that Stevens was diligently uncovering. From 2000 to the publication of the Enquiry Report in 2003, Defence Secretary, Geoff Hoon, repeatedly sought injunctions against military officers and media outlets in order to prevent publication

¹⁰⁴ Ware, <http://news.bbc.co.uk/1/hi/programmes/panorama/2953705.stm> (accessed October 6, 2008).

of details of the activities of the intelligence unit that handled Unionist agents. Most disturbingly, Hoon sought an injunction to prevent a handler known as Martin Ingram from testifying at not only the Stevens Inquiry but also the Saville Inquiry into Bloody Sunday. Ingram was also arrested for breaching the Official Secrets Act by Special Branch who stated that the charge arose from a complaint made by Hoon. Ingram was detained for 24 hours and shown his phone records listing numerous calls to a reporter. The charges were later dropped due to lack of evidence. Eventually the terms of the injunction against Ingram were relaxed to allow him to provide testimony to Stevens. Another handler was targeted by Hoon when he attempted to sue the military. With this flurry of injunction activity against officers the media stepped up and attempted to make public what the government was clearly intent on shielding from public view. Once again, the Ministry of Defence assiduously sought injunctions.¹⁰⁵ Rather than performing an oversight role, Hoon opted to use his executive powers to prevent publication of wrongdoing. This is all the more curious as much of the activities in question took place under previous Conservative governments. Hoon's aggressive behaviour towards Defence employees undoubtedly sent a very clear message that no matter how egregious the wrongdoing whistle blowing would not be tolerated.

¹⁰⁵ David Leigh and Richard Norton-Taylor, "Minister Gagged Media to Guard Dirty Secret," *The Guardian*, (May 13, 2003).
<http://www.guardian.co.uk/uk/2003/may/13/northernireland.northernireland1>
(accessed October 6, 2008).

As John Stevens and his team were struggling to uncover the truth about collusion Tony Blair decided to convoke a second inquiry¹⁰⁶ into the Bloody Sunday incident in 1998. This decision was in response to the long-standing dissatisfaction amongst the victims' families and the Republic of Ireland with the findings of the first inquiry.¹⁰⁷ The report issued by Lord Widgery in 1972 concluded, after an eleven-week investigation, that the Parachute Regiment inadvertently killed thirteen unarmed civilians when they were forced to respond to fire from nationalist paramilitaries embedded in the crowd. The only blame assigned by Lord Widgery was to the protestors who, he argued, could have avoided injury and death if they had not marched.¹⁰⁸ Early on in the Saville Inquiry forensic reports regarding whether the dead and injured had handled weapons were reviewed. Forensic analysis presented to the Widgery Inquiry supported the Army's position that they faced armed protestors. The new forensic reports determined that it was impossible to conclude that any of the protestors had handled weapons or explosives.¹⁰⁹ These findings allowed the inquiry to focus its energies on determining what orders were given to the soldiers prior to and during the march.

¹⁰⁶ Mark Saville, Baron Saville of Newdigate was appointed by Prime Minister Tony Blair to conduct a second inquiry into the Bloody Sunday incident. At the time of his appointment Saville was Lord Justice of Appeal. On November 6, 2008 Lord Saville announced that the final report of his inquiry would not be released for another year. For further information visit <http://www.timesonline.co.uk/tol/news/uk/article5098399.ece> (accessed December 7, 2008).

¹⁰⁷ Prime Minister Edward Heath responded to the events of January 30, 1972 by convoking an inquiry. John Passmore Widgery, Baron Widgery, who served as Lord Chief Justice of England and Wales was appointed to preside over the inquiry.

¹⁰⁸ BBC News, Bloody Sunday Inquiry, Chronology, the Widgery Report, (March 24, 2000). http://news.bbc.co.uk/1/hi/in_depth/northern_ireland/2000/bloody_sunday_inquiry/665100.stm (accessed October 6, 2008).

¹⁰⁹ J.B.F Loyde, *Bloody Sunday Inquiry, Initial Report, Firearms and Explosive Residues*, (June 22, 1999). <http://www.bloody-sunday-inquiry.org.uk/index2.asp?p=1> (accessed October 6, 2008).

The Inquiry heard the testimony of 2500 individuals. Of those 512 were marchers or eyewitnesses, 245 were drawn from the military and thirty-three were from the RUC.¹¹⁰ Lord Saville, unlike his predecessor Widgery, opted to review an exhaustive amount of information. Even though the Saville Inquiry has been the subject of much criticism due to its enormous cost and failure to produce a final report in a timely fashion its meticulous approach allowed a vivid picture to emerge of a chaotic operational environment where consensus amongst the main parties on a security strategy for Northern Ireland had proved unreachable. By early 1972 nationalists had claimed a number of areas of Londonderry as no-go zones for British Forces and the RUC. Evidence was presented that military briefings in the days before the march saw senior officers voicing their belief that something had to be done to re-establish right of access to these areas. Further documentary evidence supports the view that attitudes were hardening within the upper echelons of the army towards civilians. A memo written three weeks before the march by the Army's second in command in Northern Ireland, Colonel Robert Ford, provided the inquiry a glimpse of the extent to which the military brass were rethinking the rules of engagement. In the memo Ford contends that the use of rubber bullets and tear gas were no longer keeping rioters at bay in Catholic enclaves. Ford then offers an alternate method to deal with civil unrest: "The minimum force necessary to achieve a restoration of law and order is to shoot selected ringleaders among the Derry Young Hooligans after clear

¹¹⁰ Bloody Sunday Inquiry, *Frequently Asked Questions*. <http://www.bloody-sunday-inquiry.org.uk/index2.asp?p=7> (accessed October 6, 2008).

warnings have been given."¹¹¹ This memo seemed to confirm the long-held position of nationalist activists that the British Army had a set a shoot to kill policy prior to Blood Sunday. At the same time, evidence was presented that showed that Ford's superior, General Harry Tuzo, did not support a hardened stance and wanted to see a softened security posture with political change.¹¹² In a similar vein, the RUC's Chief Superintendent in Derry supported the march being allowed to proceed unhindered. The military rejected this position and cited in memos the belief that the Catholic Chief Superintendent was motivated by a desire to maintain his position in his own community. The Chief Constable of the RUC sided with the military and it was decided the march should be stopped.¹¹³ Further complicating matters were the convoluted discussions taking place between the members of the Westminster Cabinet committee on Northern Ireland. The most senior members of this committee were British Prime Minister, Edward Heath, and the Northern Ireland Prime Minister, Brian Faulkner. In the weeks leading up to the march the committee held a series of crisis meetings regarding the worsening security situation in Belfast and Londonderry. Minutes of these meetings reveal that Heath makes it clear to the committee that his government was prepared to deal with the political consequences of using a military solution to defeat nationalist paramilitaries. Once again General Ford plays a central role as he delivered a security briefing to the committee that alleged that the Catholic population of Derry was entirely hostile to the security

¹¹¹ John Mullin, "Shoot to kill – army general's plan before Bloody Sunday," *Guardian*, (March 13, 2000). <http://www.guardian.co.uk/uk/2000/mar/13/bloodysunday.northernireland> (accessed October 6, 2008).

¹¹² BBC News, "Inquiry hears of 'Killing Policy' claim," (November 14, 2000). http://news.bbc.co.uk/1/hi/northern_ireland/1023341.stm (accessed October 6, 2008).

¹¹³ BBC News, "Inquiry hears of police-army dispute," (March 29, 2000). http://news.bbc.co.uk/1/hi/northern_ireland/693467.stm (accessed October 6, 2008).

forces. He then goes on to state that military intelligence believes that the area is home to a hundred members of the IRA and 1000 nationalist activists. It is unclear how he determined that all 33,000 Catholics in Derry were hostile.¹¹⁴ The hawkish tone of Ford's briefing is in stark contrast to a cautionary memo prepared for the committee by the Prime Minister's cabinet secretary, Sir Burke Trend, warning that the Parachute Regiment had previously overreacted to civil rights protests.¹¹⁵ Despite the massive amount of testimony and documentary evidence reviewed by the Saville Inquiry it remains unclear whether political leaders and the military had formalized and communicated a clear plan as to how the marchers were to be handled. What does seem indisputable is that the increasing tolerance to the idea that the use of violence was necessary seems to have trickled down to the front-line.

