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One Issue, Two Voices

Intelligence Sharing between Canada and the United States: A Matter of National Survival

Drawing on expertise from both sides of the Canada–U.S. border, the *One Issue, Two Voices* series is intended to stimulate discussion on policy matters relevant to the bilateral relationship. This sixth issue examines how intelligence-sharing practices differ between Canada and the United States. Authors Robert Henderson, an Ottawa-based senior security analyst, and Fred Hitz of the University of Virginia School of Law are international experts in the field of intelligence. Together they compare the state of bilateral intelligence cooperation in response to terrorist threats.

Although the events of September 11 radically changed the security landscape expanding intelligence cooperation between Canada and the United States, it was not until the publication of Mr. Justice O'Connor's *Report of the Events Relating to Maher Arar* in September 2006 that our intelligence-sharing practices came under public scrutiny. The report found that erroneous intelligence from the RCMP may have prompted American authorities to detain Maher Arar in New York and deport him to Syria. The Arar case sheds light on how intelligence agencies operate in Canada and the United States and why they must cooperate to protect national security.

Our authors flag
intelligence-shar-

ing practices that highlight both the cooperation and the differences between Canada and the United States based on history, cultural values, and global responsibilities. Henderson argues that, despite the cooling on Canada's part to supply the United States with sensitive intelligence in the wake of the Arar disaster, it is vital for Canada and the United States to continue to cooperate closely on terrorist matters. Hitz is concerned that new restrictions on exchanging information to avoid making future mistakes will prevent our intelligence agencies from acting quickly in an emergency.

Both countries insist on their right to withhold intelligence information that they feel is essential to their own national security and which they don't choose to share. The U.S. government chose not to testify at the Arar Inquiry and has refused to disclose pertinent information to Canadians. Nonetheless, we must hope that basic cooperation amongst the intelligence agencies and the practical procedures for operations will work together effectively when the next crisis hits. In today's world, efficient bilateral intelligence sharing is key to national survival.

The Canada Institute thanks the authors for contributing to our understanding of a critical issue in the ongoing bilateral dialogue. We are grateful to the Canada Institute on North American Issues for its support.

Stephanie McLuhan

Program Consultant (Toronto), Canada Institute

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“There is no
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Robert D'A. Henderson

We Need to Continue Bilateral Intelligence Cooperation—but Carefully

In his incisive and insightful assessment, Mr. Justice Dennis O'Connor, the commissioner of the Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, expressed the concerns of many Canadians about Canada's close but delicate security intelligence relations with our southern neighbor and alliance partner, the United States.¹

The commission's *Report of the Events Relating to Maher Arar* uncovered in explicit detail Arar's ordeal, which began during his return from a family vacation trip to Tunisia to their home in Ottawa in September 2002. In transit through JFK International Airport in New York City, Arar, who has dual Canadian and Syrian citizenship, was detained by U.S. immigration officials, questioned about his Middle Eastern acquaintances as possible “persons of interest,” and, after a week, sent against his will to Syria—under the U.S. policy that is now known as “extraordinary rendition.” According to American authorities, Arar was deported under a lawful “removal order” from the United States. However, he was not given the choice of being returned to his flight departure (Tunisia), continuing to his flight destination (Canada—his country of citizenship and residence), or being sent to his other country of dual nationality (Syria). He was simply ordered to Syria without his consent. And it is this fact that suggests that his deportation was an “extraordinary rendition,” in fact if not in name. While imprisoned for almost a year by Syrian Military Intelligence, he was tortured and forced to make a false confession about alleged links to the Al Qaeda terrorist network.

After a thorough two-year inquiry investigation, Judge O'Connor found that, in the aftermath of the September 11 attacks, Royal Canadian Mounted Police (RCMP) law-enforcement officials shared inaccurate or misleading security intelligence information about Arar with U.S. authorities which very likely led to his Syrian ordeal. Judge O'Connor acknowledged that the RCMP had reasonable grounds to conduct their surveillance of Arar as part of a wider national security investigation and that their subsequent inquiries did not involve any impropriety. He also found that there was no evidence that Arar had committed any offense or that his activities constituted a threat to Canadian security.² Following the release of the *Report*, Maher Arar himself made a public call for the full implementation of Judge O'Connor's 23 comprehensive and balanced recommendations.³

With a view to the heightened post-September 11 worldwide security regime, the *Arar Report* is a Canadian fact-finding inquiry report whose primary audience is Canadians—though American readers would also benefit. It is intended to prevent what happened to Maher Arar from happening to any other Canadian—whether with Middle Eastern or other overseas origins, dual citizenship, acquaintance with persons of interest, or simply being in the wrong place at the wrong time. In addition, the report offers a unique insight into the U.S.–Canadian security intelligence relationship in the years since the attack on the World Trade Center and the Pentagon.

The Canadian Intelligence Community and Its Place in Canadian Culture

In April 2004, Canada issued its first ever National Security Policy: “There is no conflict between a commitment to security and a commitment to our most deeply held values. At their heart, both speak to strengthening Canada. Canadians have built a remarkable country shaped by a deep attachment to democracy, the rule of law, respect for human rights and pluralism.”⁴

In the last quarter-century, several pieces of legislation have strengthened this perspective. In 1982, at the same time that it patriated its constitution, Canada passed the *Charter of Rights and Freedoms*—a document similar to the American *Bill of Rights*—which guarantees basic human rights for Canadians and foreign residents in Canada. In addition, Canadians expect that their personal information will be protected from unlawful use by the enforcement of the *Privacy Act of 1985* and the *Personal Information Protection and Electronic Documents Act of 2000*.

