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Charkaoui and Bill C-3: Some Implications for Anti-Terrorism Policy and Dialogue between Courts and Legislatures

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I. INTRODUCTION

The Supreme Court's decision in *Charkaoui v. Canada (Citizenship and Immigration)*[1] and the government's response to that decision in Bill C-3[2] bring together two areas of scholarly interest: anti-terrorism law and policy and Charter dialogues between courts and legislatures about the treatment of rights. The Court's decision in *Charkaoui* that the absence of adversarial challenge to the secret information used by the government to justify detention and deportation of non-citizens was an unjustified violation of section 7 of the *Canadian Charter of Rights and Freedoms* is an important example of the anti-majoritarian role of courts in protecting rights of the unpopular that were ignored in the legislative process.[3] It is difficult to imagine a group — non-citizens alleged to be involved with terrorism — who would have less political power in a

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[1] [2007] S.C.J. No. 9, [2007] 1 S.C.R. 350 (S.C.C.) [hereinafter "*Charkaoui*"].

[2] *An Act to amend the Immigration and Refugee Protection Act*, S.C. 2008, c. 3.

[3] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "Charter"]. The theory of dialogue has sometimes been criticized for not justifying the judicial contribution to the dialogue. My own view is that the judicial role should be justified with respect both to the unique role of unelected judges in protecting vulnerable minorities as well as the role of courts in protecting fundamental principles such as adjudicative fairness that may be neglected by legislative and the executive branches that are more committed to responding to popular concerns such as public safety. See Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law, 2001) c. 13. For a recent symposium examining many controversies about dialogue between courts and legislatures under the Charter, see "Charter Dialogue: Ten Years Later" (2007) 45 Osgoode Hall L.J. 1-192.

democracy.[4] The Court in *Charkaoui* shone a spotlight on the treatment of these outcasts and examined whether the government could advance its interests in secrecy and social protection in a manner that was more respectful of rights. It also found that Parliament had no valid rationale for subjecting foreign nationals without permanent residence status in Canada to much harsher treatment than permanent residents with respect to the judicial review of their detention.[5] This is not to say that the Court's decision was free from criticism, especially in its abrupt rejection of the non-citizens' challenge under section 15 of the Charter and its deferral of deciding when indeterminate detention becomes unconstitutional and unhinged from the prospect of deportation. The Court might have decided more, but what it did decide was important and beneficial.

Consistent with the theory that the Charter promotes dialogue between courts and legislatures as an alternative to either judicial or legislative supremacy, the Court in *Charkaoui* allowed Parliament to select the precise means to increase adversarial challenge to security certificates. It outlined a range of less rights-restrictive alternatives and gave Parliament a year to fashion a legislative response to the decision by suspending its main declaration of invalidity for 12 months. The Court protected the rights of the unpopular, but recognized the ability of Parliament to select and establish the precise means to provide adversarial challenge to the secret evidence/intelligence used to support detention and deportation under a security certificate. The Court's suspended declaration of invalidity, however, meant that the successful applicants in the case did not receive an immediate remedy for their victory in court. This raises the question of whether the wait for the enactment of Bill C-3 as the ultimate remedy was worth it.

Serious concerns have been raised about both the process and substance of the government's response to *Charkaoui*.[6] There was little apparent consultation before Bill C-3 was introduced into Parliament on October 22, 2007.[7] The Bill was debated in the Commons Public Safety

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[4] But see as well *Canada (Justice) v. Khadr*, [2008] S.C.J. No. 28, 2008 SCC 28 (S.C.C.) holding that the s. 7 rights of a Canadian citizen accused of involvement with Al Qaeda and of killing an American soldier in Afghanistan were violated by the non-disclosure of records of interviews with him by Canadian officials at Guantanamo Bay, Cuba.

[5] *Charkaoui*, *supra*, note 1, at paras. 88-89.

[6] See Craig Forcese & Lorne Waldman, "A Bismarckian Moment: *Charkaoui* and Bill C-3" (2008) 42 S.C.L.R. (2d) 355 [hereinafter "Forcese & Waldman"].

[7] In its response to the delayed three-year review of the *Anti-terrorism Act*, S.C. 2001, c. 41, the government signalled in July 2007 only that it would study "the possibility of establishing

and National Security committee for only six days, with four of those days being allocated to non-governmental witnesses. Some amendments were proposed by that Committee and made to the Bill with respect to the status and selection of special advocates, but they did not address the major criticisms of the Bill in relation to the ability of the special advocate to have contact with the detainee after having seen the secret evidence or to demand further disclosure from the government. The Bill was debated over eight days in the House of Commons but over only two days in the Senate as the deadline for the suspension of the declaration of invalidity approached. The Bill was only given first reading in the Senate on February 6, 2008 and was passed on February 12, 2008, less than two weeks before the Court's declaration of invalidity would take full effect. After having held hearings for one day in a marathon 10-hour session, the Special Senate Committee on Anti-Terrorism law pointedly commented that it "would have appreciated more time to reflect upon all aspects of this bill and the views of those concerned, given the life-altering effects that security certificates have on those named in them, and the reflection the process has on Canadian society and values".[8]

Although it facilitated a legislative reply to *Charkaoui*, the suspended declaration of invalidity, coupled with the government's decision not to introduce the Bill until eight months after the Court's decision, produced a rushed parliamentary debate. The Bill was passed in the House of Commons by a vote of 197 to 71. The political debate about Bill C-3 was also affected by the reluctance of the official Opposition to defeat the minority government on an issue that was presented as implicating public safety. There was no provision in Bill C-

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a special advocate role in the security certificate process" but provided no rationale for why it had apparently rejected alternative models for adversarial challenge or alternative models of special advocates. "Response of the Government of Canada to the Final Report of the House of Commons Standing Committee on Public Safety and National Security on the Review of the *Anti-Terrorism Act*" July 2007. On the contrast between the laconic response by the Canadian government and the more detailed response by the British government which at the same time issued six detailed discussion documents and invited public consultation on its proposed anti-terrorism legislation see Kent Roach, "Better Late than Never? The Canadian Parliamentary Review of the *Anti-Terrorism Act*" (2007) 13(5) Choices 1, at 27 [hereinafter "Roach, 'Better Late Than Never?'"].

[8] Second Report of the Special Senate Committee on the Anti-Terrorism Act, February 2008. This Committee has developed considerable expertise with respect to anti-terrorism law and policy over the years. See Kent Roach, "The Role and Capacities of Courts and Legislatures in Reviewing Canada's Anti-Terrorism Law" (2008) 24 Windsor Rev. Legal Soc. Issues 5, at 17-18 [hereinafter "Roach, 'Role and Capacities of Courts'"].

3 to require a subsequent parliamentary review of its operation.[9] The rushed process that was used to enact Bill C-3 left much to be desired.[10]

On its substantive merits, Bill C-3 has been criticized for selecting the least robust form of adversarial challenge outlined by the Court, namely, the British system of security-cleared special advocates. Special advocates under Bill C-3 will be able to challenge the government's claims that evidence must be kept secret and the relevance and reliability of the secret evidence. They will not, however, be able to consult the detainee or other persons after they have seen the secret evidence, demand further disclosure from the government or call their own witnesses without prior judicial approval. In this respect, special advocates have less power than counsel for the Security Intelligence Review Committee ("SIRC"), the review body for Canadian Security Intelligence Service ("CSIS"), that used to review security certificates. They also have less powers than counsel for public inquiries such as the Commission of Inquiry into the Activities of Canadian Officials in Relation to Maher Arar (the "Arar Commission"). Commission counsel had powers to demand full disclosure from the government, call witnesses and consult with the affected person after having seen the secret information. These powers were not explicitly denied to special advocates under Bill C-3,[11] but they require the approval and supervision of the specially designated judges of the Federal Court who preside over security certificate cases.[12] Bill C-3 also does not follow section 38 of the *Canada Evidence Act* ("CEA"),[13] which allows a Federal Court to balance the public interest in disclosure against the public interest in

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[9] The Senate Special Committee is, however, conducting a continuing review of the legislation and is expected to issue its continuing review by the end of 2008.

