

NATIONAL SECURITY GOVERNANCE AFTER ARAR

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In the aftermath of Maher Arar's ordeal, this article critically examines Justice O'Connor's recommended reforms as well some of the wider implications for the governance of national security. The author argues that a key lesson from the Arar Inquiry is the manner by which excessive secrecy corrodes both the perception and performance of government. What is required, beyond O'Connor's call for a new RCMP review body of eminent Canadians, is meaningful and direct public oversight by parliamentarians, as well as public engagement in order to collectively determine how best to safeguard democratic freedoms in an uncertain and complex world. The post-9/11 expansion of the security and intelligence apparatus both within the RCMP and across the public sector must be brought out of the shadows.

Par suite de l'épreuve subie par Maher Arar, cet article s'interroge sur les réformes proposées par le juge O'Connor et les conséquences de l'affaire sur la gouvernance de la sécurité nationale. Selon l'une des grandes leçons à en tirer, estime l'auteur, le secret excessif corrode à la fois la perception et l'action du gouvernement. Au-delà de l'appel du juge en faveur d'un comité d'examen de la GRC formé d'éminents Canadiens, nous devons prévoir une supervision directe par les parlementaires et favoriser l'engagement du public en vue d'établir collectivement les moyens de préserver nos libertés démocratiques dans un monde toujours plus complexe et incertain. L'expansion de l'appareil de sécurité et du renseignement survenue depuis le 11 septembre, tant à la GRC que dans le secteur public, doit être portée à l'attention de tous.

In the aftermath of Maher Arar's harrowing ordeal of wrongful detention and torture, Justice Dennis O'Connor has provided an enormous service to Canadians by heading a commission of inquiry that has, over the course of its two phases of work, first absolved Arar of any terrorist activity or affiliation, then recommended numerous changes to the governance of this country's national security apparatus.

In some respects, change is already well underway. The resignation of the former RCMP commissioner is a case in point. So too is heightened public sensitivity to security operations and the central importance of ensuring accountability, especially in a post-9/11 world. Now, however, in looking beyond the Arar case (and other such cases now under review), the government must look forward and decide how best to respond to the sweeping recommendations put forth by O'Connor. How it does so will go a long way in determining whether the livelihood of other Canadians may be wrongly compromised, as well as the capacities of Canada's security agencies to fulfill their fundamental mission, which is the pursuit of our collective safety.

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tions for the governance of national security. Some five years after 9/11 and with the scope of the terrorist threat widening, it is difficult to envision a more important matter that will come before Parliament in the coming months.

Due to their central role in Arar's mistreatment (chronicled in the initial report) and the resulting terms of the commission of inquiry, the primary focus in O'Connor's reform package is the RCMP. It bears noting here that the RCMP encompasses both policing and national security functions, the latter a direct result of the federal response to 9/11. While the RCMP had, in the past, dealt with security and intelligence matters, changes adopted more than 20 years ago were designed to yield a more exclusive focus on law enforcement. As such, in 1984 the Canadian Security Intelligence Service was created (and during the last federal campaign the Conservatives promised to create a new foreign intelligence agency, in order to better complement CSIS abroad).

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attacks for federal officials to gain some comfort in navigating the respective roles of CSIS and the RCMP. Importantly, this was a time of relative calm in geopolitical waters — the Cold War receding and terrorism a largely distant overseas reality for North Americans.

The hurried response to 9/11 that would define terrorist activity into law for the first time in the country's history brought with it unavoidable pressures to mobilize and expand segments of the RCMP. CSIS would remain important, also called to expanded duties, but the more specialized intelligence gathering efforts of this relatively small agency could not have legally nor tactically served the urgent push to identify, prevent and prosecute terrorist activity (of the sort that came to light in Toronto in June 2006).

Yet the widening of the RCMP's mandate and operations also underscores a quandary in all democratic governance systems — namely, how best to ensure appropriate conduct and accountability in law enforcement and security operations. Prior to 9/11, the RCMP reported to Parliament through a minister, the solicitor general, though not without considerable operational autonomy in order to limit the risk of political meddling. Needless to say, the reverse also holds, which is why eyebrows were raised when the RCMP publicly announced an investigation of the offices of then finance minister Ralph Goodale over the income trust matter during a federal election.