Moreover, together with the country's two official languages, English and French, the *Canadian Multicultural Act of 1988* reaffirmed multiculturalism as a fundamental characteristic of Canadian society. Both the multiculturalism policies and various ethno-cultural communities—as well as its liberal immigration and refugee asylum policies—are central to the way Canada defines itself as a country. Furthermore, many Canadians retain dual citizenship with their ethnic homeland or birthplace.

Within our multicultural, parliamentary democracy, the Canadian intelligence community has as its primary focus the provision of domestic security monitoring and security enforcement. Under the December 2003 Canadian national security reorganization, the civilian minister of Public Safety and Emergency Preparedness Canada⁵ has the political responsibility for the Canadian Security Intelligence Service (CSIS), the Royal Canadian Mounted Police, and the newly formed Canadian Border Services Agency. Both CSIS and the RCMP are tasked with national security and anti-terrorism responsibilities under the *Anti-Terrorism Law of 2001*. But, under the *CSIS Act of 1984*, CSIS is responsible for security intelligence collection and advice, while the RCMP, as the national law-enforcement agency with powers of arrest and detention, is responsible for security enforcement. Although foreign intelligence is provided by signals intelligence collection (SIGINT), foreign-posted intelligence liaison officers, and allied intelligence sharing, Canada is the only G8 industrial nation that does not possess a foreign intelligence service.⁶

In the area of national security both before and since September 11, the RCMP national security units have conducted counter-terrorism intelligence collection,⁷ with the principal aim of making arrests and providing evidence for criminal prosecutions. While the chief role of CSIS is to collect security intelligence in order to provide advanced warning and advice to the federal government and other government departments, both CSIS and the RCMP have a mandate to uncover information to pre-empt any possible domestic terrorist attacks. CSIS is also expected to provide discovered information concerning potential criminal activities to the relevant Canadian law-enforcement agency. While the RCMP has bilateral agreements for intelligence exchange with the American FBI, CSIS and the Privy Council Office (PCO) are the lead Canadian federal agencies for security intelligence exchanges with the U.S. government, including the CIA. For these purposes, the PCO, CSIS, and the RCMP all maintain permanent security liaison officers in the Canadian Embassy in Washington, D.C., to facilitate intelligence exchanges and coordination—just as the FBI and the CIA maintain liaison officers at the U.S. Embassy in Ottawa.

The Post-September 11 Pressure to Act

The *Arar Report* points out in graphic detail that the devastating loss of life from the September 11 terrorist attacks in New York City and Washington, D.C., raised considerable concern about a potential second wave of terrorist attacks within the United States and, possibly, in Canada. As the lead security intelligence agency, CSIS was tasked by the Canadian government to extend its intelligence collection broadly on domestic

terrorist suspects within Canada. At the same time, U.S. intelligence and law-enforcement agencies—principally the FBI and the CIA—were sending an enormous number of requests to Canada for terrorist-related security information. In this “imminent threat” milieu, and with its more limited personnel resources, CSIS transferred to the RCMP the prime responsibility for investigating a number of individuals suspected of criminal offenses and terrorist links.⁸

Even before this imminent threat period, a number of Canadian–U.S. intelligence-sharing accords were already in place—to which additional arrangements were now mutually agreed. And, just as the United States passed its extensive security legislation, the *USA Patriot Act* (PL 107-56) in October 2001, Canada fast tracked with little debate its own omnibus *Anti-Terrorism Law of 2001* (Bill C-36) in December of that same year. There is no evidence that Canada adopted an American-style “extraordinary rendition” policy—whereby detained terrorist suspects could be deported to countries with a poor human rights record for the purpose of information extraction, including interrogation under torture. According to the *Arar Report*, there was no evidence of any Canadian request for the deportation of Arar against his will to his original homeland, Syria, despite his dual citizenship.⁹

The Arar Inquiry Report Recommendations: What Needs to Be Done

As Judge O’Connor has written, the RCMP provided American authorities with security information (including the entire Supertext investigation database)¹⁰ that did not comply with RCMP policies requiring screening for relevance, reliability, and personal information, some of which related to Maher Arar. The information on Arar was inaccurate and lacked written caveats as to its use—thereby “increasing the risk that the information would be used for purposes of which the RCMP would not approve, such as sending Mr. Arar to Syria.”¹¹ Yet, despite Arar’s reprehensible ordeal and the errors made by the RCMP in the period following the September 11 attacks, it is vital to remember that the continuing exchange of security information between Canada and the United States is essential to the security of our shared North American continent. (Though the obligations under the post-September 11 intelligence agreements between Canada and the United States are not known, it is understood that, because of what transpired in the Arar case, there is, at present, a coolness within the Canadian Intelligence Community to the transfer of information to the United States.)

In his recommendations, Judge O’Connor noted that the information-sharing policies of the RCMP were essentially sound. However, he recommended that the RCMP and other Canadian security agencies need to ensure that information is not passed to any foreign government agencies—including those of the United States—except under the strictest procedures, written caveats, and institutional oversight.¹² In addition, the sharing of personal information on Canadian citizens and residents must also meet the moral, legal, and human rights standards set out in the *Charter of Rights and Freedoms*, the privacy laws, and the *Criminal Code of Canada*. If not, then the intelligence-sharing regulations have to be reviewed to ensure that these standards are duly adhered to.