[10] Forcese & Waldman, *supra*, note 6. For similar observations about the rushed nature of the debate about the *Anti-terrorism Act* enacted in the aftermath of 9/11, as well as the debate about the expiry of investigative hearings and preventive arrests in 2007, see Kent Roach, *September 11: Consequences for Canada* (Montreal: McGill-Queens, 2003) c. 3 and Roach, "Better Late than Never?", *supra*, note 7, at 8-11. One of the advantages of the judicial process over the legislative process is that the former generally has adequate time for reflection and deliberation on the issues. See Alexander Bickel, *The Least Dangerous Branch*, 2d ed. (New Haven: Yale University Press, 1986).

[11] David Dunbar & Scott Nesbitt, "Parliament's Response to *Charkaoui*: Bill C-3 and the Special Advocate Regime under IRPA" (2008) 42 S.C.L.R. (2d) 415.

[12] Bill C-3 also gives the Federal Court a degree of ownership over special advocates by providing that the Chief Justice of the Federal Court and the Chief Justice of the Federal Court of Appeal shall establish a committee to make rules for special advocates: Bill C-3, s. 85.6. On the role of the Federal Court in security certificates, see Benjamin Berger, "Our Evolving Judicature: Security Certificates, Detention Review, and the Federal Court" (2006) 39 U.B.C. L. Rev. 101.

[13] R.S.C. 1985, c. C-5.

secrecy and to order the disclosure of information that may harm national security. Under Bill C-3, the Federal Court must still not disclose any information to the detainee once it determines that its disclosure would harm national security or any other person. Despite the initial euphoria at the Court victory, the end result of the dialogue was a disappointment for many.

In this article, I will use the *Charkaoui* case and its legislative aftermath as a case study in the development of anti-terrorism policy and dialogue between courts and legislature. The study of dialogue — or what some might wish to describe less metaphorically as the institutional role of and exchanges between courts and legislatures — should examine what courts and legislatures actually do and not be based on idealized visions of either institution. The back and forth between courts and legislatures has been a feature of not only recent Canadian debates about anti-terrorism law, but also those in the United Kingdom and the United States.[14] The *Charkaoui* and Bill C-3 dialogue provide evidence of the strengths and weaknesses of both courts and legislatures in dealing with anti-terrorism laws.[15] It is by no means clear that either courts or legislatures are handling the challenges of responding to terrorism very well.

The dialogue model of judicial review seeks to find and justify time and space for legislative responses and democratic debate about court decisions about rights and freedoms. The dialogue model does not, however, guarantee that legislatures will necessarily fill the policy space that is available to them or that it will do so wisely. Indeed, the possibility of legislative failure and short-sightedness underlines that dialogue is a genuine democratic dialogue and not simply one where the legislators follow the orders of the judges. Bill C-3 also reveals a phenomenon that is often neglected by critics of judicial activism,[16] namely, that elected governments and legislatures are frequently happy to defer some issues to the judiciary. As will be seen, Bill C-3 defers to the judiciary the critical decisions about whether the special advocate can obtain full disclosure, call witnesses and consult the detainee after having seen the secret information. It also leaves the question of the

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[14] Kent Roach, "Sharpening the Dialogue Debate: The Next Decade of Scholarship" (2007) 45 Osgoode Hall L.J. 169, at 186-89.

[15] For a broader review of this question see Roach, "Role and Capacities of Courts", *supra*, note 8.

[16] For an exception see Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge: Harvard University Press, 2004).

limits of indeterminate detention under sections 7 and 12 of the Charter to the decisions of courts in particular cases. Finally, it leaves the related question of whether Canada will breach its international law obligations by deporting people to torture to the decisions of judges in applying the *Suresh*[17] exception despite recommendations by a number of parliamentary committees that Parliament reject the use of such an exception. *Charkaoui* and Bill C-3 will not resolve democratic debates about security certificates.

In this essay, I will first examine the Court's decision in *Charkaoui*. *Charkaoui* is best known for its holding that the absence of any adversarial challenge to the secret evidence presented by the government violated the detainee's right to know the case to be met under section 7 of the Charter. The Court held that this violation could not be justified under section 1 because of the existence of a number of alternative measures that would infringe the detainee's rights less while still respecting the government's objectives of protecting secrets. The Court's survey of less rights-invasive alternatives was wide-ranging and included the British special advocate system, the former system used to review security certificates by SIRC, the use of undertakings by the accused's lawyers in the Air India trial and the use of the national security confidentiality proceedings in section 38 of the *Canada Evidence Act*. I will suggest that the Court may have misunderstood the use of security-cleared counsel in the Arar commission and that this is an example of the need for courts to be cautious about opining about possible responses by legislatures to its decisions. The very fact that the Court mentioned the British special advocate seemed to have been interpreted by some as a sort of pre-approval of that scheme, even though the Court correctly noted that there has been a number of serious criticisms of special advocates in the United Kingdom on the grounds that they could not generally call witnesses or have discussions with the affected person after having seen the classified material.[18] One of the values of dialogue is that it allows for further research by the executive and the legislature into the range of possible responses to the Court's decisions[19] and democratic debate and choice about those options.

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17 *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] S.C.J. No. 3, [2002] 1 S.C.R. 3 (S.C.C.).

18 *Charkaoui*, *supra*, note 1, at para. 83.

19 Although the judiciary, assisted by law clerks, can also conduct research, this research is restricted to library research whereas both the executive and legislative committees can consult experts and even visit other countries to explore other policy options. For an examination of the number of witnesses consulted by parliamentary committees that have examined anti-terrorism laws

It will be suggested that the Court's summary dismissal of the claims that the security certificate procedure violated section 15 is problematic in a number of respects. In contrast to the House of Lords in its Belmarsh decision,[20] the Court failed to explore the rationality of using immigration law as anti-terrorism law. The Court's decision that the indeterminate detention of the detainees did not violate sections 7 and 12 is also problematic. The Court seemed to accept that the long-term detention of the three men was still justified because it remained connected to the prospect that they could be deported if their certificates were upheld. The Court's approach may be formally and technically correct, but only because of the strange absence on the record of the cases of findings that the men in the case (particularly Hassan Almrei who would be deported to Syria, but also Adil Charkaoui who would be deported to Morocco and Mohamed Harkat who would be deported to Algeria) would be tortured if deported to their countries of citizenship.[21] Nevertheless, if one accepts that the men would face a substantial risk of torture if returned to their home countries then the only connection with possible deportation is to invoke the *Suresh* exception that would allow deportation to a substantial risk of torture.

The Court's refusal to explore the limits of indeterminate detention and the related issue of whether deportation to torture could be justified can be defended as one-case-at-a-time constitutionalism minimalism advocated by Cass Sunstein.[22] Constitutional minimalism may serve the

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as well as a criticism of the shortage of research support for such committees see Roach, "Better Late than Never?", *supra*, note 7. For proposals for greater use of expert committees see Craig Forcese, "Fixing the Deficiencies in Parliamentary Review of Anti-Terrorism Law: Lessons from the United Kingdom and Australia" (2008) 14(6) Choices.

[20] *A. v. Secretary of State, for the Home Department*, [2004] UKHL 56, [2005] 2 A.C. 68 (U.K.H.L.).