The legislative and administrative changes introduced as a result of 9/11 have amplified the importance of this quandary. Ministerial responsibility was expanded through the portfolio of public safety and security (now encompassing the RCMP and fusing the previously separate solicitor general's position), but the autonomy of the RCMP, even with its expanded security operations, was largely preserved. With respect to the Arar affair, the

unavoidable tensions have been on display ever since — arguably even a root cause of the inquiry itself (as many claim Prime Minister Martin appointed O'Connor, having grown exasperated at RCMP stonewalling).

In this expanded anti-terrorism environment, the need for strengthened review and oversight did not go unnoticed, leading to a proposed new parliamentary committee on national security. This point will be returned to below, as it was by and large ignored by O'Connor in his final report. Instead, O'Connor has taken aim at the absence of alternative mechanisms for public complaints and independent review over the RCMP. His model in this regard is that of CSIS.

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In light of its secretive activities, and the equally pronounced need to shield intelligence services from inappropriate political interference, CSIS operates under the guise of an independent body known as the Security Intelligence Review Committee (SIRC). The public optics are not unlike those of judicial inquiries: eminent Canadians are called upon and sworn in to observe and, as appropriate, investigate CSIS activities, reporting on the results of their actions to Canadians via Parliament.

Yet, unlike the exhaustive and widely covered proceedings of a judicial inquiry (typically established in the aftermath of presumed wrongdoing), SIRC's role is meant to provide a more normal-

ized review process that can also help steer the efforts of the agency and the government. While many domestic and international observers have praised the SIRC-CSIS model, there is little by way of direct, verifiable evidence to suggest corrective measures being undertaken due to the existence of SIRC since almost all of its findings are classified as secret. Clearly, however, the conventional wisdom regarding SIRC is that some review is better than none at all.

With respect to the RCMP, O'Connor seeks to apply such wisdom and, to his credit, build upon it in light of both the post-9/11 expansion of the RCMP's stature and the reality that national security involves many other actors from across the federal government. On the first point, O'Connor's proposal is for a review committee, modelled after SIRC, for the RCMP as a whole, including both its policing and security functions. This new body, the Independent Complaints and National Security Review Agency (ICRA), would be more powerful than the current Commission for Public Complaints Office in that it would hold extensive investigatory powers of review.

This proposed new body largely underwrites Ronald Atkey's characterization of O'Connor's blueprint as a "bull's eye." Atkey served as the first chair of SIRC and in a thoughtful commentary in the *Globe and Mail*, he endorses the ICRA concept as well as expanded mandates for this body (also encompassing the Canada Border Services Agency) as well as SIRC (which would add to its domain the security functions of Citizenship and Immigration Canada, Transportation Canada, the Financial Transactions and Reports Analysis Centre of Canada and Foreign Affairs).

Atkey nonetheless tempers his own praise with two pertinent observations. First, the five aforementioned units added to the review bodies are but one-

fifth of the total number of agencies and departments partaking in national security work. Thus, whether this group is the right size and composition is an issue worthy of further consideration. O'Connor's response to such horizontal complexity is a proposed overarching body, the Integrated National Security Review Coordinating Committee, a group of four comprising the chairs of the newly formed ICRA, SIRC, the commissioner of the Communications Security Establishment, and an additional outside appointee.

Secondly, O'Connor's neglect of parliamentary review is flagged by Atkey as a "minor quibble" that should not distract the government from moving forward with O'Connor's blueprint. This latter omission, however, is arguably far from minor: it is one deserving of critical attention and great care in order to refurbish the governance mechanisms underpinning national security for both contemporary challenges and those to come.

On the matter of parliamentary involvement, the need for a stronger basis of political review has been an increasingly recognized omission of the anti-terrorism apparatus enacted over the past five years. Indeed, while in power the Liberals endorsed plans for a new parliamentary committee on national security that would include

used to "create a new National Security Review Committee to ensure effective oversight and a greater degree of accountability and transparency regarding Canada's national security efforts." During this past year, SIRC even set aside a modest budgetary allocation in order to liaise with the proposed new body.