Judge O’Connor also found that CSIS had acted within its mandate in transferring some security investigations, and the intelligence uncovered in those investigations, to the RCMP. In addition, under the terms of the *CSIS Act of 1984*, CSIS procedures and



Maher Arar recounts story of torture as wife Monia listens

operations are reviewed by an internal CSIS inspector general and an external government-appointed Security Intelligence Review Committee (SIRC)—each of which conducts an annual audit. The annual SIRC public report on CSIS is then presented to the Canadian Parliament.¹³ There is no similar oversight mechanism for external reporting on the activities of the RCMP.¹⁴ To correct this omission, Judge O'Connor has recommended that the RCMP's information-sharing practices and arrangements be subjected to review by an independent, arm's-length review body yet to be established.¹⁵

Permanent Neighbors, Friendly Allies, and National Interests

Canada and the United States are permanent neighbors in North America—with a staggering cross-border trade of US\$1.4 billion a day in goods, services, and investment income, as well as over 100 million people-crossings of the U.S.-Canadian border every year. Our nations have been friendly allies for almost two centuries, through both world wars, the Cold War, and assorted hot regional conflicts. In the five decades since the Second World War we have had well-established intelligence-sharing arrangements—the 1947 UKUSA intelligence-sharing accord, the North American Air Defense Agreement, and more recent intelligence cooperation accords reached in the post-September 11 period.

Despite this proximity and our ongoing relationship, each of our countries is a sovereign state, with national interests that it pursues and selected intelligence information that remains tagged for “Canadian Eyes Only” (CEO) or for “No Foreign Access” (NOFORN). As such, both countries should continue to exchange intelligence to the extent compatible with the moral and legal context of their distinct societies.

Canadian Concerns about Intelligence Cooperation

Canadians have expressed concerns about the extensive security powers under the *USA Patriot Act of 2001* (renewed in March 2006) which have the capacity to have an impact on them. In addition to border watch lists and detention powers within the United States, American law-enforcement agencies can access personal information held by a number of corporate bodies. Many Canadian corporations and even some provincial governments outsource the processing and maintenance of their data records to American companies, thereby making Canadian personal information such as credit-card use, health records, and airline travel available for security inspection in the United States without the knowledge of Canadian government agencies or legal protections.¹⁶ Moreover, the newly passed *US Military Commissions Act* of 2006 (also known as the detainee law) will establish further security regulations for detaining and interrogating individuals suspected of planning terrorist acts or supporting terrorism.

Another Canadian concern deals with the current state of information sharing within and between the various American security and law-enforcement bodies themselves. In March 2003 the U.S. Department of Homeland Security (DHS) was created by merging 22 departments and agencies into a single American internal security department—each of which had its own security information databank and perhaps its own intelligence exchange accord with its Canadian counterpart. Currently, the DHS is still experiencing difficulties in its vertical intelligence sharing with state-level and local-level law-enforcement agencies. Despite the creation of the new Office of the Director of National Intelligence, there are reports of difficulties in horizontal information sharing within the U.S. intelligence community, which has 15 components including the DHS. Many of these problems are due to institutional differences and differing systems for security data collection and retrieval.

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Some Canadians are concerned about their dual citizenship, but the Canadian passport bears an explicit warning that dual nationalities may be subject to all the laws of the other country of citizenship, and Canada would be unable to offer any protection in that regard. Many foreign countries refuse to recognize dual citizenship, so ignore the rights of dual-nationality Canadians. Moreover, the increasing security procedures on the U.S.-Canada border, with watch lists, photo identity, passport requirement, finger printing, and such,¹⁷ have affected American and Canadian residents alike as they cross from one country into the other.

There are even critics in the U.S. Congress who have suggested that Canada has become a haven for terrorists and called for the construction of a border fence for the world's longest undefended border—the United States' northern border with Canada. Instead of a "Fortress America" and "blame your neighbor" approach, however, the answer to internal security concerns about a terrorist presence on our continent lies in mutual respect and cooperation.

Finally, serious questions remain about the extent to which American security and law-enforcement officials really understand the operations of the Canadian security system and its procedures. According to a March 2004 FBI internal audit report, for instance, FBI field agents have conducted a number of unauthorized investigations within Canada since 2001—unauthorized by the U.S. Embassy in Ottawa at least. Stockwell Day, the minister of public safety, assured the House of Commons in October 2006, however, that all the FBI visits were done in accordance with Canadian law.¹⁸

Prospects for Continued Intelligence Sharing: Necessary but Carefully

As the United States and Canada are increasingly integrating as a North American economic market, the post-September 11 security threats have become an even greater driver for a North American "security zone." The exchange of intelligence between allied nations is a basic survival necessity in our present world, where individuals with extremist views can perpetrate acts of mass killings. And, in threatening statements broadcast publicly by Osama Bin Laden, Canada was one of the few Western countries explicitly cited as a target that has not yet suffered an Al Qaeda-related terrorist strike.

As recently as June 2006, according to a CSIS public statement, Canadian law-enforcement and security officers arrested 10 men and five youths in southern Ontario on suspicion of plotting terrorist attacks against high-profile targets in the Toronto metropolitan area. The fact that all the suspects were Canadian nationals has further highlighted concerns of a new generation of home-grown Al Qaeda-inspired terrorist groupings. These Canadian suspects have been linked to two other men arrested in the United States in March 2006 by American authorities on suspicion of providing material support for terrorism. These cases demonstrate the need for continued intelligence cooperation.

Between the United States and Canada, bilateral intelligence cooperation must be maintained for the security of both nations and for the security of the North American continent—but such intelligence sharing must also be done carefully. Canadians expect circumspect use of any and all government-collected personal information. They also expect regulated procedures for the way Canadian government agencies share this information with other agencies or with foreign governments, including the United States and other allied countries.