[21] Both Amnesty International and the U.S. Department of State have expressed concerns about the torture of suspected terrorists in Morocco, Syria and Algeria as well as Egypt, to which Mahmoud Jaballah and Mohamed Majoub, the other security certificate detainees, face deportation. See Amnesty International, *Morocco/Western Sahara: Torture in the "Anti-Terrorism" Campaign — the case of Témara Detention Centre* (AI Index: MDE 29/004/2004), June 2004; *Syria: Unfair Trial and Sentencing of Muhammad Haydar Zammar: Appeal Case Update 3* (AI Index: MDE 24/020/2007), March 2007; *Algeria: Torture in the "War on Terror": A Memorandum to the Algerian President* (AI Index: MDE 28/008/2006), April 2006; *Egypt: Systematic Abuses in the Name of Security* (AI Index: MDE 12/001/2007). See also the Country Report on Human Rights Practices issued by the United States Department of State's Bureau of Democracy, Human Rights and Labor for each of Morocco (March 2006), Syria (March 2006), Algeria (March 2007) and Egypt (March 2007).

[22] Cass Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Cambridge: Harvard University Press, 1999); Cass Sunstein, "Minimalism at War" (2004) Sup. Ct. Rev. 47. See also Neil S. Siegel, "A Theory in Search of a Court, and Itself: Judicial Minimalism at

institutional interests of the judiciary in keeping their "powder dry",[23] but in this context, it will likely extend the detention of men who have been detained many years under immigration law even though in all likelihood, they cannot be deported without running a substantial risk of torture.

In the second section, I will examine the way in which Bill C-3 responds to the Court's decision in *Charkaoui*. Bill C-3 contemplates that special advocates will challenge the government's argument that evidence cannot be disclosed to the detainee because of harms to national security and other persons and that special advocates can challenge the secret evidence that is submitted. That said, Bill C-3 contains a very broad prohibition on the ability of the special advocate to consult any person about the case after the special advocate has examined the secret information. It delegates decisions about whether the special advocate can, after having seen the secret information, have contact with detainees or indeed anyone else about the information and whether the special advocate can obtain further disclosure and call witnesses to the decisions of the presiding Federal Court judge. This delegation of critical issues to judges suggests that legislatures may have an interest in avoiding some of the most contentious policy issues. It also increases the likelihood that in subsequent Charter challenges to Bill C-3, the courts will find that a judge has erred on the facts of a particular case as opposed to striking down Bill C-3 as a whole. In other words, the one-case-at-a-time constitutional minimalism of the Court's decision in *Charkaoui* is echoed in a one-case-at-a-time approach in Bill C-3 to judicial authorization of the ability of the special advocate to exercise powers beyond challenge to governmental claims of secrecy and to the reliability and relevance of the secret evidence.

Another feature of Bill C-3 is that it follows the Supreme Court's ruling that the deferral of judicial review of detention for non-citizens who are not permanent residents could not be justified and that it provides for the same requirements for judicial review of all detentions under security certificates. This raises the issue of whether dialogue between courts and legislatures most often result in the latter obeying the

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the Supreme Court Bar" (2005) 103 Mich. L. Rev. 1951; Cass Sunstein, "Testing Minimalism: A Reply" (2005) 104 Mich. L. Rev. 129. For Canadian support of constitutionalism minimalism in the different context of Aboriginal rights litigation see Patrick Monahan, "The Supreme Court in the 21st Century" (2001) 80 Can. Bar Rev. 374, at 391-97.

[23] The phrase is that of my colleague David Dyzenhaus. See David Dyzenhaus, "Legality in a Time of Emergency" (2008) 24 Windsor Review of Legal and Social Issues 1, at 2.

rulings of the former. It will be suggested that in some cases, there may be little viable alternative than to follow the thrust of a court's ruling, but that even in those cases, the legislature retains the option to make subtle variations on the court's rulings.

I will also examine the few instances in which Bill C-3 expands the policy debate beyond a precise response to *Charkaoui* and addresses other questions. These other questions include recognition of the ability of the special advocate to challenge the relevancy and reliability of the secret evidence, to challenge secret evidence on the basis that it was obtained as a result of torture or cruel, inhumane or degrading treatment, the recognition of the use of house arrests for security certificate detainees as an alternative to imprisonment, the recognition of limited appeals and the recognition of the ability to authorize the release of security certificate detainees to allow them to leave Canada for a third country.

In the third section, I will examine Bill C-3 as an example of truncated dialogue both with respect to security certificates and with respect to the treatment of secret information in all legal proceedings, most notably under section 38 of the *Canada Evidence Act*. Although some may be tempted to see Parliament's response to *Charkaoui* as a sign that security certificates can be "Charter proofed", I will suggest that many other Charter issues remain surrounding the issue of long-term indeterminate detention and the related issue of deporting a person to a substantial risk of torture. With respect to the treatment of secret information, Bill C-3 takes a narrow approach to the use of special advocates and rejects the advice of two parliamentary committees that special advocates be available with respect to other procedures where the government uses secret evidence or is allowed to make *ex parte* submissions that the disclosure of information will harm national security. The government's partial response leaves the availability of special advocates to be litigated in a case-by-case manner. It also does not respond to documented recent cases in which the government has overclaimed national security confidentiality or the need for Canada to reform and discipline the process in which national security confidentiality is claimed. Such a process would make criminal prosecutions a more viable alternative to reliance on immigration law security certificates.

My conclusion will assess the lessons of *Charkaoui* and Bill C-3 both for the development of fair and effective anti-terrorism policy and for dialogue between courts and legislatures about the treatment of the rights of the unpopular. The end result of this dialogue has been to

achieve a fairer security certificate process, but not one that is sustainable from either a rights or a security perspective. The Court's summary treatment of the equality rights claims allowed it to avoid the discussion of the rationality and proportionality of using immigration law with its ultimate remedy of deportation as anti-terrorism law. The Court also avoided the critical question of when indeterminate detention becomes unconstitutional in part by implicitly relying on the disturbing possibility that the three men could still be deported to Syria, Algeria or Morocco. The Court's minimalist approach to these issues set the stage for a legislative reply that was similarly minimalist in only providing special advocates for security certificate proceedings and not addressing larger issues concerning the treatment of secret information or the sustainability of security certificates. Even with respect to special advocates, the government made a conscious decision to delegate some of the most contentious issues in the legislation to the judiciary, thus suggesting that governments may often find it attractive to do so.

Bill C-3 will not end Charter litigation or continued debate about security certificates. Indeed, the dialogue so far has only deferred the critical questions of when indeterminate detention under security certificates becomes unconstitutional; whether deportation to a substantial risk of torture will be allowed or whether a special advocate should be allowed to seek further disclosure or consult the detainee after having seen the secret information.

II. *CHARKAOUI*

1. The Court's Decision

In *Charkaoui*, the Court described the security certificate regime in the following revealing terms:

> Confidentiality is a constant preoccupation of the certificate scheme. The judge "shall ensure" the confidentiality of the information on which the certificate is based and of any other evidence if, in the opinion of the judge, disclosure would be injurious to national security or to the safety of any person: s. 78(*b*). At the request of either minister "at any time during the proceedings", the judge "shall hear" information or evidence in the absence of the named person and his or her counsel if, in the opinion of the judge, its disclosure would be injurious to national security or to the safety of any person: s. 78(*e*). The judge "shall provide" the named person with a summary of information that

> enables him or her to be reasonably informed of the circumstances giving rise to the certificate, but the summary cannot include anything that would, in the opinion of the judge, be injurious to national security or to the safety of any person: s. 78(*h*). Ultimately, the judge may have to consider information that is not included in the summary: s. 78(*g*). In the result, the judge may be required to decide the case, wholly or in part, on the basis of information that the named person and his or her counsel never see. The named person may know nothing of the case to meet, and although technically afforded an opportunity to be heard, may be left in a position of having no idea as to what needs to be said.[24]

The Court thus accepted the idea that the security certificate process was one driven by secret evidence. The process could result in unfairness to the detainee by justifying his detention and possible deportation on the basis of evidence never seen by the detainee or his counsel.