It is worth underscoring here that at present, the legislative branch sits well on the margins of security and intelligence matters. Despite the recent public inquisition of the former RCMP commissioner over his conduct in the Arar case, it should not be forgotten that it took a combination of media scrutiny (fuelled by the tenacity of Arar and, while he was imprisoned, his wife), judicial inquiry and a change in government before these House of Commons committee hearings served merely to amplify the invariable outcome of such prolonged and extraordinary measures.

The fundamental problem at hand — namely the absence of political oversight on specific matters of national security, stems from both perception problems and performance impacts intertwined with excessive secrecy. A central pillar of executive branch decision-making, secrecy fashions concentrated power and thereby contributes to the notion of a diminished role for Parliament. Perception becomes reality when faith in the leg-

a zone of insularity encompasses those agencies and departments with security-related responsibilities.

As we have seen in the Arar affair, such insularity breeds technocracy since accountability not only is necessary for public confidence and remedial action when things go awry, it also underpins strong and adaptive performance capacities in volatile and uncertain environments. Such a link is ensured not through reactive, after-the-fact investigation, but by ongoing involvement and engagement by all stakeholders committed, in this case, to the cause of collective security.

One key stakeholder in this regard is the public at large. Less deferential to representational authority and increasingly informed, today's citizenry must find a role in the governance of public safety and security, both through but also beyond their elected representatives. By avoiding the question of political review, O'Connor instead opts for a more traditional path of eminently qualified Canadians to serve the ICRA in a similar manner as has been the case with SIRC.

While such persons and credential-driven review mechanisms may well have important contributions to make, they alone cannot suffice. A much stronger degree of direct public engagement is required in order to create the sort of ongoing, participatory and performance-driven accountability regime required for 21st century security challenges. How odd that the rebuttal to such notions is often that the public is not sufficiently informed or qualified, when as a society we routinely empower juries of our peers to determine guilt or innocence in the most complex and insidious of matters.

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members from all political parties, drawing from both the House of Commons and the Senate.

After much consultation and debate by an interim group established in 2004, a draft blueprint for such a committee was introduced in Parliament in April 2005, only to die on the order paper later that year. In their own electoral platform, the Conservatives likewise prom-

islate diminishes: extraordinary measures such as public inquiries thus become compensatory in order to maintain a modicum of public trust.

In the national security realm, where some measure of secrecy is clearly warranted, the danger is that the absence of a political dialogue over precisely what the standard of secrecy should be further widens the gap between elected officials and the citizenry. Furthermore,



CP Photo

Maher Arar, at the hour of his vindication by the O'Connor Commission. Beyond his fact-finding, Judge Dennis O'Connor recommended sweeping changes to Canada's security oversight, particularly regarding the RCMP, to strike a better balance between citizens' rights and their safety from terrorism.

carefully, begin to politicize discussions about national security in a positive manner. Even as parliamentarians may well be sworn in as Privy Council members in order to respect classified information, a profoundly important issue worthy of political debate is how to balance secrecy and openness in the conduct of national security.

O'Connor struggled with this very issue himself, preferring to defer (in order to complete and release his report) what remains an ongoing court challenge of the federal government's refusal to release significant portions of commission proceedings. The Canadian Senate has reported repeatedly and forcefully in recent years on its inability to meaningfully review Canadian security agencies in light of the pervasive "culture" of secrecy (a concern acknowledged by Anne McLellan, then deputy prime minister and minister responsible for national security).

Review bodies such as SIRC and the proposed ICRA play a very precise role. Their purpose is to ensure that existing laws are upheld and respected, while also providing a channel of legal recourse for those with legitimate grievances. SIRC itself underscores this retrospective mandate as "not providing oversight of current CSIS activities." As important as such review functions are, they are in no way a substitute for ongoing political review and a proactive dialogue as to the objectives and means of an enlarged agenda of public safety and security. The current absence of such conditions is both striking and worrisome.

Rectifying this deficiency is important since a number of important issues call for enlightened political and public attention. One such issue is how best to reconcile the conflicting demands of complexity and clarity

with respect to administrative and political accountability.