In its 2004 National Security Policy, the Canadian government publicly set out its three core national security interests. The first is to protect Canada and Canadians at

home and abroad; the second is to ensure that Canada is *not* a base for threats to the United States and our other allies; and the third is to confirm that Canada continues to contribute to international security efforts. The priority given to protecting the United States is placed just behind that of protecting Canada and Canadians. Effective bilateral intelligence cooperation constitutes the first line of protection for both countries against domestic and international terrorists, as well as other extremist groupings, international criminal groups, and individuals prepared to use mass violence for socio-religious and political causes.

Notes

1. For a useful backgrounder on Canada–U.S. intelligence sharing, see Martin Rudner, “Hunters and Gatherers: The Intelligence Coalition Against Islamic Terrorism,” *International Journal of Intelligence and CounterIntelligence* (New York), vol. 17 (summer 2004): 193–230.
2. Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar [Arar Report]*, vol. III: *Analysis and Recommendations* (Ottawa 2006, in English and French), 78–79, 9.
3. Maher Arar, “Our faith has been shaken,” *Ottawa Citizen*, October 14, 2006.
4. Privy Council Office, *Securing an Open Society: Canada’s National Security Policy* (Ottawa: Public Works and Government Services Canada, April 2004, in English and French)—executive summary available at <<http://www.psepc.gc.ca/pol/ns/secpol04-en.asp>> and the full report at <http://www.pco-bcp.gc.ca/default.asp?Language=E&page=publications&sub=natsecurnat&doc=natsecurnat_e.htm>.
5. Previously known as the solicitor general, the government minister in charge of the Department of the Solicitor General.
6. In addition to CSIS, the RCMP, and the CBSA, the Canadian Intelligence Community includes the Privy Council Office (PCO), with responsibility for federal security and intelligence coordination; Foreign Affairs Canada, for diplomatic (foreign political and economic) intelligence; the Department of National Defence, for military intelligence; the Communications Security Establishment (which is under DND) for signals intelligence; and a number of other specialized components.
7. As noted by Judge O’Connor in the *Arar Report*, vol. III, 66–69.
8. *Ibid.*, vol. I, 35–37, and vol. III, 65–66. CSIS did not share any information on Maher Arar with the U.S. authorities. See *ibid.*, vol. III, 14.
9. *Ibid.*, vol. III, 14.
10. For an explanation of the Supertext Database, see *ibid.*, vol. I, 91–100.
11. *Ibid.*, vol. III, 13. As a result, the issue of some form of compensation due to Arar still needs to be addressed. See Judge O’Connor’s Recommendation 23, *ibid.*, vol. III, 362–63.
12. Recommendations 6–11, *ibid.*, vol. III, 331–43.
13. Security Intelligence Review Committee, *Annual Report 2005–2006: An Operational Review of the Canadian Security Intelligence Service* (Ottawa: SIRC, October 2006, in English and French)—available at <http://www.sirc.gc.ca/annual/2005-2006/intro_e.html>. This report contains information on the Arar Affair.
14. The Commission for Public Complaints against the RCMP is a federal body established in 1988 to receive public complaints about the conduct of RCMP members in the performance of their duties. It has no oversight or review function.
15. Recommendation 10, *Arar Report*, vol. III, 342–43.
16. Thomas Walkom, “Uncle Sam’s steely glare,” *Toronto Star*, February 19, 2005.
17. The U.S. Homeland Security Department will require virtually all air travelers entering the United States after January 23, 2007, to show passports as personal identification—including Canadians and even U.S. citizens—according to Homeland Security Secretary Michael Chertoff. See “Homeland Security to require passports for U.S. entry,” Associated Press (Washington), November 22, 2006.
18. “US investigations on Canadian soil done within the law: Stockwell Day,” CBC National News (Ottawa), October 5, 2006, and “Tories play down concerns about FBI agents in Canada,” Canadian Press (Ottawa), October 5, 2006.

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Frederick P. Hitz

Tighten Up the Terms of Cooperation—Don't End It!

In his superbly drafted *Report of the Events Relating to Maher Arar*, Mr. Justice Dennis O'Connor strikes precisely the right balance between recommending ways to reduce the possibility of such an injustice occurring again at the hands of Canadian and U.S. officials and stopping short of ending the free exchange of information that may have led to the tragedy. The Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar chose the middle path, knowing that, despite the many cultural and jurisprudential differences between Canada and the United States, the need to cooperate closely on terrorist matters relating to North America remains imperative. Close relations between the FBI, the principal domestic intelligence and law-enforcement agency in the United States, and the RCMP stretch back to the run-up to World War II. The Canadian Security Intelligence Service (CSIS) and the CIA are relative newcomers to the business of cross-border security, but they now play a critical role in supplying intelligence on the international provenance of terrorist threats. There are additional players on both sides, from diplomats to immigration services and customs, homeland security, and provincial police, but the FBI and the RCMP are paramount.

The *Arar Report* is simply written and exhaustive. It is hampered by the fact that the American authorities chose not to participate in the interview process. Still, Judge O'Connor, without putting words in the mouths of the U.S. officials involved, develops a fairly consistent narrative of what must have happened both before and at the time of the issuance of the removal order of Maher Arar from the United States on October 7, 2002. He finds it is "very likely" that U.S. authorities "relied on information received from the RCMP in making the decision to remove Mr. Arar to Syria."¹ The RCMP had been cooperating extra closely on border matters with U.S. officials since the events of September 11 and had provided them with information about Arar that Judge O'Connor finds to have been inaccurate as it related to the extent of Arar's involvement with Al Qaeda suspects in Canada. Judge O'Connor repeatedly stresses the need for precision and accuracy in Canadian reports that are to be shared with foreign governments and for caveats with respect to their use.