The Court in a unanimous judgment by the Chief Justice held that the use of secret evidence violated the section 7 rights of the detainee. The Court took a contextual approach to interpreting the Charter right, rejecting the idea that section 7 did not apply in the immigration and security contexts. It concluded that the impugned scheme placed the burden of ensuring the fairness and the accuracy of the decision "entirely on the shoulders of the designated judge", adding:

> … Those shoulders cannot by themselves bear the heavy burden of assuring, in fact and appearance, that the decision on the reasonableness of the certificate is impartial, is based on a full view of the facts and law, and reflects the named person's knowledge of the case to meet. The judge, working under the constraints imposed by the *IRPA*, simply cannot fill the vacuum left by the removal of the traditional guarantees of a fair hearing. The judge sees only what the ministers put before him or her. The judge, knowing nothing else about the case, is not in a position to identify errors, find omissions or assess the credibility and truthfulness of the information in the way the named person would be. Although the judge may ask questions of the named person when the hearing is reopened, the judge is prevented from asking questions that might disclose the protected information. Likewise, since the named person does not know what has been put against him or her, he or she does not know what the designated judge needs to hear. If the judge cannot provide the named person with a summary of the information that is sufficient to enable the person to know the case to meet, then the judge cannot be satisfied that the information before him or her is

[24] *Charkaoui*, *supra*, note 1, at para. 55.

> sufficient or reliable. Despite the judge's best efforts to question the government's witnesses and scrutinize the documentary evidence, he or she is placed in the situation of asking questions and ultimately deciding the issues on the basis of incomplete and potentially unreliable information.[25]

Although the Court rejected the idea that the reviewing Federal Court judges were no longer independent and impartial and praised the Federal Court for adopting a "pseudo-inquisitorial role",[26] it raised concerns about the factual and legal accuracy of decisions that were made without effective adversarial challenge.[27]

The Court also resisted the idea that the interpretation of section 7 rights should be collapsed into the process of attempting to justify violations of rights under section 1 of the Charter. The Chief Justice stressed that "the issue at the s. 7 stage, as discussed above, is not whether the government has struck the right balance between the need for security and individual liberties; that is the issue at the stage of s. 1 justification of an established limitation on a *Charter* right. The question at the s. 7 stage is whether the basic requirements of procedural justice have been met …". This division between the section 7 and section 1 issues is appropriate because it allows the courts to insist on basic fairness under section 7 while facilitating a structured inquiry into the proportionality of any departures from these standards under section 1 of the Charter. Although dicta that suggest that section 7 violations can never be justified under section 1[28] may be intended to strengthen section 7 rights, they actually diminish the scope of those rights and allow the government to avoid having to justify limits on rights and demonstrate their proportionality.[29]

Having concluded that the existing scheme violated section 7 of the Charter because the detainee could not know and challenge the case

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[25] *Id*., at para. 63.

[26] *Id*., at para. 51.

[27] For arguments that the concepts of and learning about miscarriages of justice and wrongful convictions should apply to long-term administrative detention see Kent Roach & Gary Trotter, "Miscarriages of Justice in the War Against Terror" (2005) 109 Penn. State L. Rev. 967.

[28] *Reference re Motor Vehicle Act (B.C.) S. 94(2)*, [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486, at 518 (S.C.C.).

[29] For arguments that the Court's approach of effectively eliminating the possibility of justifying reasonable limits on s. 7 rights may have had a debilitating effect on the scope of s. 7 rights at least in the context of the constitutionalization of the principles of subjective fault under s. 7 see Kent Roach, "Common Law Bills of Rights as Dialogue Between Courts and Legislatures" (2005) 55 U.T.L.J. 733.

against him, the Court then considered whether the state could justify the procedures under section 1 of the Charter. The Court adverted to its prior jurisprudence which effectively had eliminated the ability to justify violations of section 7 under section 1 of the Charter, but noted that such justifications "may not be impossible".[30] The effect of discussing the alternatives to the existing procedure under section 1 was to place the burden on the government to justify departures from basic standards of adjudicative fairness. In general, the government is in the best position to be able to marshal the evidence to justify limitations on rights. This is particularly true in the national security context where the applicants not only have less resources than the state, but often lack basic information about the rationale of the state's national security activities because of the secrecy that surrounds them.[31] The Charter applicants in this case had been excluded from secret hearings in their case for years and it would have been particularly inappropriate to require them to demonstrate why these hearings were not necessary. The burden of justification for such extraordinary procedures should be on the government.

2. The Court's Discussion of Alternatives to the Existing Regime of Secret Evidence

The Court readily accepted that the protection of secret information was a pressing and substantial objective that could justify the limitation of Charter rights, noting that "Canada is a net importer of security information. This information is essential to the security and defence of Canada, and disclosure would adversely affect its flow and quality."[32] In the end, however, the Court found that the government had not demonstrated the proportionality of the limitation because there was a range of alternatives that would provide for adversarial challenge to the government's secret evidence while respecting the need to keep the information secret. The Court quite appropriately discussed a range of less rights-invasive alternatives. The primary purpose of this discussion was to explain and justify the Court's decision to strike the impugned

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30 *Charkaoui*, *supra*, note 1, at para. 66.

31 Gus Van Harten, "*Charkaoui* and Secret Evidence" (2008) 42 S.C.L.R. (2d) 251 [hereinafter "Van Harten"].

32 *Charkaoui*, *supra*, note 1, at para. 68. The Court described the state's interests in protecting secrets as follows: "Information may be obtained from other countries or from informers on condition that it not be disclosed. Or it may simply be so critical that it cannot be disclosed without risking public security. This is a reality of our modern world." *Id*., at para. 61.

scheme down as an unjustified violation of the Charter. At the same time, such a discussion of alternatives also provided policy-makers with important information about what sort of a new scheme could pass constitutional muster. Indeed it is likely that this part of the judgment was read closely by the policy-makers and government lawyers who drafted the legislative reply to the Court's decision. In subtle but important ways, the way the Court discusses possible less drastic alternatives can shape the eventual legislative reply and for this reason it is important for the Court to be careful about what signals and hints it sends to policy-makers.

(a) The SIRC Model

The Court spent the most time discussing the role played by SIRC in investigating security certificates before they were issued. This role applied to all security certificates until 1988 and to security certificates issued against permanent residents until 2002. The Court stressed that "independent security-cleared SIRC counsel" would cross-examine CSIS witnesses when the affected person was excluded from the hearing and then "would negotiate the contents of the summary with CSIS, under the supervision of the presiding SIRC member. … These procedures illustrate how special counsel can provide not only an effective substitute for informed participation, but can also help bolster actual informed participation by the affected person."[33] The Court relied on an article by a former independent counsel for SIRC.[34] Although the article makes a valuable contribution about practices that were not widely known, it focused on complaints that were heard by SIRC about the denial or withdrawal of security clearances and not on security certificates. The article also did not explicitly address the critical questions of whether SIRC counsel would consult with the affected parties after having seen the secret information about possible lines of cross-examination or whether SIRC counsel would seek further disclosure. The article also examined the alternative of allowing the complainant's own counsel to obtain a security clearance and see the secret information while warning about the dangers to CSIS and allied

33 *Id.*, at paras. 73-74.