The uncertainty that resulted from the absence of clear orders being issued seems to be the key ingredient of the chaos that ensued. One of the officers placed in charge of stopping the march and arresting protestors admitted on the witness stand that he assumed there was a plan to stop the march but that he did not know the details.¹¹⁶ Furthermore, one soldier testified that the night before the protest march tension was running high amongst the Parachute Regiment as soldiers discussed their resentment of parts of Derry being declared no-go zones. The soldier alleged that his lieutenant stated: "Let's teach these buggers a lesson. We want some kills

¹¹⁴ BBC News, "Inquiry hears of PM's 'tough tactics.'" (March 28, 2000). http://news.bbc.co.uk/1/hi/northern_ireland/693452.stm (accessed October 6, 2008).

¹¹⁵ BBC News, "Heath warned over Bloody Sunday Paras," (January 1, 2003). <http://news.bbc.co.uk/1/hi/uk/2599433.stm> (accessed October 6, 2008).

¹¹⁶ Guardian, "Questions remain, says Bloody Sunday lawyer," (November 22, 2004). <http://www.guardian.co.uk/uk/2004/nov/22/politics.bloodysunday> (accessed October 6, 2008).

tomorrow."¹¹⁷ According to further testimony firing started almost immediately after soldiers left the armoured vehicles. This created confusion as some soldiers testified that they believed they were under attack simply because their colleagues were firing so they joined in the melee.¹¹⁸ The picture that emerges from the testimony of those on the security forces side is one where the rules of engagement were not articulated thus allowing a breakdown in control which may have led a certain number of soldiers to become emboldened by an awareness that some amongst their senior ranks supported the use of deadly force to re-establish official control of Londonderry. The Inquiry panel was left to determine did the tragedy occur because there was no official security plan for the march or did upper level officers and their political masters purposively fail to commit their deadly directions to paper to obfuscate attempts to review the situation and apportion responsibility. The lack of adherence to government record rules, intentional or otherwise, forced the inquiry to piece together meeting minutes, testimony and briefing documents to determine if there was some form of official design behind the tragedy. In the end the political consequences Edward Heath stated he was willing to accept may very well have led all parties to carefully avoid leaving a complete record of executive decision making which, in turn, seems to have stymied the efforts of Lord Saville to provide a definitive narrative of what exactly took place.

In spite of spectacular failures on the part of government ministers to prevent scandal tarnishing the national security program few challenged the executive

¹¹⁷ BBC News, "Soldiers urged to 'get kills,'" (June 15, 2000).
http://news.bbc.co.uk/1/hi/northern_ireland/787902.stm (accessed October 6, 2008).

¹¹⁸ Ibid.,(accessed October 6, 2008).

strangle hold on this policy area. The lone voice of dissent came from the legislature. Specifically, the Home Affairs Select Committee, which regularly made protestations about the degree of secrecy employed by the government to which they were told that any attempts to scrutinize national security matters would be met with a refusal to disclose information or make witnesses available. The first crack in this seemingly impenetrable facade came with the passage of the *Security Service Act* in 1989 that provided the legal basis for the operation of MI5. This marked a significant sea change in Britain's approach to security and intelligence. With this piece of legislation the government acknowledged for the first time the existence of the agency; three years later it would concede that MI6 existed. The process of making the veil of secrecy slightly less opaque culminated in 1994 with the passage of the *Intelligence Services Act*.¹¹⁹

Along with providing a statutory charter for MI5, MI6 and the Government Communications Headquarters (GCHQ) the legislation introduced an oversight mechanism to monitor the three agencies. The Intelligence and Security Committee (ISC) is made up of nine parliamentarians drawn from both Houses of Parliament. While parliament supplies the ISC its members that is where its relationship with the legislative branch begins and ends. The findings of the ISC are not binding and it does not have the authority to call for disclosure of government record or access to civil servants. Its statutory authority extends to review of expenditure, administration

¹¹⁹ Ian Leigh, "The UK's Intelligence Security Committee," *Democratic Control of Intelligence Services: Containing Rogue Elephants*, ed. Hans Born & Marina Caparini (Aldershot: Ashgate, 2007): 178-179.

and policy. Security and intelligence operations are outside the committee's remit.¹²⁰ Further emphasizing that this is not a legislative oversight mechanism the ISC's annual report is submitted not to Parliament, but to the Prime Minister, who controls the timing of its release and has the right to review and censor what is deemed necessary to protect national security.¹²¹

Even though he clearly favours highly developed system of accountability, British legal scholar Ian Leigh, can still find much of merit in the ISC. Leigh makes the argument that the ISC has worked surprisingly well given its limited legal powers most notably its lack of authority to call for people and papers. Much of its efficacy appears to be owing to the fact that the Prime Minister, in consultation with the leader of the opposition, has fortunately chosen for appointment parliamentarians with extensive national security backgrounds. The ISC, in Leigh's view, has also been successful at forging a positive relationship with its target agencies and has been remarkably skillful at gaining access to a wide variety of government records. Long serving chairman of the ISC, Tom King, also makes much of the committee's regular and expansive access to government record. At the same time, Leigh acknowledges that the ISC's history is not entirely free of disclosure problems. When the committee set out to review the Joint Intelligence Committee's assessment of Iraq's weapons of mass destruction program the Ministry of Defence did not show ISC members all of the JIC's assessments of Iraqi WMD. As information omission and manipulation were the central concern of the review exercise it was critical that

¹²⁰ Ibid., 183-185

¹²¹ Roy Rempel, "Canada's Parliamentary Oversight of Security and Intelligence," *International Journal of Intelligence and Counterintelligence*, 17, no.4 (Fall 2005): 648.

the Ministry disclose all relevant documents. As the Butler Inquiry into the same matter was taking place at the same time it is hard to believe that this omission was simply an administrative error as the Ministry claimed. The ISC accepted this explanation but expressed on record its grave concerns.¹²² In spite of this episode Leigh's assessment of the ISC is overwhelmingly positive and he further supports his view that the committee is recognized as an effective oversight mechanism by citing the fact that the government has called upon the committee to conduct investigations that ordinarily would be out of bounds as significant operational matters were at play.¹²³

Another leader commentator on British security and intelligence matters, Mark Phythian, also lauds the ISC and notes that members became steadily less deferential to the government and more confident in their subject matter area. The committee's assertiveness was particularly in evidence from 1997 to 2001. Running through both scholars' analysis of the output of the ISC is the view that the committee has delivered effective oversight reporting, albeit on a small scale, in spite of how it is constituted. Specifically, its lack of legislative authority to demand access coupled with its very limited resource base - nine members supported by a staff of five civil servants.¹²⁴ Given the enormous size of the United Kingdom's security intelligence infrastructure the ISC understandably has to be very selective regarding what matters it scrutinizes. This selectiveness has come under increasing scrutiny in the post 9/11 world with the heightened awareness of security and

¹²² Leigh, 193.

¹²³ Ibid., 183-187

¹²⁴ Mark Phythian, "The British Experience with Intelligence Accountability," *Intelligence and National Security*, 22, no. 1, (2007): 84-90.

intelligence. The committee's failure to consider certain incidents and issues has led some to wonder if this has less to do with resources and more to do with its close relationship with the executive.¹²⁵

In spite of the early success of the ISC oversight of national security in Britain has been characterized as insufficient by two notable entities - the Home Affairs Committee and the Government of Gordon Brown. From the inception of the ISC the Home Affairs Committee has consistently called for its replacement with a parliamentary select committee. While the parliamentary committee acknowledged that the ISC was a vast improvement over leaving democratic accountability to the Prime Minister and the Home Secretary, it maintained that its remit is too circumscribed to ensure a system of effective scrutiny is in place. In particular the Home Affairs Committee took exception to the ISC's lack of authority to review operational matters and the fact that agencies have the right to deny access to records if the Secretary of State forbids it or the information is deemed too sensitive to disclose. As in the evaluations of Leigh and Phythian, the select committee acknowledged the ability of the ISC to negotiate access to information and delve into operational matters beyond its mandate. In fact it went so far as to say that the ISC is, for all practical purposes, operating in the manner of a select committee. Due to this fact the parliamentary committee could see no reason why the ISC cannot be dissolved and its mandate transferred to Home Affairs or to a separate select committee created for national security matters. Only then could the oversight mechanism demand access to people and papers; a power the Home Affairs

¹²⁵ Ibid, 96-97.