He notes that the events of September 11 created a huge increase in the amount of anti-terrorist work then being demanded of the RCMP. As a result, at least initially, the security group found it necessary to farm out some of its work to other RCMP officers—in Arar's case to Project A-O Canada, a group previously involved in criminal investigations, not national security matters. These officers do not seem to have been familiar with all the safeguards that the Canadian government expected the security services to observe in the transfer of sensitive information about Canadian citizens to other governments. Among other things, they transferred to American authorities their investigative file on suspected Al Qaeda activities in Canada.

In any event, without cooperation from the U.S. authorities, it was impossible for Judge O'Connor to know whether the FBI or some other U.S. agency had developed independent evidence of Arar's involvement with Al Qaeda that was passed on to the U.S. Immigration and Naturalization Service (INS) commissioner before the removal order was issued. Judge O'Connor does not think any such evidence had been compiled, given the manner in which U.S. authorities sought questions for Arar from the RCMP before the removal order was signed.

Judge O'Connor finds that Canadian authorities were never officially consulted by the United States about the possibility of Arar being sent to Syria, although hints were given to Canadian consular officials concerned about his internment in New York that they should pursue the matter at the highest levels of the U.S. government, and Arar himself had apparently been told by several U.S. immigration officials that he would be removed to Syria. On hearing of the possibility that Arar might be removed to Syria, Canadian consular officials reported these rumors to Ottawa on October 3, but no official action was taken apart from retaining legal counsel for him in New York. Canadian consular officials apparently concluded that there was no precedent for U.S. removal of a Canadian citizen to a third country after Canada had expressed an interest in his returning to Canada. Furthermore, even if the U.S. immigration authorities were contemplating Arar's removal to Syria, in their experience such a decision would take a month or more to implement. In short, Canadian consular authorities believed they had time to protest and stop Arar's removal to Syria, if that were to be the U.S. game plan. Nonetheless, Judge O'Connor finds that there was no official communication to Canadian authorities that Arar was being considered for deportation to Syria, and that CSIS was not negligent in failing to pursue this possibility with the United States.

Judge O'Connor finds it difficult to believe that, if the United States possessed independent evidence that Arar was associated with Al Qaeda, it would not have shared that information with Canada. Both countries appeared to be in common accord about preventing further Al Qaeda terrorist activity in North America and, having received and made use of Canada's intelligence on Arar, there was every incentive for the United States to share whatever evidence it had—if only to increase the likelihood that Canada might try to detain him on his return or increase its surveillance of him.² What reason was there for it to hide such information from the RCMP? FBI investigators had gone back to the Canadians for elaboration on questions they wished to pose to Arar, based on the information they had earlier received from the RCMP as to his alleged Al Qaeda associates.

I can only conclude that, when the RCMP stated it would have no basis on which to hold Arar if he were returned to Canada, the United States assumed that Canada would be obliged to object to his transfer to Syria. Perhaps the U.S. authorities assumed that the Canadians were strapped in what they could do and, since they appeared to believe that Arar was tied to Al Qaeda, they decided it was best to remove him to Syria for further questioning without involving the RCMP in what for them would have been an impossible decision. Without evidence from the U.S. side, this explanation is rank speculation, but, based on the information we have, I understand Judge O'Connor's disappointment at the U.S. decision not to inform the RCMP of its intentions with respect to Arar.

Given that Arar held dual citizenship, in both Syria and Canada, it was within the INS commissioner's discretion to remove him to Syria. It also seems clear to me that this was likely an intelligence decision, if not an intelligent one. The manner of his deportation by private plane to Jordan and then overland by car to Syria bespeaks involvement by U.S. intelligence, probably the CIA.

The removal of Arar to Syria is tantamount to being an application of the U.S. policy of "extraordinary rendition," in which, in the aftermath of September 11, U.S. intelligence had decided to deliver certain nationals of Middle Eastern countries suspected of Al Qaeda or terrorist affiliations to the countries of their origin for intense and coercive interrogation, perhaps to a degree not permitted in the United States or Canada. As Judge O'Connor noted, the INS commissioner attempted to obtain an assurance from the Syrian government that Arar would be treated in accordance with the Geneva Convention prohibiting torture and cruel and inhuman treatment, but no mechanism existed to enforce such an understanding

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even if one had been reached.³ Thus began Arar’s year-long odyssey to Syria, in the course of which he was tortured but eventually released when the Syrians were unable to substantiate the accusation of Al Qaeda involvement.

I have no doubt that Arar’s removal to Syria, whether based on independent U.S. evidence of his terrorist involvement or only that of the RCMP, represented an early reaction to the September 11 attack but not necessarily a permanent one. In light of strong international and domestic opposition to the practices at Abu Ghraib and Guantanamo, and similar opposition to the existence of “secret” CIA prisons in which coercive interrogations of terrorist suspects allegedly take place, it seems clear that impatience with such excessive behavior is becoming universal. The European Union has just issued a report criticizing several of its member states for having provided secret facilities for U.S. use after September 11. There is even a hint that the new Democratic-controlled Congress in the United States may take up the issue in 2007.

With the passage of the *Military Commissions Act* of 2006, which limited interrogation practices of accused terrorists to those set out in the U.S. Army Field Manual, the die is cast. Henceforth, interrogation procedures must comply with U.S. law prohibiting torture and with the standards of Article Three of the Geneva Convention outlawing “cruel and inhuman treatment of prisoners.” I believe it is only a matter of time before extraordinary renditions and secret prisons are explicitly outlawed for the CIA, just as political assassinations were prohibited by Ford, Carter, and Reagan Executive Orders after the Church Commission Report was issued in 1976. And the honest truth is that the CIA will be the first to applaud. CIA officials do not like this seeming license to torture, directly or through surrogates, any more than their critics do.