34 Murray Rankin, "The Security Intelligence Review Committee: Reconciling National Security with Procedural Fairness" (1990) 3 C.J.A.L.P. 173.

agencies of any leaks of the secret information.[35] The Court's reliance on this article reflects its reliance on library research.[36] The executive and Parliamentary committees would not be limited to such forms of research and could question various representatives of and counsel for SIRC about the workings of the system. For this reason, the Court's discussion of policy alternatives in section 1 analysis should not be treated as the final or definitive word about the specific policy alternative.

(b) The Section 38 of the Canada Evidence Act *Model*

The Court also examined the role of the judge in balancing the interests of secrecy and disclosure under section 38 of the *Canada Evidence Act*, which allows the government to seek non-disclosure orders from specially designated judges of the Federal Court in civil, criminal and administrative proceedings on the basis that the harm of disclosure to national security, national defence or international relations is greater than the public interest in disclosure. The Court noted that the impugned immigration law procedure did not allow the judge to weigh the competing interests but rather "requires judges not to disclose information the disclosure of which is injurious to national security or the safety of any person".[37] The Court also noted that unlike the immigration law procedure, the CEA "makes no provision for the use of information that has not been disclosed".[38] Although it can be used in civil and administrative proceedings, the practical implication here is that secret evidence is not used in criminal trials.[39] In addition, the trial judge retains a full discretion under section 38.14 to fashion any remedy that is necessary to protect the accused's right to a fair trial in light of the Federal Court's non-disclosure order. This remedy could include a stay of proceedings, and such a remedy has indeed been ordered in a case in which two men were originally convicted in 1986 of conspiring to blow up an Air India plane.[40]

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35 *Id.*, at 196.

36 But see also Marian McGrath, "The Impact of the Charter on Accountability for National Security" (2008) 36 S.C.L.R. (2d) 201 and Forcese & Waldman, *supra*, note 6 for other helpful discussions of the SIRC process.

37 *Charkaoui*, [2007] S.C.J. No. 9, [2007] 1 S.C.R. 350, at para. 77 (S.C.C.).

38 *Id.*, at para. 77.

39 On the importance of this refusal to use secret evidence see Van Harten, *supra*, note 31.

40 *R. v. Khela*, [1998] Q.J. No. 2035, 126 C.C.C. (3d) 341 (Que. C.A.).

The treatment of those accused of terrorism crimes under section 38 of the *Canada Evidence Act* would be a main feature of a comparison between the treatment of citizens and non-citizens thought to be involved with terrorism, but the Court was cautious about such a comparison observing that "the CEA does not address the same problems as the IRPA, and hence is of limited assistance here …".[41] The Court did not really explain the rationale for this conclusion. This is unfortunate because the Court's conclusion may have encouraged the government to reject section 38 of the CEA as a model for the reform of the immigration law.[42] If judges are allowed to balance the competing interests in disclosure and non-disclosure in criminal trials, or indeed in the broad range of proceedings including public inquiries, civil lawsuits and other administrative proceedings, to which section 38 applies, it is not clear why the immigration context requires non-disclosure once any injury to national security from the disclosure of the information is established.

(c) The Undertaking of Counsel in the Air India Trial Model

The Court also examined the procedure used in the Air India trial in which sensitive material was disclosed to counsel for the accused on initial undertakings that the information not be shared with the accused or any other person. The Court had appeared to express misgivings about this approach in its 2004 decision in the Air India investigative hearing case[43] but these misgivings were not repeated here, perhaps because the Court had subsequently approved a similar undertaking by counsel process in the access to information context in order to preserve confidentiality.[44] The Court in *Charkaoui* did note, however, that "[d]isclosure in a specific trial, to a select group of counsel on undertakings, may not provide a working model for general deportation legislation that must deal with a wide variety of counsel in a host of cases. Nevertheless, the procedures adopted in the Air India trial suggest that a search should be made for a less intrusive solution than one found

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41 *Charkaoui*, *supra*, note 37, at para. 77.

42 For arguments that s. 38 should be used as a model for such reforms see Craig Forcese & Lorne Waldman, *Seeking Justice in an Unfair Process* (August 2007) (available at <http://aix1.uottawa.ca/~cforcese/other/sastuddy.pdf>).

43 *Re Vancouver Sun*, [2004] S.C.J. No. 41, [2004] 2 S.C.R. 332, at para. 49 (S.C.C.).

44 *Goodis v. Ontario (Ministry of Correctional Services)*, [2006] S.C.J. No. 31, [2006] 2 S.C.R. 32, at para. 33 (S.C.C.).

in the *IRPA*."[45] This statement, however, overestimates the number of security certificate cases and the fact that the detainees have been represented by a small group of experienced counsel. Indeed, as will be seen, three lawyers who have represented detainees in security certificate cases have qualified as special advocates under the regime established by Bill C-3.

The approach used in the Air India trial can be defended on the basis that the client would have to consent to the initial undertaking. It recognizes that the affected person's lawyer will know the most about a case, but is not simply an agent for the client.[46] In both the United States and Australia, disclosure to the affected person's lawyer is sometimes made on the condition that the lawyer obtain a security clearance, in addition to the condition that the secret information not be disclosed to the client.

Some of the advantages of allowing the detainee's lawyer to obtain access to the secret evidence on the condition of obtaining a security clearance may be achieved under the new special advocate regime in Bill C-3 because two experienced lawyers who represented the security certificate detainees, Paul Copeland and John Norris, have been appointed and qualified as special advocates and have, subject to the decision of the presiding judge, been allowed to act as special advocates in the cases subject to undertaking that they cease acting as counsel for their former clients in the open proceedings, as well as in related matters.[47] The government had objected to the two lawyers serving as special advocates on the basis of concerns about conflict of interest and inadvertent disclosure of secret material. The former concern is difficult to understand as the special advocate and the detainee's own lawyer would have the same interest in challenging both the secret evidence and the government's claim to secrecy. The government's concern about inadvertent disclosure of secret information would seem to be the nub of the matter. As will be seen, however, this concern discounts the ability of commission counsel for the Arar Commission to have contact with the affected person without disclosing secret information.

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45 *Charkaoui*, *supra*, note 37, at para. 78.

46 Michael Code & Kent Roach, "The Role of the Independent Lawyer and Security Certificates" (2006) 52 C.L.Q. 85, at 109-11 [hereinafter "Code & Roach"].

47 *In the Matter of the Appointment of John Norris and Paul Copeland as Special Advocates*, Order of Blanchard J., (April 14, 2008), DES 5-08, 6-08, 7-08.

(d) The British Special Advocate Model

The Court also discussed the British special advocate system as a more proportionate alternative to the system in the *Immigration and Refugee Protection Act* ("IRPA") which provided no adversarial challenge to the secret evidence. To its credit, the Court recognized that British special advocates had been criticized on the basis that "(1) once they have seen the confidential material, they cannot, subject to narrow exceptions, take instructions from the appellant or the appellant's counsel; (2) they lack the resources of an ordinary legal team, for the purpose of conducting in secret a full defence; and (3) they have no power to call witnesses".[48] The Court also noted that rules established for the Special Immigration Appeals Commission allowed the government to object to any proposed communication between the special advocate and the affected person and his or her counsel after the special advocate had seen the secret information.

Most criticisms of British special advocates have focused on their practical inability to consult the affected person after having seen the secret information, but the concerns about inadequate disclosure are also very serious. A study conducted by Craig Forcese and Lorne Waldman revealed that some British special advocates that they interviewed expressed concern about the adequacy of disclosure they received. Some reported receiving redacted information or summaries of the information and complained that they did not always have access to those within security agencies who collected the information.[49] These reports are at odds with past reports that suggested that the government had adequately disclosed to the special advocates material adverse to its case or helpful to the excluded person's case.[50] They also explain why Forcese and Waldman recommend not only that special advocates be able to ask questions of the named person after seeing the secret information, but also that there be some means of ensuring that the government has made full disclosure to the special advocate. I agree with their analysis about the critical importance of full disclosure.