Committee believed is essential if oversight is to be seen as credible. The report of the Home Affairs Committee acknowledged that some may be perplexed by its opposition to the ISC's continued existence given the widespread praise it had received. What lay at the crux of the parliamentary committee's unease with the configuration of the ISC is that it had not been significantly tested. To the members of the Home Affairs Committee it was uncertain whether the ISC's ability to secure access through negotiation could withstand a political crisis or scandal. As effective oversight is essential in a democracy it cannot be left to chance or be reliant on the fostering of goodwill.¹²⁶

The concerns of the Home Affairs Committee regarding the untested nature of the ISC are powerfully born out by the extensive obstruction experienced by the Stevens Inquiry. In striking contrast the ISC became operational during the latter phase of the Stevens Inquiry and found the same ministries overwhelmingly cooperative.¹²⁷ As Stevens was investigating an operational arena that abounded with incidents that could prove highly embarrassing to the Government, and the Ministry of Defense in particular, it is telling that such a high degree of resistance was met by the Inquiry. This is exactly the type of test that the Home Affairs Committee feared would cause the government to fall back to secrecy and concealment rather than engage with oversight.¹²⁸

¹²⁶ Select Committee on Home Affairs, *Select Committee on Home Affairs Third Report: Accountability of the Security Service*, (June 14, 1999), <http://www.fas.org/irp/world/uk/docs/291/29105.htm> (accessed October 6, 2008).

¹²⁷ Phythian, 81.

¹²⁸ Stevens, 13.

More recently the adequacy of national security oversight was thrust into the spotlight with the publication of the government's Green Paper called the *Governance of Britain* in July of 2007. In this document the Prime Minister and Secretary of State outline an ambitious reform agenda with four main goals: 1. limiting the power of the executive, 2. making the executive more accountable, 3. strengthening the relationship between the individual and the state, 4. reinvigorating democracy. As part of this reform process the Government is contemplating surrendering control of such key areas of executive prerogative as influencing the appointment of judges, declaring war and ratifying international treaties. It is clear from Gordon Brown's statements leading up to the release of the Green Paper the Labour Government had opted to take on the daunting task of contemplating democratic governance as a response to the public's increasing disaffection with the existing approach to security and intelligence and, more specifically, the Blair government's decision to go to war in Iraq. Numerous public inquiries have cast a negative light on the previous Labour Government's decision to closely ally itself on security matters with the United States. Clearly the Brown Government is feeling that it is experiencing a crisis of legitimacy, as it is a rare thing for a government to engage in a consultative process designed to consider ways to limit executive power. Furthermore, as Great Britain relied on executive oversight of national security programs longer than any other liberal democracy it is very significant that its government is now acknowledging in a very public manner the inadequacies of this approach.

Like so many publications before it the Green Paper praises the ISC for its record of “independently and assiduously” performing scrutiny of the work of the security agencies.¹²⁹ However, the report acknowledges that the manner in which the ISC operates is insufficiently transparent. To address this democratic deficit the Government proposes that consultation should take place regarding legislative amendment to bring the way in which the committee is appointed, operates and reports, as far as possible, into line with that of select committees. The report recognizes that measures must be taken to safeguard classified information but that this does not preclude the establishment of greater transparency. The Government proposes in the interim that a number of reforms be made: appointment process should be altered to mirror the one followed for selection of select committee members, the Committee should be given the option to meet in public, parliamentary debates on the ISC’s reports should be led by the Chair of the Committee rather than a Government Minister, the Secretariat to the Committee should be separate to the Cabinet Office and the efficacy of the Committee should be bolstered by the appointment of an independent investigator.¹³⁰

As Great Britain’s oversight system was closest to Canada’s it is very meaningful that it is now rethinking its long-standing practice of leaving the executive overwhelmingly in control of monitoring the national security sector. Like the findings of the O’Connor Commission the Brown Government is now publicly recognizing that the establishment of an independent and transparent oversight mechanism is most

¹²⁹ Secretary of State and Lord Chancellor, *The Governance of Britain*, (July 2007): 32.
<http://www.official-documents.gov.uk/document/cm71/7170/7170.pdf> (accessed October 6, 2008).

¹³⁰ *Ibid.*, 33

in harmony with liberal democratic principles. Moreover, the introduction of far reaching counterterrorism legislation understandably raises public concerns about the extent of state intrusion into the daily lives of its residents. For oversight to have a firm hold on public confidence it must be seen as operating in a sphere beyond the control or manipulation of the executive. The ability of oversight bodies to investigate wrongdoing or operational failings should never be reliant on the willingness of the agencies being scrutinized to cooperate. This is antithetical to the whole process of oversight and accountability.

Accountability in the United States – A Tangled Web of Checks and Balances

The country with an accountability framework closest to the layered approach advocated by Born and Leigh is the United States of America. This may seem incongruous given the previous discussion of the excesses of its post-9/11 national security program. However, the oversight system in place in the United States is one of the most comprehensive and rigorous in existence. Not surprisingly the oversight framework was designed to conform to the system of checks and balances so famously set out in the American Constitution. All three governing branches, the executive, legislative branch and the judiciary, possess expansive oversight capacity.

Prior to the 1970s national security was the exclusive purview of the executive. Then a series of scandals rocked the United States. Largely owing to the efforts of investigative journalists Americans found out, in quick succession, about Watergate, FBI intelligence operations against the anti-war movement and CIA efforts to

destabilize foreign governments. A shocked public demanded greater accountability. What emerged from this reform minded era was an involved network of control and oversight mechanisms. In the executive branch two oversight bodies, the Intelligence Oversight Board (IOB) and the Office of Management and Budget (OMB), were added to the existing President's Foreign Intelligence Advisory Board (PFIAB). The Foreign Intelligence Advisory Board is comprised of sixteen outside experts who advise the President. The Intelligence Oversight Board is a standing committee of the PFIAB. It has four members, appointed by the chairperson of the PFIAB, who conduct independent investigations and review the oversight practices of the inspector generals and general counsels of the intelligence agencies. The OMB is part of the executive office of the President and reviews all budget documents in reference to Presidential policies and priorities. The OMB also clears all testimony and draft intelligence legislation. Through these three entities the executive exerts considerable control over the security intelligence community. Moreover, through executive orders and Presidential directives the White House sets the priorities for the agencies, allocates resources, and ensures that security policy allows for the realization of national priorities. When you add the fact that the executive is also the primary consumer of security intelligence product it becomes apparent that the executive has a distinct advantage over other aspects of the

accountability framework as it enjoys the most immediate and influential relationship with security intelligence agencies.¹³¹

The structure of oversight in the legislative branch is no less involved. The two main mechanisms of scrutiny are the Senate Select Committee on Intelligence and the House Permanent Select Committee on Intelligence. Given the stunning extent of the abuses reviewed by the Church and Pike hearings reformers were able to secure extensive oversight powers for these two committees. The Senate Select Committee is made up of thirteen to seventeen members. The majority party in Congress is given one more seat than the minority. Membership is determined by the majority and minority leaders. The committee's considerable influence is due to its power to authorize annual appropriations, conduct oversight investigations, and handle presidential nominations for all senior intelligence appointments. The House Senate Committee has nineteen members selected by the Speaker of the House. This body has an identical set of duties to the Senate Select Committee. Both committees have the broadest oversight mandate possible as they are authorized to scrutinize both the effectiveness and legality of the intelligence services. In addition to these two main committees there are smaller bodies within the legislative branch that scrutinize specific policy areas. These are the Defense and Homeland Security

¹³¹ Steven C. Boraz, "Executive Privilege, Intelligence Oversight in the United States," *Reforming Intelligence: Obstacles to Democratic Control and Effectiveness*, Ed. Thomac C. Bruneau and Steven C. Boraz, (Austin: University of Texas Press, 2007): 30-37.