In light of these expected restrictions on current U.S. interrogation practices, the tone and tenor of the *Arar Report* is very helpful for continued cooperation in the sharing of intelligence information between Canada and the United States. As Judge O’Connor’s Recommendation 6 states, “the RCMP’s current policies with respect to information sharing are essentially sound.”⁴ If the Commission’s other recommendations concerning the cleaning up and vetting of the information to be contained in the shared reports are followed, the exchange of intelligence information between the RCMP and U.S. intelligence and law-enforcement agencies should proceed apace.

Given that Canada seems not to have been informed about plans for Arar’s deportation to Syria, I believe it was appropriate for the Commission to recommend that an apology be sought from the United States in the Arar matter. To date, however, it seems that no apology has been issued.

I also share Judge O’Connor’s concern that, during Arar’s detention in Syria, the Canadian government drafted a series of questions to be put to Abdullah Almalki, another Canadian citizen being held in that country.⁵ Aside from Almalki’s personal interests, this involvement was bound to create confusion in the mind of the Syrian government about what should happen to Arar.⁶ The delicacy of this situation was further compounded by a Syrian assertion that a CSIS employee had told the Syrian government that CSIS did not want Arar back in Canada.⁷ Although Judge O’Connor finds no evidence of such a statement, he does find that CSIS did have some reasons for not wanting Arar to return to Canada, and that it opposed sending a “one voice” letter to Syria asking that Arar be returned.⁸

A word should be said about the different cultural perceptions surrounding the Global War on Terror from the Canadian and U.S. perspectives. Americans are increasingly aware of the porous nature of the borders between it and its two closest neighbors and trading partners, Canada and Mexico. In the United States and Canada, there is increasing pressure from the citizenry to know who resides within its borders and to control the movement

across them. We are also aware of different traditions respecting political asylum, immigration, refugees, and perhaps human rights. It is critical that the peoples of both Canada and the United States believe that the law-enforcement and intelligence agencies that have primary responsibility for the security of the borders between them share terrorist information seamlessly, willingly, and accurately. Judge O'Connor's report is written in the spirit of trying to rectify misunderstandings between the two nations in a case that has greatly tested their ability to work together in the future, and he has succeeded in getting to the bottom of what went wrong and recommending improvements without throwing the baby out with the bath water.

I have one concluding concern to express about the *Arar Report's* recommendations which parallels my views about the current situation affecting the CIA and the FBI on similar matters. After noting in Recommendation 1 that the RCMP's posture as a law-enforcement agency is largely reactive, Judge O'Connor states that it also has a "prevention" mandate—part of the newly fashionable concept of "intelligence-led policing." This role is identical to President George W. Bush's charge to the CIA and the FBI after September 11 to "pre-empt or prevent" future terrorist attacks. The Canadian and U.S. charges are both admirable and understandable, but how can they be accomplished in a lawful manner without jeopardizing current Canadian and U.S. notions of a right to privacy, the presumption of innocence, and the prohibition of unreasonable searches and seizures, as set out in both the Fourth Amendment to the U.S. Constitution and the *Canadian Charter of Rights and Freedoms*?

Having declared that the RCMP has a prevention mandate, Judge O'Connor writes in Recommendations 2, 3, and 4 about internal controls, written agreements, centralized oversight, and other worthy restrictions on the ability of the RCMP and CSIS to act quickly in an emergency to exchange information both with each other and with foreigners. In short, the Commission is setting up such a narrow margin of propriety for the intelligence and law-enforcement agencies that these standards may well have to bend in a fast-moving terrorist situation if the RCMP and CSIS are to be successful in pre-empting or preventing a future terrorist incident.

In setting out these responsibilities and restrictions, both Canada and the United States have given to their respective law-enforcement and intelligence services a difficult task. But that is why there has to be absolute confidence that the Arar misunderstanding between the two countries is not permitted to recur. In a slam-bang terrorist threat case, each side has to be able to rely on the other's information and the ground rules by which it is being shared. There is little time for accountability checks and balances if the terrorists or the attack is already incoming. Everything has got to be right the first time.

Notes

1. Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar [Arar Report]*, vol. III: *Analysis and Recommendations* (Ottawa 2006), 157.

2. *Ibid.*, 160–61.

3. *Ibid.*, 156.

4. *Ibid.*, 331.

5. *Ibid.*, 208 and 212.

6. *Ibid.*, 213.

7. *Ibid.*, 216, 217.

8. *Ibid.*, 217, 227.