A common criticism of the O'Connor blueprint and likeminded reforms in recent times, such as the new federal *Accountability Act*, is the danger of an overabundance of controls and watchdogs — the likes of which threaten to stifle any hope of innovation and freedom within the public service. Applied to the security realm, O'Connor's layering of bolstered review offices and coordinating committees could stifle creativity and responsiveness in a volatile and often virtual environment of criminal and terrorist actions that are poorly suited to safely adhering to procedure.

The immense challenges of information management are a central theme of O'Connor's final report, acknowledging the constant flows of information across departments and agencies, across levels of governments

and, of course, across national borders. Was anyone truly surprised to learn that in the aftermath of 9/11, rules were broken as law enforcement officials rushed to share information in an urgent effort to assess potential threats while responding to established ones?

Therefore, one must ask how governments can best respond to the unavoidable complexities of today's environment. Is it, as has been the case since 9/11, to remain loyal to the political traditions of ministerial accountability that — for the sake of clarity and simplicity — presuppose that one individual can oversee the massively expanded portfolio of public safety and security and all of its subcomponents (while respecting the arm's-length relationship to law enforcement)?

Public safety and security has arguably become the single most complex and multi-faceted agenda confronting not only the federal government but the public sector and the country as a whole. While some may lament the introduction of new mechanisms and approaches that seem to challenge the integrity of traditional organizing principles, it is worth asking whether traditions established in the 19th century or earlier are sufficiently robust to meet the challenges of the 21st.

At a minimum, with more than 20 federal departments and agencies involved in national security, should we not expect more than a single minister to be accountable to Parliament for both process and results? There are surely opportunities to envision a new cabinet subcommittee (one that would at least partially convene in public) to grapple with the horizontal complexities of an integrated security apparatus and report collectively on both means and results.

In this regard as well, O'Connor has done his part — arguing for statutory gateways across his expanded set of review offices (themselves overseen by an overarching committee) in order to allow for some basis of systemic review.

Despite its potential for authoritative clarity, he resists calls for a new “super-agency” that would merely add to an already overly rigid federal bureaucracy. As terrorists and criminals organize in a networked fashion, public sector guardians must do the same — and this

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challenge is as much political as it is technological and organizational.

Adding to this complexity is the unavoidable reality that such networked responses must also transcend jurisdictional boundaries. O'Connor insists, for example, that RCMP review must extend, as appropriate, to local and provincial authorities, all the while acknowledging the fluid and informal nature of much of the collaboration and information sharing that takes place. Despite such integrative action on the ground, our “national” security strategies have mainly been federal-government-driven strategies, a capacity weakness for communities and regions that has been well documented by Canada's Senate among other groups. More effective intergovernmentalism, as a basis for a truly integrative security agenda, requires a more overt and politicized discussion than has been the case to date.

Finally, there are the vexing questions of Canada-US relations that proved so central to Arar himself. With the US bowing out of the inquiry's proceedings, Justice O'Connor could only chronicle the manner by which bilateral information flows involving mainly the RCMP on this side of the border breached formal procedures on numerous occasions (as well as explanations for doing so).

Few Canadians would dispute the need for transnational collaboration

beginning with our American partners. At the same time, the schism between the rhetoric of Canadian political leaders espousing national sovereignty and the operational alignment of our post-9/11 security efforts with those of the US is widening. Here, then, O'Connor's

blueprint must be viewed as one important piece of a larger puzzle. The future of national security is intertwined with foreign policy, international institutions and, most predominantly, new continental governance relationships such as the Security and Prosperity Partnership of North American.

Here, too, such themes demand a more honest and artful examination of the implications for both Canadian policy and public sector organization and accountability. They require political dialogue and public engagement.

The final report of the Arar Commission of Inquiry presents a uniquely comprehensive analysis of Canada's national security apparatus that must be fully leveraged. Justice O'Connor merits both praise and consideration, but the country would be poorly served if this were to be an ending, and not a new beginning. A conversation involving all stakeholders is now required. The fundamental task, involving both policy and process, is determining how best to strike the appropriate balance between democratic freedom and collective security, and foster strong, adaptive and accountable mechanisms for transforming this balance into strong capacities and successful outcomes.

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