Committee, the Senate Armed Services Committee, the House National Security Committee, and both the Senate and House Appropriations Committees.¹³²

There are also multiple layers to the system of internal controls. The Central Intelligence Agency, Department of Defense, State Department and Federal Bureau of Investigation all have an internal watchdog in the form of an Inspector General that files annual reports and conducts issue specific audits. Reports pertaining to the CIA are submitted to the two congressional intelligence committees, while the IG of Defense reports to the Secretary of Defense. These agencies also have general counsels who ensure that activities are in compliance with law and policy. Inspector Generals primarily focus on fiduciary management but can investigate personnel management and allegations of impropriety. Another aspect of internal control is a process unique to the United States called competitive analysis. All organizations that produce intelligence are subject to a rigorous process of peer review. Analysis is circulated amongst agencies and outside experts. Dissenting views are provided to intelligence consumers with the agency's final product. The Intelligence Reform Act mandates this competitive analysis process. Finally, extensive training programs are in place designed to provide security intelligence workers with ongoing inculcation of standards and ethics, laws and organizational policies.¹³³

Traditionally the oversight role of the judiciary in regards to security intelligence agencies has been limited. Prior to 9/11 American courts demonstrated a pronounced reluctance to become involved in national security matters. A number of

¹³² Ibid., 33-34.

¹³³ Ibid., 35-37.

commentators have contended that this reluctance has its origins in two interrelated factors. First, national security almost always calls for secrecy. This need for secrecy is inimical to standard trial procedures. The Federal Rule of Criminal Procedure 16, relating to discovery, and case law demands that pertinent materials must be handed over to defense regardless of classification. The open airing of classified information could be injurious to national interests and immediately devalue what has most likely been gathered at great cost and risk. The struggle between the need for secrecy and the requirement to disclose has led the courts to refrain from taking an activist role in security intelligence issues. Secondly, a long established practice called the political question doctrine has been interpreted as largely precluding the judiciary from concerning itself with security. The doctrine allows judges to express no opinion on matters it feels are best left to the other branches of government. The case of *Baker v. Carr* sets out that in order to support the invocation of this doctrine the case should involve a “lack of judicially discoverable and manageable standards”¹³⁴ for resolving the matter. No area of government decision-making is more likely to meet this condition than national security issues given the degree of official secrecy and involvement of foreign actors outside the court’s jurisdiction.¹³⁵

The courts’ reservations have begun to lessen as the established nexus between national security and foreign policy has been overshadowed by the emerging preoccupation with homeland security. With the massive expansion of the domestic

¹³⁴ Elizabeth Rindskopf Parker and Bryan Pate, “Judicial Oversight of Intelligence,” *Reforming Intelligence: Obstacles to Democratic Control and Effectiveness*, ed. Thomas C. Bruneau and Steven C. Boraz, (Austin: University of Texas Press, 2007): 59.

¹³⁵ *Ibid.*, 58-59; Fred F. Mangat, “Intelligence and Judicial Intervention,” *Handbook of Intelligence Studies*, ed. Loch K. Johnson, (New York: Routledge, 2007): 329-331.

national security program after the attacks of September 11th the judiciary could not ignore applications to the courts alleging government actions on American soil breached individual freedoms guaranteed by the Constitution. It must be added that when compared to legislative oversight judicial review remains deferential to the executive branch in regards to security intelligence. Its scope of review is also narrower as judges must confine themselves to legal issues and avoid comment on policy.¹³⁶ While the courts taking on a greater oversight role, in the security realm, is in its early stages the impact of judicial decision-making has already been significant.

One of the first cases to signal that the judiciary may not be willing to stand on the sidelines of the Bush Administration's war on terror was the 2002 decision of the Federal District Court in Manhattan that concluded enemy combatant Jose Padilla had a right to consult legal counsel. A year later a federal appeals court in New York further ruled that the President did not have the authority to declare someone an enemy combatant without an act of Congress. As this setback to presidential authority was being dealt a San Francisco court ruled that the Administration use of the detention camp at Guantanamo as a legal black hole for suspected terrorists was not supported by law. In 2004 the case of another enemy combatant, Yaser Hamdi, was heard by the Supreme Court, which ruled that detainees had a right to receive the factual basis for their designation and an opportunity to challenge the government's position before a neutral decision-maker.¹³⁷ These series of decisions

¹³⁶ Manget, 339.

¹³⁷ Freeman, 243.

circumscribed the Bush Administration's expansive interpretation of wartime powers accorded to the executive by Article II of the Constitution. More recently, a federal court judge delivered a significant blow to the broad powers of the *Patriot Act* by striking down the national security letter provision for being in breach of two central constitutional freedoms - the right to free assembly and speech and the right to be protected from unreasonable search and seizure.¹³⁸

After reviewing the constituent parts of the exhaustive oversight system in the United States it is hard to believe that it was not able to detect the institutional failings that left security intelligence agencies so ill prepared for 9/11 and its aftermath. Even more perplexing is how acquiescent Congress was to the legislative overkill of the *Patriot Act* and the Bush Administration's use of wartime powers without the authority of a formal declaration of war. While the judiciary is increasingly joining civil groups on the frontlines of the battle to restore the supremacy of the Constitution, the high profile Congressional oversight committees have been noticeably absent from the fray. This is highly instructive for nations about to embark on oversight reform, like Canada, as it demonstrates that simply putting in place a highly developed oversight structure with the requisite legal authority and resources will not in itself deliver effective accountability. A number of commentators have weighed in

¹³⁸ Dan Egan, "Judge Invalidates Patriot Act Provisions: FBI is Told to Halt Warrantless Tactic." *Washington Post*, (September 7, 2007): A01. <http://www.washingtonpost.com/wp-dyn/content/article/2007/09/06/AR2007090601438.html> (accessed October 6, 2008).

on the desperate need for reform of the Congressional oversight system, not the least of which was the 9/11 Commission.¹³⁹

In the final report of the 9/11 Commission the authors bluntly characterize the current state of Congressional oversight as dysfunctional. The report goes on to say that strengthening legislative oversight is probably its most important and difficult recommendation. The Commission viewed the review system as cumbersome with responsibility for oversight fractured throughout a bureaucratic structure made up of a large number of committees and subcommittees. To illustrate this point the Commission relates how the Department of Homeland Security is required to report to no less than eighty-eight committees and subcommittees. While this is somewhat of an extreme example give the department's excessively broad mandate, most security intelligence agencies are required to deal with just over twenty oversight bodies.¹⁴⁰ While the complexity of the oversight system reflects the reality of reviewing a massive security intelligence infrastructure, it cannot be denied that it has also become a behemoth with such decentralized authority that it is seemingly incapable of exerting the influence necessary to limit executive power. The Commission advocated a vast simplification of the structure and offered two possible reform models: the two main Congressional committees should be absorbed into

¹³⁹ The National Commission on Terrorist Attacks Upon the United States (also known as the 9/11 Commission) was created by congressional legislation with President Bush's approval in 2002. The Commission was an independent, bi-partisan entity charged with preparing a full account of the circumstances that led to the terrorist attacks on the United States in 2001. The Commission was also tasked with providing recommendations regarding how the U.S could ensure that future attacks are prevented. Further information available at <http://www.9-11commission.gov/> (accessed December 7, 2008).

¹⁴⁰ William J. Lahnen, "U.S. Intelligence Prior to 9/11," *Reforming Intelligence: Obstacles to Democratic Control and Effectiveness*, Ed. Thomac C. Bruneau and Steven C. Boraz, (Austin: University of Texas Press, 2007): 89.

one joint committee or a House and Senate committee should be created with combined authorizing and appropriations powers. Regardless of the model adopted a specific subcommittee dedicated exclusively to oversight should be created. This was necessary in the eyes of the Commission as its investigation found that an inordinate amount of committee work focused on budget review. The Commission also advocated that members should serve indefinitely, rather than the current limit of eight years, in order to ensure that the committee possessed the necessary expertise. Committee size should drop by half to foster a greater sense of responsibility amongst members and accountability for the quality of the committee's output. Resistance to reform was predicted, as it was clear to the Commission that each committee was intent on guarding the territory and resources it had carved out for itself.¹⁴¹

The findings of the Commission were echoed by American political scientist Loch Johnson, who captures the central failing of legislative oversight in the United States in a more colorful way by presenting two models of oversight. First is the more common and less desirable fire alarm model. In this approach legislators are involved in intense, reactive investigations most often prompted by media revelations or reports of wrongdoing by interest groups. In the period after the Church and Pike Committees there have been a number of notable incidents of fire alarm style oversight. The Iran-Contra affair in 1987, brought to light by an alarm sounded in foreign media reports, is a classic example of crisis-oriented oversight.