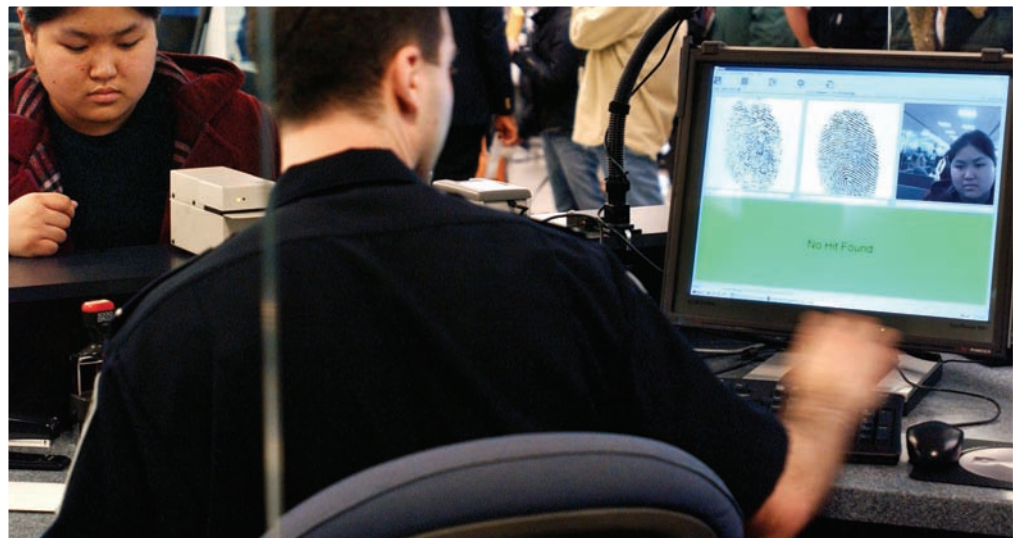
Robert D'A. Henderson's Response

With his extensive experience in the U.S. intelligence community, Frederick Hitz has provided a very useful examination of Mr. Justice O'Connor's report and the need for his recommendations to be given careful consideration and implementation to prevent similar abuse in the future of another Canadian's human rights.

What needs to be emphasized is that the creation of ports-of-entry security watch lists is a current post-September 11 necessity. Anything less than accurate compilation and use of such lists has the capacity to inflict extensive harm on individuals and their families—whether Canadian or American or foreign resident.¹ And any transfer of Canadians' personal information in raw intelligence files or analyzed intelligence assessments must carry firm Canadian security caveats on their use by U.S. authorities. In addition, ever since its entire Supertext security investigation database was burnt onto three compact disks and handed over by the RCMP officials, Canadians have shown considerable concern over the easy technical transfer of Canadian security information files to the American authorities.²

In his essay, Hitz also pointed out that the American authorities chose *not* to participate in the Arar Inquiry's testimony process. As a result, it is not possible to know how American decisions were made in the Arar case. For example, it is *not* known whether those authorities conducted their questioning and subsequent deportation of Arar to Syria based on the faulty information provided by the RCMP or if they acted on separate American—or allied—intelligence in making their rendition decision. More recently, David Wilkins, the U.S. ambassador to Canada, has stated that the decision to remove Arar from the United States in 2002 was made by American officials "based on our own independent assessment of the threat to the United States [which was] based on information from a variety of sources." Further, the U.S. authorities did *not* inform Canadian officials of their decision and Arar's subsequent deportation. Yet, despite the lack of information about their decision-making process, some observers have suggested that, because of the inaccurate information, the U.S. authorities were not at fault in deporting Arar.

In October 2006 the Canadian government made an official protest to the United States over Arar's personal ordeal and the handling of his case. Reportedly, the U.S. State Department response included no apology to Canada or to Arar, though the Department of



Foreign Affairs was “satisfied with the content of the reply” from Secretary of State Condoleezza Rice.³ In its most recent *Country Reports on Terrorism 2005*, the U.S. State Department praised Canada for its continued counter-terrorism activities and downplayed the impact of the Arar affair on U.S.-Canada relations.⁴

Hitz also noted in his essay that it is *not* known if the U.S. authorities opted for removing Arar to Syria “for further questions without involving the RCMP” so as *not* to place them [RCMP] in the position of making “an impossible decision.” Although he leaves open the exact nature of the unstated Canadian decision, it would appear that he means that the RCMP senior officials could not have condoned Arar’s deportment to Syria without violating his basic human rights under Canadian law as well as legal due process.

Some observers have questioned how effectively Canada can implement its national security goals at the practical level in the current period of fast-moving terrorist threats. Is it even possible, they ask, for Canadian security officials and front-line government personnel to implement these policy goals quickly and effectively? On U.S.-Canadian intelligence sharing, Judge O’Connor clearly points out that firm written rules on intelligence-sharing procedures, including written caveats on the use and distribution of that security information, are the way to go,⁵ even though U.S. authorities may not view this more restrictive Canadian national-intelligence approach as satisfactory for their own fast-paced counter-terrorist operational demands.

Notes

1. Some dual-nationality Americans have been “caught up” in the U.S. border watch lists. See Adam Nichols, “Trapped by their name [Amir Khan family],” *New York Daily News*, November 17, 2006, and Ian Macleod, “U.S. man stranded [in Toronto, Canada] by terror watchlist,” *Ottawa Citizen*, November 18, 2006.

2. *Arar Report*, vol. III, 119. The ease of downloading the entire Supertext Database, burning it onto three standard CDs, and then providing copies to the American agencies in April 2002 is demonstrable evidence that it is far easier to transfer personal information files than it is to review them for accuracy and relevance.

3. Simon Tuck, “U.S. hasn’t said sorry to Arar but Ottawa says it’s satisfied,” *Globe and Mail* (Toronto), October 30, 2006.

4. Office of the Coordinator for Counterterrorism, *Country Reports on Terrorism 2005*, chapter 5: *Western Hemisphere Overview* (Washington: Department of State, April 28, 2006), available at <<http://www.state.gov/s/ct/rls/crt/2005/64346.htm>>. But, according to the Canadian wire service reporting at the time the report was released, Canada was cited as having become a “safe haven” for Islamic terrorists who exploit lax immigration laws and weak counterterrorism enforcement to raise money and plan attacks. See Sheldon Alberts, “Terror plotters lurk in Canada, U.S. charges,” *CanWest News Service* (Washington), April 29, 2006.

5. See Recommendations 6–12, *Arar Report*, vol. III, 331–44.

Anything less than accurate compilation and use of watch lists has the capacity to inflict extensive harm on individuals and their families—whether Canadian or American or foreign resident.