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48 *Charkaoui*, *supra*, note 37, at para. 83. IRPA, S.C. 2001, c. 27.

49 Forcese & Waldman, *supra*, note 42, at 41-42.

50 Forcese and Waldman also report that the rules governing special advocates are being amended to require the government to disclose "any exculpatory material" of which it is aware. *Id.*, at 41.

The issue of full disclosure is complicated by the learning about tunnel vision in wrongful conviction cases.[51] Tunnel vision refers to a process in which authorities, often with the noblest of intentions, fixate on a person's purported guilt, discount or ignore information that points to the person's innocence and interpret ambiguous and even innocent information as evidence of a person's guilt. Tunnel vision is not necessarily the product of deliberate misconduct by officials, but can be the product of institutional pressures that increase as the state has invested much time and resources in focusing on a suspect. The practical concern is that CSIS might possess material in its files that someone representing the detainees might be able to use as evidence to undermine the case against the detainee. To the extent that the cases rely on intelligence provided by foreign agencies, it may be impossible to ever obtain full disclosure. There is a danger that the foreign agency may selectively provide intelligence to Canadian officials or be affected by tunnel vision which ignores or explains away potentially exculpatory information.

(e) The Arar Commission Model

The Court discussed how the Arar Commission handled the challenges of reconciling the need for secrecy with the need for disclosure in one brief paragraph. It noted that the commission of inquiry was subject to section 38 of the *Canada Evidence Act* and commented that "[t]o help assess claims for confidentiality, the Commissioner was assisted by independent security-cleared legal counsel with a background in security and intelligence, whose role was to act as *amicus curiae* on confidentiality applications. The scheme's aim was to ensure that only information that was rightly subject to national security confidentiality was kept from public view. There is no indication that these procedures increased the risk of disclosure of protected information."[52] This comment unfortunately suggests that the Court may not have fully understood how the Arar Commission handled the challenges of secret information.

Although the Court was correct in noting that security cleared *amicus curiae* played a role in the Arar Commission in challenging the government's national security confidentiality ("NSC") claims, it neglected

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[51] On tunnel vision see Bruce MacFarlane, "Convicting the Innocent: A Triple Failure of the Justice System" (2006) 31 Man. L.J. 403.

[52] *Charkaoui*, *supra*, note 37, at para. 79.

the more important place of security-cleared commission counsel in ensuring that a full investigation took place and, where appropriate, challenging governmental witnesses who presented evidence in the closed hearings.

The fundamental role played by security-cleared commission counsel in the Arar Commission was carefully explained by Justice O'Connor in his public report. He explained that Commission counsel had top secret security clearances and made numerous demands for disclosure and obtained access to over 21,500 full text documents before redaction.[53] In light of the fact that many of the hearings were held *in camera* with Mr. Arar and his counsel excluded and because counsel for the Attorney General of Canada represented all departments and did not explore differences in position between them, O'Connor J. explained that he "instructed Commission counsel to test the *in camera* evidence by means of cross-examination, when necessary. Thus, as one of the steps in preparing to examine witnesses *in camera*, Commission counsel met periodically with counsel for Mr. Arar and for the intervenors to receive suggestions about areas for cross-examination. In the *in camera* hearings, if Commission counsel thought it necessary, witnesses called by the Commission were cross-examined, whether the Government agreed or not. Commission counsel cross-examined many of the witnesses, sometimes vigorously, and did so with considerable effectiveness."[54]

The *amicus curiae* that was the focus of the Supreme Court's attention had a more limited role than Commission counsel in the Arar Commission. They had access to all the documents that Commission counsel had, but they did not meet with counsel for Mr. Arar or the intervenors or cross-examine governmental witnesses. Rather, they "made submissions about the substance of the Government's NSC claim", issues that should be addressed in the Commission's report, and what parts of the report should be made public.[55]

Thus the central role of Commission counsel in the Arar Commission included (1) ensuring that the government fully disclosed all documents that were relevant to the inquiry's work; (2) calling relevant witnesses; (3) obtaining from counsel for the excluded parties suggestions for cross-examination of key witnesses; (4) challenging when appropriate

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53 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), at 290.

54 *Id.*, at 291.

55 *Id.*, at 292-93.

through cross-examination evidence presented in *in camera* proceedings; and finally (5) challenging the government's NSC claims. The *amicus curiae* in contrast only played a key role with respect to challenging NSC claims and making representations about what material could be disclosed publicly.

Justice O'Connor added in his discussion of the central role of Commission counsel that "having Commission counsel incorporate into witness examinations the perspectives of those who had an interest, but could not take part in the proceedings, helped to address the substantial shortcomings in the process resulting from the exclusion of those parties".[56] Justice O'Connor characterized Commission counsel as "independent counsel". He stressed that if independent counsel were effectively to test the evidence they "must have access to all relevant documents and must be given the time and facilities to properly prepare".[57]

A failure to understand the respective roles of Commission counsel and the *amicus curiae* in the Arar Commission is more than a historical quibble. It may have affected the design and adequacy of the government's response to *Charkaoui* in Bill C-3, including Parliament's judgment about the risk of inadvertent disclosure of secret material by a security-cleared counsel such as Arar Commission counsel who communicated with the affected person and his lawyer after having seen the secret material. Indeed, the special advocates provided for under Bill C-3 may turn out to play a role similar to that played by the *amicus curiae* in the Arar Commission and by British special advocates. In other words, special advocates under Bill C-3 are best equipped to challenge governmental claims of national security confidentiality. Unlike Commission counsel in the Arar Commission or counsel representing SIRC, it is unclear whether special advocates will have the power (1) to demand that the government disclose more relevant information, (2) to call evidence to ensure that all relevant information has been presented or (3) to consult with the affected person after they had access to the secret information.

Although an Arar-style *amicus curiae* could play a valuable role in challenging potentially overbroad secrecy claims made by governments in security certificate cases, it would not necessarily make the process significantly fairer for the detained person. There is a danger that new security-cleared counsel inserted into the security certificate process

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56 *Id.*, at 292.

57 *Id.*, at 293.

might not have the power to dig up new information held by the government or by third parties that mitigates or casts doubt on the information submitted by the government. There is also a danger that new security-cleared counsel might not, after seeing the secret information, be able to obtain information from the affected person or his counsel that might be necessary to make full answer and defence to the secret information. As will be seen, the presiding judge under Bill C-3 can allow the special advocate to have contact with the detainee and his counsel after having seen the secret information, but may be reluctant to do so because of concerns about the inadvertent disclosure of secret information. Although the Supreme Court's brief discussion of the Arar Commission does not make this clear, the judge should understand that commission counsel in the Arar Commission, not the *amicus curiae*, were able to discuss matters with Mr. Arar and his counsel after having seen the secret information with no concerns being raised that they inadvertently disclosed secret information.

The Supreme Court's neglect of the central role of commission counsel in the Arar Commission is also unfortunate because the Court elsewhere expressed a concern that one of the flaws of the present security certificate system was that the reviewing judge might not have access to all the relevant information. At several junctures in *Charkaoui* the Court stressed that one of the problems with the hearings was that the detainee was not in an informed position to demand full disclosure from the government of all the relevant information. Chief Justice McLachlin, for example, stated that "the judge sees only what the ministers put before him or her".[58] She added: "the judge's activity on behalf of the named person is confined to what is presented by the ministers".[59] These statements suggest that the Court may not have been persuaded that the duty placed on Crown counsel to make full disclosure was an adequate response to the unfairness of *ex parte* proceedings. Again, commission counsel, as opposed to *amicus curiae*, could respond to such concerns because only commission counsel or independent counsel representing a review body such as SIRC would have powers to investigate all of CSIS's files to determine whether there was other relevant information that would be of assistance to the security certificate detainee.