¹⁴¹ 9/11 Commission, *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks upon the United States*, (July 2004), 419-421.
<http://govinfo.library.unt.edu/911/report/911Report.pdf> (accessed October 6, 2008).

Of course the attacks of September 11th is another. When not responding to a fire alarm most committee members engage in sporadic episodes of patrolling for problem issues with varying degrees of enthusiasm or as the 9/11 Commission pointed out busying themselves reviewing the staggering budgets of security intelligence agencies. One can be forgiven for thinking that the media attention scandals draw may be a central motivating factor behind the vigour elected officials invariably display when playing the firefighter role. This assertion seems to be supported by the findings of a study of attendance patterns of members of Congress to intelligence related committee meetings that found that only one third showed up. The depth of preparation for routine hearings is also wanting as agency witnesses have often been heard to lament the lack of quality questioning. It appears that inaction can set in once the committee's work is no longer garnering headlines.¹⁴² The second and more effective model is the police patrolling approach. This sees committees, on their own initiative, conducting regular audits of agency activities. The aim of this ongoing exercise is to detect failure to meet legislative priorities or legal standards and formulate a remedy before a crisis occurs. By conducting audit activities like this the committees will set performance standards and discourage wrongdoing. The police patrol mode of review would be well suited for the subcommittee devoted completely to oversight recommended by the 9/11 Commission. It would also be preferable if committee members had indefinite terms of service, also recommended by the Commission, as it would allow for the

¹⁴² Loch Johnson, "Governing in the Absence of Angels," *Who's Watching the Spies*, Eds. Hans Born, Loch K. Johnson, Ian Leigh, (Dulles: Potomac Books, Inc, 2005):68-69.

development of specialized expertise amongst committee members which would translate into meaningful examination of security intelligence practice.

The true capacity of legislative oversight is very much in evidence when Congress responds to high profile incidents of wrongdoing or crisis. In the aftermath of September 11th a joint Congressional inquiry conducted an assessment of the United States intelligence community. This investigation's report was heavily relied on by the 9/11 Commission. It delivered a devastatingly frank analysis of the incompetence and confusion that reigned amongst the government agencies tasked with monitoring the terrorist threat to the United States. A minority report by Republican Senator Richard C. Selby went even further and named the senior officials in the intelligence community who failed to ensure that the country was aware of the threat posed by Al Qaeda.¹⁴³ Similarly, the 9/11 Commission did not shrink from publicly lambasting the performance of the intelligence community, the Administration, and its own mechanisms of oversight. While the series of hard-hitting reports issued by Congress demonstrated its independence from the executive and its ability to conduct incisive review it also illustrated a significant problem with legislative oversight in America. Given the wealth of analysis produced it was all too easy for agencies and the public to become overwhelmed by information and competing lists of recommendations. Repeated calls for reform from a confusing array of oversight bodies with similarly unwieldy names can run the danger of mitigating the impact of Congress' oversight role.

¹⁴³ Craig R. Whitney, "Introduction" *The 9/11 Investigations*, Ed. Steven Strasser, (New York: Public Affairs, 2004): xxiii-xxv.

There is much of value in the United States oversight system with its robust system of legislative oversight. Congressional review bodies have an unmatched degree of access to government record, resources, and authority to scrutinize virtually any aspect of security intelligence activities. During times of crisis Congressional committees, with civil groups and the judiciary, have repeatedly demonstrated a determination to uncover the facts and expose official wrongdoing. At the same time, any country looking to the United States for oversight best practices should avoid at all costs mirroring the bloated review infrastructure so apparent in Congress as the sheer complexity of it often defeats the efforts of the public and the press to follow oversight activity. It also allows committee members to engage in free rider behaviour, as it is so easy to hide from public view given the secrecy and vast array of review bodies.

Having reviewed the strengths and weaknesses of the accountability frameworks of two of Canada's closest allies, with their much more involved histories with terrorism, we can now turn our attention to how oversight is constituted here and whether it is capable of protecting rights and freedoms in this era of heightened intelligence gathering and security enforcement.

CHAPTER 4: IN THE ABSENCE OF PROOF - THE CASE OF MAHER ARAR

The case involving Maher Arar is an all too familiar story of what happens when government agencies are conducting a high stakes counter-terrorism investigation with little control or oversight. Many police witnesses at the O'Connor Inquiry spoke of feeling that they were in a race against the clock, as many feared that the attacks of September 11th were just the first in a series planned by Al Qaeda for North America. As reports were already swirling that some of the nineteen suicide bombers had entered the United States from Canada there seemed to have been a widespread belief that a Canadian nexus to any future attacks could have a devastating impact on the country's reputation and relationship with the American government.¹⁴⁴ Accordingly the Royal Canadian Mounted Police established a national investigation into the terrorist threat to Canada and its partners known as Project Shock. A central element of Project Shock was the formation of national security teams across Canada that would come to be known as Integrated National Security Enforcement Teams or INSET. This integrated approach to security policing was given a large injection of funds in the Federal Budget of December 2001.¹⁴⁵ As the RCMP was reasserting itself as a major player in the national security realm the Canadian Security Intelligence Service was reviewing its files to ensure that any

¹⁴⁴ Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar – Analysis and Recommendations*, (Ottawa: Public Works and Government Services, 2006): 67-66.

¹⁴⁵ Jody Brian, "Integrated Policing in Action – High level of collaboration continue one year post-9/11," *Safety and Security for Canadians*. http://www.rcmp-grc.gc.ca/security/feature2_e.htm (accessed October 6, 2008).

individual who posed a threat was immediately referred to RCMP integrated teams for investigation. In Ottawa a number of CSIS files were transferred to the RCMP. This led to the creation of a special project to handle the files, which was called Project A-O Canada. One of these transferred files involved Abdullah Almalki, an electronics exporter, who had been under CSIS scrutiny for a number of years as he was suspected of being associated to Al Qaeda.¹⁴⁶ This suspicion appears to arise from his association to the Pakistan office of a charity known as Human Concern International. The director of this charity in Pakistan, during Almalki's term of employment, was Ahmad Said Khadr who forged close ties with Osama bin Laden.¹⁴⁷ Maher Arar enters the picture two months after 9/11 when he contacted Almalki to arrange a lunch meeting.

The A-O Canada Investigation

One of the great shocks that comes with reading the report of the O'Connor Inquiry is how little Maher Arar figures in the A-O Canada investigation and how great a price he paid for what really amounts to a brief encounter with an individual who had become the subject of a national security investigation. As a recent arrival to Ottawa, Arar sought contact with his passing acquaintance, Almalki, a father of four children, to discuss where he and his wife could find a good doctor as they were expecting a child.¹⁴⁸ On October 12, 2001 the two men met at a café in Ottawa and after dining took what would become a fateful walk in the rain. After about twenty minutes they

¹⁴⁶ Commission of Inquiry into the Actions of Canadian Officials, 16-17.

¹⁴⁷ Abdullah Almalki and Paul Copeland, *Abdullah Almalki Chronology*, 1.
<http://www.mun.ca/serq/almalkichronology.pdf> (accessed October 6, 2008).

¹⁴⁸ Don Butler, "From Success to Suspect," *Ottawa Citizen*, (December 8, 2006).
<http://www.canada.com/ottawacitizen/specials/arar-1.pdf> (accessed October 6, 2008).

proceeded to a house for prayers and then to a retail store. The two men once again engaged in conversation in the parking lot. Unbeknownst to Almalki and Arar three surveillance teams were watching their every move. Surveillance reports state that officers believed the men appeared to be engaged in deep discussion and were taking care not to be overheard. Hence the walk in the rain and the final discussion in the parking lot. Prior to this outing Arar was unknown to the police or intelligence agencies.¹⁴⁹

As a result of his brief meeting with Almalki the computer consultant became a person of interest to the RCMP investigation. In order to track his international travel investigators requested border lookouts be placed on both Canadian and American customs databases. The letter submitted to Customs agencies on both sides of the border referred to Arar and his wife, Monia Mazigh, as part of a group of Islamic extremist individuals suspected of links to Al Qaeda. Even though the RCMP had no evidence to support this startling assertion it was declared in writing to an agency of a foreign government in regards to two Canadian citizens. As Justice O'Connor pointed out the RCMP treat declarations made by American agencies as coming from a reliable source. Clearly the RCMP would expect its US counterparts to treat their written declarations in the same manner.¹⁵⁰ To apply such a serious label to Canadians in a communication to an American agency so soon after that nation suffered such a devastating terror attack by the named group could be construed as needlessly reckless. Anyone with even a passing knowledge of border controls

¹⁴⁹ Commission of Inquiry into the Actions of Canadian Officials, *Analysis and Recommendations*, 20.