Frederick P. Hitz's Response

Without trying to gloss things over, I find much in Mr. Henderson's opinion piece on the work of the Arar Commission that mirrors my own view. He sees a need for the United States and Canada to cooperate closely on terrorist matters, despite the notable cooling he detects in the Canadian desire to supply the U.S. side with sensitive intelligence information in the wake of the Arar disaster. He also applauds Judge O'Connor's recommendations on the methods to be employed to make sure the intelligence proffered is as precise and accurate and protective of Canadians' privacy rights as it can be. I agree wholeheartedly with these two points.

My major concern with Mr. Henderson's comments, as with several of Judge O'Connor's recommendations in the *Arar Report* itself, is that the restrictions put in place in the effort to avoid making another mistake may overly bureaucratize and sanitize the intelligence exchange between the two allies—to such an extent that it is less valuable as a deterrent to a terrorist act. If that is where both Mr. Henderson and Judge O'Connor believe Canada is at present, it is understandable but unfortunate.

I should like to view the Arar removal to Syria in a broader yet more temporal context. I believe it occurred at a time when the United States was still reeling from the after-effects of September 11 and casting about for new ways to meet a terrorist threat it had not faced before and which it had not fully scoped. Unfortunately for Mr. Arar, he transited New York at a time when, because of intelligence mistakenly supplied by the RCMP, he appeared to be an Al Qaeda operative on his way back to his Canadian home—to embark, possibly, on an unknown course of action that both governments feared might lead to a terrorist act. It was that concern, I believe, that prompted U.S. immigration and intelligence officials to decide on removal to Syria after Canadian officials said they had no grounds to hold Arar if he were returned to Canada.

I agree that Canada should have been consulted on the decision to remove Arar to Syria, even if it meant that Canada would have objected. Nonetheless, I also believe that if Mr. Arar were to transit Kennedy airport today, the outcome would be entirely different. The passage of time and the decisions of the U.S. Supreme Court in the *Odah*, *Rasul*, *Hamdi*, and *Hamdan* cases have substantially altered the lay of the land for accused Al Qaeda persons in circumstances like Mr. Arar's situation. In these four cases, the Court has announced that it has jurisdiction to hear *habeas corpus* appeals from alleged unlawful combatants, all of whom must have an opportunity to contest their designation before a neutral decision-maker and be entitled to Geneva Convention protections while in custody. These court decisions have been enacted in statute with passage of the *Detainee Treatment Act of 2005* and the *Military Commissions Act of 2006*.

So unpopular today is the concept of “extraordinary rendition” in intelligence circles as well as in international legal thinking that it would be highly unlikely for what befell Mr. Arar to occur again. I agree that this belief might appear to be a slender reed on which to rely after what has gone before, but I would hate to so encumber the process of intelligence exchange between Canada and the United States that it is cooperation only in name. Much will depend on the manner in which Canada chooses to implement its tightening of the system of intelligence exchanges at the working level. If the signal is as Judge O'Connor appears to want it—the exchanges are important and must continue, although with precision and accuracy—that is one thing. If, on the contrary, the signal is to massage them endlessly for fear of making a mistake, much useful cooperation will be lost.

Robert D'A. **Henderson**

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Dr. Henderson edited the *Brassey's International Intelligence Yearbook* (2000–4), an accumulative open reference assessment series on the structures and functions of more than 100 national security and intelligence communities worldwide. He is author of a number of Canadian government reports, including *State of Security Programs in Federal Government of Canada* (2004), *Former Government & Security Forces Personnel and Modern War Crimes in Horn of Africa* (2001), *International Endemic Violence* (1999), *Rise or Demise of Democracy and Rule of Law* (1999), *Democracy, Neo-authoritarianism and International Security* (1992), *Intelligence Needs of Newly-Industrializing Countries* (1992), and *Future of ex-Eastern Bloc Intelligence Personnel* (1990). As well, he is the author of major national intelligence studies on Chile, China, Ghana, Japan, Portugal, South Africa, and Taiwan. In addition, he has more than 50 book chapters and articles in professional, academic, and media publications on international security, comparative intelligence, governance, and regional conflicts.

He is a graduate of the University of British Columbia (1969) with a B.A. in political science and Asian studies. He also has an M.A. degree in African studies from the University of York, U.K. (1974) and a Ph.D. degree in government and administration from the University of Manchester, U.K. (1979). He is the Canadian member of the Editorial Committee of the *International Journal of Intelligence and CounterIntelligence* (New York) and past editor of the professional *CASIS Intelligence Newsletter* (Toronto).

Frederick P. **Hitz**

Frederick P. Hitz is a lecturer at the Woodrow Wilson School of Public and International Affairs of Princeton University and at the University of Virginia School of Law. A career intelligence officer, he entered the CIA as operations officer in 1967 and subsequently served as a congressional relations officer with the State Department, as deputy assistant secretary of defense for legislative affairs, as director of congressional affairs at the Department of Energy, as legislative counsel to the director of Central Intelligence, as deputy chief of the Europe Division in the Directorate of Operations of the CIA, and, finally, as inspector general of the CIA, 1990–98. At various times he also practiced law, most recently as managing partner of Schwabe, Williamson and Wyatt in Washington, D.C., 1982–90.

Dr. Hitz is the author of *The Great Game: The Myth and Reality of Espionage* (Alfred A. Knopf, 2004) and several articles on espionage and intelligence published in the *International Journal of Intelligence and CounterIntelligence*, *The Harvard Journal of Law and Public Policy*, the *Washington Post*, and other media. He graduated with his B.A. in history from Princeton University (Phi Beta Kappa) and his J.D. from Harvard Law School. He has also received several awards and medals from both the CIA and the Department of Defense.

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