The role of commission counsel, like the former role of independent counsel representing SIRC, provided a solid Canadian-built foundation

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58 *Charkaoui*, *supra*, note 37, at para. 63.

59 *Id.*, at para. 64.

for designing a response to *Charkaoui*. The independent counsel in both proceedings can be distinguished from the Arar *amicus curiae* and British special advocates on the basis that they have powers to demand that the government produce all relevant evidence, if need be by calling witnesses. The Air India trial model would also allow the lawyer to make further demands for disclosure.

(f) Summary

Both the Arar commission counsel and the SIRC models, as well as the Air India model, allow the independent counsel to consult with the affected person after the independent counsel has seen the secret evidence. In this manner, they avoided the most notorious problem with the British special advocate procedure. That said, however, the difficulties of independent counsel obtaining important information from the affected person without revealing secrets should not be underestimated. In this respect, it may be significant that Arar Commission counsel conducted most of the discussions with Mr. Arar's counsel. Although counsel owes a strong duty of loyalty and confidentiality to his or her clients in our legal system, they also have sometimes neglected duties as members of the bar and officers of the court.[60] In some cases, including in the Air India trial, counsel have agreed to initial undertakings not to disclose information to their clients. Such undertakings alter the traditional solicitor client relationship and require the informed consent of the client. Nevertheless, they may present a means to obtain information that will assist in the defence of a case without risking that secrets will fall into the hands of the affected person. Even without such undertakings, there may be less of a risk that secrets will be inadvertently divulged if discussions are conducted on a counsel-to-counsel basis. Although they can be expected to share vital information with their client and take instructions from them on vital steps of the proceedings, counsel have independent obligations to the administration of justice. They are not in every respect the alter ego of their client.[61]

Another possibility that is used in Australia and the United States is to allow counsel the option of seeking security clearances as a way of obtaining access to secret information. Although such a process might

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[60] Michael Code, "Counsel's Duty of Civility: An Essential Component of Fair Trials and an Effective Justice System" (2007) 11 Can. Crim. L. Rev. 97.

[61] Code & Roach, *supra*, note 46, at 110.

restrict choice of counsel and be resisted by the bar, it also has the potential to increase the amount of information in the hands of the counsel with the final and ultimate responsibility of defending the affected person.

The Arar Commission's example of independent security-cleared commission counsel is a better model for a security-cleared counsel in security certificate proceedings than the security-cleared *amicus curiae* used by the Arar Commission. Commission counsel, unlike the *amicus curiae*, had legal powers to demand full disclosure of secret material from the government; to call and cross-examine witnesses that had relevant information and to consult the affected parties (often through counsel) after having seen the secret information. Although an Arar-style *amicus curiae* can help ensure an adversarial challenge to governmental claims of secrecy, such counsel is at a disadvantage with respect to ensuring that the affected person's full answer and defence interests are represented in any revised security certificate process. An *amicus curiae* will not generally have the power or means to ensure that the government has made full disclosure of all relevant information or to call and cross-examine witnesses or to consult with the affected party.

3. The Dangers of Judicial Pre-approval of Legislative Responses

The Court's discussion of the more proportionate policy alternatives in *Charkaoui* demonstrates some of the danger of judicial pre-approval of Parliament's response to its decision. As suggested above, the Court seemed to have misunderstood the Arar Commission experience, and this may have influenced Parliament's eventual response. Its discussions of both the SIRC experience and the Air India trial experience could have been supplemented by fuller information. The Court also appeared to discount the relevance of the experience under section 38 of the *Canada Evidence Act* and the Air India undertakings without providing full reasons for these conclusions.

Part of the advantage of dialogic models of constitutionalism is that they allow the executive and the legislature to research the full range of responses to the Court's decision. The executive and parliamentary committees should be able to more fully investigate the policy alternatives to the status quo than the judiciary which is generally restrained by the material presented to them. Judges can of course supplement the record in a case with library research but conventions of judicial behaviour would prohibit direct consultation with those who may have information

about policy alternatives that cannot be found in a library. There is much to be said for a conception of the judicial function that limits itself to deciding whether an impugned law is constitutional and leaves to the legislature the task of devising new laws.[62] Hence, there should not be too much judicial prompting about how the legislature should respond to a Charter decision if the government is to be free to explore the full range of dialogic options, including those that might not have been anticipated or fully researched by the Court. That said, one should not be too critical of the Court in *Charkaoui*. In order to justify its decisions, courts will often have to demonstrate a range of less rights-invasive means of satisfying the government's policy objectives. Any court that found the status quo with respect to security certificates to be unconstitutional would be obliged to demonstrate that there were better ways to reconcile the government's interest in protecting secrets with fairness to the accused.

The Court in *Charkaoui* also demonstrated that it was aware of the major criticism of the British special advocate system when it cited the report of the Constitutional Affairs Committee that had stressed the disadvantages of special advocates in consulting with the affected person once they had seen the secret material and their inability to call witnesses or demand disclosure.[63] Nevertheless, it is significant that Parliament eventually opted for special advocates as opposed to the independent counsel for SIRC or the Arar Commission, section 38 of the *Canada Evidence Act* or the Air India trial models. In other words, Parliament selected the only alternative that the Court recognized had been subject to criticism and the one alternative that arguably achieves the worst job of all the alternatives in ensuring fair treatment of the affected person. This suggests that courts should be careful not to appear to endorse any particular response to their Charter decisions and that the legislature may have an incentive to pick the alternative policy response that is the least generous to the affected individuals and the most compatible with the interests of the government. The government has an

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[62] This view was articulated in several early Charter cases. Justice Dickson for example stated: "While the courts are guardians of the Constitution and of individual's rights under it, it is the legislature's responsibility to enact legislation that embodies appropriate safeguards to comply with the Constitution's requirements. It should not fall to the courts to fill in the details that will render legislative lacunae constitutional." *Hunter v. Southam Inc.*, [1984] S.C.J. No. 36, [1984] 2 S.C.R. 145, at 169 (S.C.C.). In *Singh v. Canada (Minister of Employment and Immigration)*, [1985] S.C.J. No. 11, 17 D.L.R. (4th) 422, at 439 (S.C.C.), Beetz J. stated "it is not the function of this court to re-write the Act. Nor is it within its power."

[63] *Charkaoui*, *supra*, note 37, at para. 83.

incentive to maximize protections of national security confidentiality, especially in cases where the government is relying on secret intelligence provided to Canada by more powerful allies. This tendency is if anything stronger in the immigration law context given that non-citizens do not have the vote and courts have traditionally accepted departures from standards of adjudicative fairness in immigration proceedings that would not be tolerated in criminal trials.[64] Indeed the Court's statement in *Charkaoui* that "Parliament is not required to use the *perfect*, or the least restrictive, alternative to achieve its objective"[65] may have played a role in encouraging the adoption of the option that the Court itself recognized had been subject to the most criticism and was the most restrictive of the ability of the security cleared lawyer to communicate with others after having seen the secret information or to demand further disclosure from the government.