¹⁵⁰ *Ibid.*, 115.

would know that a lookout characterizing the person as an Al Qaeda associate would be treated with the upmost gravity. The consequences for the person would undoubtedly be considerable.

Even though Arar was now being characterized as an Islamic extremist the investigators did not seek a meeting with him to discuss his relationship with Almalki until three months had passed after the lunch meeting. Upon learning that the RCMP wanted to talk with him Arar contacted a lawyer who, in turn, spoke to a government lawyer assigned to Project A-O Canada. When asked about the nature of the investigation and in what capacity Arar was to be interviewed, a suspect or a witness, the government lawyer stated that the RCMP would not provide that information prior to the interview. Consequently Arar's lawyer felt it was necessary to place conditions on the interview. Namely that the statement was for information purposes only and could not be used in a legal proceeding. Justice O'Connor concluded that Arar's recourse to legal representation coupled with the limits set for the interview served to reinforce the investigators view that the computer consultant had something to hide.¹⁵¹ As Arar's lawyer made clear his motivation for the limits was not guilt on his client's part but the fact that the post-9/11 world was one in which Muslim men had to be cautious when dealing with authorities on matters of

¹⁵¹ Ibid., 101-102.

national security. As a result of the conditions the RCMP chose not to pursue their request for an interview any further as investigators felt it would be useless.¹⁵²

Over six months after the RCMP interview request Arar and his family traveled to his wife's native Tunisia on vacation.¹⁵³ On his return through the United States he was detained and eventually deported to Syria where he was subject to treatment that was contrary to international human rights conventions. There can be little doubt Arar would never have booked a flight transiting the United States if he had been aware of the information passing between the RCMP investigators and their American counterparts. In the months between the border lookout request and his departure for Tunisia Arar's name had made its way into numerous RCMP briefing notes to American authorities. The manner in which Arar was characterized seemed to be ever changing. Project A-O Canada officers described Arar as a "...suspect, a target, a principle subject of its investigation, a person with an 'important' connection to Mr. Almalki, a person directly linked to Mr. Almalki in a diagram titled 'Bin Laden's Associates: Al Qaeda Organization in Ottawa,' and a business associate or close associate of Mr. Almalki."¹⁵⁴ Officers were not only regularly mislabeling Arar in communication with the United States but were also making a number of false statements about his behaviour and business links. Americans were told that Arar refused to be interviewed which ran the risk of making him seem more suspicious. Similarly, it was stated that he traveled from Quebec to meet Almalki at the café.

¹⁵² Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar - Factual Background, Volume 1*, (Ottawa: Public Works and Government Services Canada, 2006): 76-78.

¹⁵³ Commission of Inquiry into the Actions of Canadian Officials, *Analysis and Recommendations*, 127.

¹⁵⁴ *Ibid.*, 25.

This in Justice O'Connor's estimation made the meeting seem far more important. Also passed on was the contention that Arar was a business associate of Almalki. The source of this information was said to be Almalki's brother. In fact the officer interviewing Youssef Almalki misquoted him in his notebook. This was identified as an error elsewhere in the file but was still conveyed to the United States.¹⁵⁵ This was no minor detail as electronics sold by Almalki in Pakistan were allegedly found in the hands of the Taliban in Afghanistan.¹⁵⁶

A Question of Capacity – the Commission's Findings

While the decision of the United States Government to deport Maher Arar to Syria was unconscionable it is far easier to comprehend once the content of RCMP communication is reviewed. Possibly the most disturbing aspect of the O'Connor report, next to the treatment of Arar by Syrian authorities, is the striking lack of capacity within the RCMP to conduct effective counter-terrorism investigations. In the aftermath of 9/11 the RCMP found itself overwhelmed by a public tips system it had created to receive terrorism related information. One month after the attacks the Force was struggling to contend with a 10,000 tip backlog. As the twenty officers assigned to the specialized National Security Investigations Section in Ottawa were swamped with tip files, senior officers created a project team to handle the CSIS referral. With the exception of one officer all those transferred to Project A-O Canada had no national security file experience. The senior officers responsible for putting the team together testified that they made every effort to gather the most

¹⁵⁵ Ibid., 25.

¹⁵⁶ Almalki and Copeland, 1.

experienced criminal investigators available for the project. Justice O'Connor concluded that the composition of the project team was appropriate and reasonable in the circumstances.¹⁵⁷ At the same time, national security investigations are markedly different to regular criminal code files as they are usually preventative in nature and often require extensive interaction with intelligence and foreign agencies. Further complicating matters the newly assigned officers were working with the first ever anti-terrorism legislation to come into effect in Canada. Given these exceptional factors it was all the more important that senior officers kept close tabs on the investigation team's activities. Moreover, the politically charged atmosphere that reigned just after the attacks added an extra dimension of intensity to the team's operational environment. Again this should have been recognized by senior officers and factored into the management plan for Project A-O Canada. The failure of the RCMP's senior management to recognize the gaps in the project team's capacity to conduct a national security investigation was succinctly captured by Justice O'Connor:

Significantly, however, the officer in charge and other members of the Project team had no training or experience in national security investigations. Moreover, the investigators were given no orientation or training on RCMP policies or practices governing information sharing with other agencies as they might be applied in the national security context. Nor did they receive any orientation or training about the analysis of terrorism-related information and the need for precision in such analysis, the cultural values and mores of the community that would be affected by their investigation, or human rights issues in the context of national security investigations.¹⁵⁸

¹⁵⁷ Commission of Inquiry into the Actions of Canadian Officials, Analysis and Recommendations, 69-70.

¹⁵⁸ Ibid., 71.

On the surface the reporting structure established to internally monitor the progress of Project A-O Canada appears to be fairly comprehensive. The Project team reported to Criminal Operations at "A" Division Headquarters. The Inspector in charge of the team had a direct reporting relationship with the Assistant Criminal Operations officer. This officer then reported up to the Chief Superintendent of "A" Division. In addition to this divisional reporting structure the team also provided regular briefings and daily situational reports to RCMP Headquarters. The Project received direct orders and guidance from Divisional senior officers rather than headquarters personnel. Justice O'Connor expressed surprise that RCMP National Headquarters did not play a larger supervisory role given the far-reaching implications of the file. This was all the more perplexing given that INSET units have a more centralized reporting relationship with Headquarters due to the fact that they conduct national security investigations. It was not clear why the Almalki investigation was allowed to progress as if it were an ordinary criminal investigation. The efficacy of internal control was further compromised by a growing tension between the Project and RCMP Headquarters. The Criminal Investigations Division (CID) was concerned that they were not being kept fully informed of the progress of the investigation. In particular, it regularly found out about actions after they had taken place. Even though the limits of the Project A-O Canada team were well known CID did little to exert greater control even though organizationally it had the authority to do so at any stage.¹⁵⁹

¹⁵⁹ Ibid., 76-77.

Justice O'Connor expressed the belief that greater involvement of upper level CID officers may have pre-empted some of the worst failings of the investigation. A closer look at the statements and subsequent actions of Headquarters personnel cast some doubt on this assertion. A serious conflict in testimony arose at the inquiry in relation to what instruction divisional officers received in regards to the use of caveats and information sharing arrangements. This was of central importance given that Maher Arar appears to have become a target of the US war on terror due to unauthorized and factually inaccurate disclosures from Project A-O Canada. RCMP Assistant Commissioner Proulx testified that information sharing figured largely in a meeting involving the RCMP, CSIS and American agencies that took place just after September 11th. At this meeting an understanding was reached that sharing of terror-related information would happen in real time. This was to ensure that preventative action could be taken to avert any further attacks. According to the Assistant Commissioner, this understanding was not to override existing policy or formal information-sharing agreements. This is notable as such formalized sharing involves vetting and restrictive caveats, which often delay release. At the very least all documents must be reviewed to ensure that only RCMP originated material is being released. Moreover, according to government record rules, documents would also be marked with caveats requiring the receiver to contact the RCMP if they wished to act on the material or further share. Just these two basic information sharing protocols would make it very difficult to share in real time as the parties discussed. Proulx went on to testify that he verbally communicated this information sharing arrangement to senior officers in various divisions including "A" Division. At no time

was this arrangement committed to paper or reviewed by the Minister's office. This extraordinary and informal approach to disclosure procedures appears to have caused considerable confusion. Chief Superintendent Couture of "A" Division testified that there was a general understanding among all the partner agencies that information was to be shared without caveats. He stated that he formed this impression partly due to statements made by Assistant Commissioner Proulx. Couture's subordinate, Inspector Clement, described the new approach to disclosure as an "open book arrangement."¹⁶⁰ Clement added to the mix that he was of the understanding that this sharing without caveats was for intelligence purposes only and could not be used in court proceedings. This is perplexing given the *raison d'être* of the RCMP is to gather information for criminal charges which, it follows, should proceed to court. According to the testimony of rank and file members of Project A-O Canada the disclosure arrangement was communicated to them as a free flow of information agreement that allowed all information obtained by the team to be passed to the partners of the agreement without screening or caveats. It was also added that third party restrictions that did not allow for onward disclosure without the permission of the originating agency were also to be ignored. Consequently the information being passed on to the Americans was far beyond what Assistant Commissioner Proulx envisioned when he entered into the real time disclosure agreement. It is unclear how the Assistant Commissioner expected officers to engage in real time sharing while adhering to RCMP policy that required time consuming vetting and careful consultation with all outside information

¹⁶⁰ Ibid., 109.

contributors. Other high-ranking members of CID supported Proulx's position that division officers misinterpreted his description of the new arrangement.¹⁶¹ The testimony of those attached to RCMP Headquarters suggests that if Project A-O Canada had adhered to Proulx's vision of the arrangement the disclosure problems could have been averted. It is curious then that a file review conducted by Chief Superintendent Killam of Headquarters in 2003 determined that Project A-O Canada had acted appropriately throughout its investigation.¹⁶² This despite the exaggerated characterization of Arar as an Islamic extremist linked to Al Qaeda and the stunning decision of the team to copy its entire investigation database to CDs for review by American agencies.¹⁶³ The confusion that characterized the Force's approach to disclosure was also evident in its efforts to conduct reviews. Just as the results of the Killam review were becoming known the Commission for Public Complaints Against the RCMP launched an investigation. Tasked to conduct this investigation was another member of Headquarters staff Superintendent Brian Garvie. The Garvie Report concedes that Project A-O Canada sharing with the United States was a clear breach of RCMP policy and government record rules. Superintendent Garvie's conclusions regarding whether the inaccurate information shared by the RCMP contributed to the American decision to deport Arar to Syria are somewhat convoluted. The report contends that the American decision to detain Maher Arar was not based solely on RCMP information. At the same time RCMP supplied

¹⁶¹ *Ibid.*, 108-110.

¹⁶² *Ibid.*, 265.

¹⁶³ *Ibid.*, 119.

information was used in the immigration proceedings against the Ottawa resident that resulted in a deportation order being issued.¹⁶⁴

Going into reading the report many may be expecting to find that Canadian authorities coordinated Arar's rendition with their American counterparts in order to maximize the information that could be drawn from the Ottawa resident. Rather than being the victim of a Machiavellian intelligence gathering scheme Maher Arar is a casualty of incompetence. Arar's fate appears to have been sealed by an extremely vague directive regarding a disclosure arrangement that the Force's second highest ranking officer strangely opted to disseminate by word of mouth. At senior levels RCMP officers failed to clearly communicate to rank and file officers what they were authorized to share with Canadian and foreign governments. The conclusion of the O'Connor Commission is that Arar most likely did nothing more than stumble into the middle of an investigation of his passing acquaintance Almalki.¹⁶⁵ Justice O'Connor was very clear in his concluding comments that what happened to Maher Arar was a gross abuse of authority and in order to prevent any future incidents of this nature the government must put in place an effective set of oversight measures to provide front line officers with clear guidelines on information disclosure, evidence reporting, and inter-agency communication.

¹⁶⁴ Commission of Inquiry into the Actions of Canadian Officials, *Factual Background*, 544-547.

¹⁶⁵ *Ibid.* 303.

CHAPTER 5: RESTORING BALANCE - AN OVERSIGHT MODEL FOR CANADA

Given the litany of institutional weaknesses catalogued by Justice O'Connor one has to ask the question where were the independent oversight agencies when all of this was unfolding. The Commission for Public Complaints Against the RCMP weighed in over a year after Arar's deportation by a filing a complaint under the *RCMP Act* that contained a series of allegations of wrongdoing in relation to the Almalki investigation. As the Commission lacks the capacity to conduct an independent probe it must rely on the RCMP to investigate its complaint and report the results to the oversight body. The outcome of this investigation was referred to in the last section as the Garvie Report. The Chair of the Commission, Shirley Heafey, was far from satisfied with the results and expressed serious concerns in the body's annual report. Heafey's central issue was the degree to which the RCMP customarily withheld relevant information from the Commission. Much to the Chair's dismay the Garvie report opened with a statement about how it was restricted from disclosing information due to the sensitive nature of criminal investigations with a nexus to national security. This was somewhat ironic as the information in question was shared with a foreign power but could not be disclosed to the oversight body for legislated scrutiny. Heafey goes on to state that this type of non-disclosure is not supported in law. To support this assertion she quotes the *RCMP Act* that mandates that the Commissioner must release all materials relevant to a complaint to the Chair of the Commission. Heafey chose to suspend her agency's review of the complaint

due to the creation of the O'Connor Commission. The resistance met in this instance is all too typical for the Complaints Commission.

O'Connor's Oversight Model

Justice O'Connor followed the publication of his exhaustive analysis of the events that led to the deportation of Maher Arar to Syria with a final report outlining a new approach to oversight that he believed would bring to an end the stonewalling Heafey describes in her report. The Commissioner proposed that a new review body, called the Independent Complaints and National Security Review Agency, be established with the jurisdiction to scrutinize all RCMP activities including national security investigations. The agency's mandate would encompass compliance with laws, policies, international obligations and standards of propriety. In order for such a body to be effective, Justice O'Connor argues, it would have to have the authority to subpoena documents and compel testimony. As a result of conducting the Arar Inquiry the commissioner became well acquainted with the national security landscape of Canada and the many interrelated agencies with a security mandate. Consequently he advocated that independent review should also be brought to bear on the activities of Canada Border Services Agency, Citizenship and Immigration Canada, Transport Canada, and the Financial Transactions and Reports Analysis Centre and Foreign Affairs Canada. Justice O'Connor went on to advocate that the Security Intelligence Review Committee take on the responsibility of monitoring these agencies in addition to CSIS. Acknowledging the integrated nature of national security enforcement post 9/11 the Commissioner recommended that the ICRA, SIRC and the Commissioner of the Canadian Security Establishment be linked by

legislation in order to ensure that exchange of information and referral of investigations is possible. The enabling statute should also allow for the conduct of joint investigations. Finally, Justice O'Connor advocated the creation of the Integrated National Security Review Coordinating Committee to provide a unified intake mechanism for complaints the national security activities of federal agencies. This body would be tasked with reporting to the Government about the impact on human rights and freedoms of the national security program.¹⁶⁶

While it cannot be denied that Justice O'Connor's proposed model would be a vast improvement over the current approach to oversight it is flawed in a number of respects. First and foremost the ICRA is just a refashioned Complaints Commission with subpoena powers. The Commission, as Heafey made clear in her response to the internal Arar investigation, currently has the legal right to material that pertains to a complaint. This has not translated into the unfettered access so essential to effective oversight. The addition of subpoena powers is a positive, as it would make the duty to disclose clearer cut. What it would not address is the authority deficit all agencies external to parliament struggle with when attempting to fact find and enforce compliance with findings.

Rather than O'Connor addressing the crippling resource gap between the agencies and their watchers the commissioner compounds the problem. Creating a network of oversight bodies that can conduct joint reviews will only off-set marginally the

¹⁶⁶ Commission for the Inquiry Into the Actions of Canadian Officials in Relation to Maher Arar, *Arar Commission recommends a new review agency for the RCMP's national security activities, and a new review process for five other agencies*, (December 12, 2006). <http://news.gc.ca/web/view/en/index.jsp?articleid=262069&keyword=Arar&> (accessed December 6, 2008).

resource issues. Saddling SIRC with a multitude of federal agencies to monitor will only spread its meager resources even thinner. There is simply no way SIRC, as it is presently constituted, could take on that jurisdictional expanse. Furthermore, the agencies listed have very specialized areas of concern. In order to conduct meaningful review SIRC would have to develop a competency in a vast array of policy arenas. A committee of its size is simply not able to build the necessary level of expertise. Its only hope would be to expand its research staff many times over. This can also be said for mandating the ICRA to review all types of RCMP investigations. As O'Connor made clear in his report national security investigations are a highly specialized area of police work. This is not accommodated in this model. In any given year the proposed agency, with O'Connor's ambitious mandate, could be responsible for reviewing complaints concerning anything from unnecessary use of force, custodial treatment and mutual legal assistance issues. Once again it is unrealistic to expect a review committee, which customarily have eight to twelve members, to master such a disparate collection of policing issue.

An Alternate Model – Parliamentary Oversight

The Arar incident is one of those watershed moments that only arise once every few decades. From it can be born a groundbreaking approach to oversight if only the opportunity is not squandered on half measures like O'Connor's slightly revised version of existing review bodies. As Canada was casting an appraising eye on the conduct of our national security program so too were the Americans in the form of the 9/11 Commission Hearings. There is much of value in the oversight model proposed in the report that could be translated to suit our parliamentary

environment. A central recommendation of the Commission was that oversight authority should be concentrated in one or two committees to ensure maximum impact. Of course oversight was to continue to be a function of Congress as the United States has never contemplated external bodies as Canada and the United Kingdom has done. Similarly, Canada should have a legislatively centered oversight system. Rather than focusing on bodies like the proposed ICRA and SIRC Canada should have parliamentary committee dedicated to reviewing all aspects of the national security program. Following the Born and Leigh model it should be made up of parliamentarians from all parties, submitting reports directly to parliament, and with a chair selected by parliament. The committee would not have to concern itself with additional subpoena powers as it would have the full authority of parliament to call for people, papers and records.

As advocated by Born and Leigh the committee should adopt the functional approach to review. This would mean that it would have the broadest possible mandate – finance, budget, propriety and efficacy. With the power to review operational files would come the need for heightened recourse to secrecy. Transparency concerns would be mitigated to a certain degree with elected officials from all parties being on the committee as well as public hearings whenever classification allowed. Another concern with a broad mandate is expertise building and workload. As pointed out by the 9/11 Commission budget review can become an onerous duty. Accordingly, Canada should adopt a simplified version of the U.S model and have specialized subcommittees. One could focus solely on finance and resource issues. Given the concerns raised by the Arar incident there should be a

subcommittee devoted to human rights and freedoms. A third committee would be tasked with general monitoring and efficacy issues. It is this part of the structure that would conduct random audits on files and ensure compliance with policy and law. This specialization would allow parliamentarians, like their congressional counterparts, to develop an in-depth knowledge of a particular policy area. Size of committee membership should correlate to workload. Making the membership too large would allow for the free rider concern raised by the 9/11 Commission.

All subcommittees would report to the central committee. The independent bodies, like the Complaints Commission and SIRC, should continue to exist to field public complaints. Any complaint considered credible that concerns any of the issues covered by the mandate of the parliamentary framework should be referred for consideration.

In order to ensure that parliamentary oversight committees have a strong connection to individual agencies the number of inspector generals should be expanded so that there is one in every agency under scrutiny. Currently CSIS is the only agency with such a position as part of their internal control structure. Once again Canada would be mirroring the U.S approach. The inspector generals would be responsible for annual reporting to the responsible minister as well as conducting random audits and internal investigations of wrongdoing. The parliamentary committees would be able to review the output of the inspectors general and call them to testify.

Finally, executive accountability can be bolstered immeasurably by having oversight performed largely by parliamentarians. Currently the ministers are called to task

regarding security intelligence matters infrequently. Most often when the media or an interest group reports impropriety. Scandals like that involving the RCMP and Maher Arar generate a high degree of public interest. As a result the responsible minister is forced to account for his or her agency's conduct at length either during question period or in the media scrums with the parliamentary press corp. Once the scandal stops making headlines the frequency of ministers being called on to explain their agencies activities shrinks. This is particularly true of security intelligence policy as the complexity and secrecy preclude it from being fertile ground to cover in parliamentary debates. Accordingly it is a rare thing to see national security issues arise in question period or in the hallways of parliament hill. Public dialogue regarding the national security program would undoubtedly escalate if there were parliamentary committees regularly meeting to conduct oversight. What is more, if ministers had to face a series of well-informed committees and engage in discourse regarding his or her agency's conduct it would become a matter of necessity for the minister to keep close tabs on the agency's activities. The fact that the minister would be facing fellow parliamentarians who are security cleared would also reinforce the sense that non-disclosure like that regularly encountered by the Complaints Commission is not an option. This type of engagement in turn would cause a trickle down effect where bureaucrats would be subject to more robust executive oversight as ministers would not want their command of their portfolio to be found wanting.

CONCLUSION

As nearly two years have passed since the publication of the Arar Inquiry report the window of opportunity for the realization of substantive change in the realm of oversight is steadily closing. The Harper Government has been noticeably silent on the need to address the stunning weaknesses in the execution of national security investigations outlined in the Arar report. It is striking how quickly complacency once again set in after months of daily revelations of incompetence, indifference and suffering emanating from Arar Inquiry. The illusion that terrorism is not really a Canadian problem appears to have once again taken hold.

What is clearly needed is civil groups to play their oversight role to the fullest and resurrect the issue in the media. It is unfortunate that the Iacobucci Internal Inquiry into the Actions of Canadian Officials in Relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin, all Canadians subject to imprisonment in Syria like Maher Arar, is shielded from public view.¹⁶⁷ This has meant the loss of a second round of public hearings regarding the deficient manner in which Canada performs oversight of its national security program. Possibly Canadians view what happened to Arar as an anomaly or isolated incident more a by-product of American hysteria than a potent illustration of Canada's ill-equipped national security apparatus.

¹⁶⁷ Internal Inquiry into the Actions of Canadian Officials in Relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin, *Terms of Reference*, (December 2006).
<http://www.iacobucciinquiry.ca/en/terms-of-reference/index.htm> (accessed October 6, 2008).

As the recent conviction of an Ontario man under the *Anti-Terrorism Act* for engaging in a terror plot targeting Canada demonstrates terrorism is not something that happens elsewhere.¹⁶⁸ This conviction can be read as a signal that Canada is where Britain and United States were three decades ago. Acts of terror have now come to Canadian shores. No longer is Canada a place where plots are hatched and violence unfolds elsewhere. Unlike the FLQ crisis of the 1970s the Ontario plot is not an isolated outburst of a fringe element in a regional political movement but an expression of support for an extremist movement that has followers all over the globe and sees itself in a pitched battle against western liberal democracies like Canada. It is unknown whether this is the beginning of Al Qaeda inspired groups becoming a significant threat to Canadian national security. What is certain is that the national security program must be able to rapidly recognize who amongst us poses a risk and have the ability to respond effectively. The program scrutinized so publicly by Justice O'Connor did not instill confidence that it possessed the capacity to differentiate between the unwitting associate and the person of real concern. If we are to avoid the large-scale civil liberty abuses experienced by minority groups in Britain and the United States we must spend the time and resources during a time of relative calm, like the present, to create an effective national security program and an oversight framework capable of keeping it in check.

¹⁶⁸ Colin Freeze, "Terrorism laws passes their first test as youth convicted in homegrown plot," *Globe and Mail*, (September 25, 2008): <http://www.theglobeandmail.com/servlet/story/RTGAM.20080925.wterrorverdict0925/BNStory/National/home> (accessed October 6, 2008).

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