4. The Need for Prompt and Continuous Review of Detention

Although the Court rejected the argument that the automatic detention of those named in the certificate was arbitrary, it held that delaying the review of the detention of foreign nationals until after the reasonableness of their certificates was decided violated sections 9 and 10(c) of the Charter, especially when compared to the automatic review within 48 hours required for permanent residents. Although courts are loathe to second guess legislative classifications, they should not hesitate to take a hard look at the rationale for such distinctions when liberty is at stake. The state was not able to put forth a rationale for this differential treatment and the Court's remedy of applying the review provisions for permanent residents to foreign nationals had immediate effect.[66]

The Court also placed considerable stress on the need for continuous review of the detention of detainees under the security certificate regime. The Court concluded that sections 7 and 12 of the Charter require "a meaningful process of ongoing review that takes into account the context and circumstances of the individual case".[67] The government will bear a higher burden as the period of detention increases both because the

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64 Audrey Macklin, "Borderline Security" in Ronald Daniels *et al.*, eds., *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill* (Toronto: University of Toronto Press, 2001).

65 *Charkaoui*, *supra*, note 37, at para. 85 (emphasis in original).

66 *Id.*, at paras. 141-42.

67 *Id.*, at para. 107.

danger of a person may decline and the government will have more time to collect evidence. Although the Court does not directly address this possibility, it is not unreasonable to conclude that long periods of detention should place the state in a position where it should have enough evidence to charge a person criminally or else allow the person to be released, initially subject to conditions. The realistic possibility or impossibility of deportation should also be a factor, but this is not spelled out by the Court. Unfortunately, the Court avoided this issue. It simply noted that all three applicants claimed they would be tortured if returned to their home country but that "in each of their cases, this remains to be proven as part of an application for protection under the provisions of Part 2 of the *IRPA*. The issue of deportation to torture is consequently not before us here".[68] Although technically correct, this conclusion ignores the fact that all of the security certificate detainees come from countries with poor human rights records and some come from countries such as Syria and Egypt that are notorious for torturing suspected terrorists. It would be unfortunate if the hopefully remote possibility of allowing a person to be deported to a substantial risk of torture was used as a means to preserve a tenuous nexus between detention and deportation.

The continuing review scheme contemplated by the Court is meant to be a demanding and robust one. For example, the Court indicated that any requirements that the detainee present new evidence or a material change in circumstances to justify a review would violate sections 7 and 12 of the Charter.[69] The Court refused to invalidate IRPA on its face for not placing any limits on detention or not requiring that the detention be related to a realistic possibility of deportation. Nevertheless, it hinted that prolonged detention could be found to violate sections 7 and 12 of the Charter at some point in the future. The Court's approach to the indeterminate detention issue adopts a form of one-case-at-a-time minimalism that Cass Sunstein has argued is particularly appropriate to ration the use of judicial powers during emergencies.[70] The Court's one-case-at-a-time approach, however, does not maximize the space for legislative policy-making as Sunstein suggests that it should. Rather, it leaves the existing legislation intact but uncertain as both detainees and governments wait and speculate about the particular point of time in

68 *Id.*, at para. 15.

69 *Id.*, at para. 122.

70 See note 22.

which courts will conclude that detention has become constitutionally excessive. At that point of time, the courts will fashion a case-specific remedy under section 24(1) of the Charter while leaving the constitutional scheme intact.

5. The Court's Conclusion on Equality Rights

The Court's summary dismissal of the detainees' equality rights claims is disappointing, especially when compared to the House of Lords approach to equality in the Belmarsh case.[71] The Supreme Court's rationale for holding that there is no equality violation was its assertion that, unlike citizens, non-citizens do not have an independent right to remain in Canada under section 6 of the Charter coupled with the Court's statement that detention has not yet "become unhinged from the state's purpose of deportation".[72] The Court's justification is presumably its conclusion that none of the three applicants had reached the point where it has been determined that they were in need of protection from a substantial risk of torture if deported.[73] But at least with respect to Hassan Almrei who was born in Syria, it would be shocking if a substantial risk of torture was not found. If this is accepted, the only possible connection between Mr. Almrei's continued detention and the unique immigration remedy of deportation is the possible use of the *Suresh* exception.

The Court's summary dismissal of the equality claim also avoided comparing the long-term indeterminate detention of non-citizens suspected of involvement with terrorism with the more limited tools available to the state with respect to citizens suspected of involvement with terrorism. Those charged with terrorism offences have Charter rights to a trial in a reasonable time and not to be denied reasonable bail without just cause. They have broad rights to disclosure of relevant information held by the state, subject only to non-disclosure applications under section 38 of the *Canada Evidence Act* which, as the Court noted, does not allow the use of secret evidence. Section 38.14 of the CEA also allows a trial judge to fashion whatever remedy is necessary to protect the accused's right to a fair trial because of the non-disclosure of secret

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[71] *A. v. Secretary of State, for the Home Department*, [2004] UKHL 56, [2005] 2 A.C. 68 (U.K.H.L.).

[72] *Charkaoui*, [2007] S.C.J. No. 9, [2007] 1 S.C.R. 350, at para. 131 (S.C.C.).

[73] *Id.*, at para. 15.

information. Citizens can be subject to peace bond provisions under section 810.01 of the *Criminal Code* or the now-expired preventive arrest provisions of section 83.3, but only for a year.[74] The Court did not conduct a full section 15 analysis, which would have required it to select a comparator group or reflect on the position of non-citizens suspected of terrorism.

The Court's summary conclusion that section 15 was not violated precluded it from examining under section 1 of the Charter whether the singling out of non-citizens suspected of terrorism for harsher treatment under IRPA compared to the criminal law could be justified under section 1 of the Charter. Such an analysis would have required the Court to address questions of rational connection, proportionality and overall balance between the treatment of non-citizens and the important objective of preventing terrorism. Such an analysis would have raised some difficult questions about the use of immigration law as anti-terrorism law. The legislative objective for any section 15 violation would likely have been the need to protect the security of Canada whereas the legislative objective that was used to determine whether the denial of a fair hearing under section 7 could be justified under section 1 of the Charter was the state's need for secrecy, not security. The House of Lords in the Belmarsh case focused on the legislative objective of security as a possible justification for the differential treatment of non-citizens. It concluded that there was not even a rational connection between the prevention of terrorism and the singling out of non-citizens suspected of terrorism. The House of Lords also raised questions about the utility of deportation as a tool in the fight against international terrorism.[75] Even if the Court in *Charkaoui* had deferred on the rational connection issue, it still would have had to grapple with whether criminal prosecutions were a more proportionate means for the state to protect itself against non-citizens involved with terrorist organizations than reliance on security certificates that in these cases were only tenuously tied to the possibility of deportation. The important issues of whether the use of immigration law as anti-terrorism law was rational and proportionate were avoided in *Charkaoui* because of the Court's blunt conclusion that no section 15 violation had been established. The absence of proportionality analysis on security issues may also help

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74 *Criminal Code*, R.S.C. 1985, c. C-46.

75 *A. v. Secretary of State*, *supra*, note 71.

explain why Parliament's ultimate response to *Charkaoui* did not explore the long-term sustainability of security certificates as anti-terrorism law.

6. The Court's Remedy

The Court delayed for 12 months its declaration of invalidity with respect to those parts of the legislation that authorized the government to make unchallenged *ex parte* representations to the Court.[76] Although the Court did not cite the *Schachter v. Canada*[77] categories for when it will be appropriate to suspend a declaration of invalidity, it is reasonably certain that they applied the public danger category given the Court's conclusion that the signing of a certificate constituted a determination of dangerousness. The Court indicated that the unconstitutional provisions could be applied during the 12-month delay, but that at the end of this time

> the certificates of Mr. Harkat and Mr. Almrei (and of any other individuals whose certificates have been deemed reasonable) will lose the "reasonable" status that has been conferred on them, and it will be open to them to apply to have the certificates quashed. If the government intends to employ a certificate after the one-year delay, it will need to seek a fresh determination of reasonableness under the new process devised by Parliament. Likewise, any detention review occurring after the delay will be subject to the new process.[78]

The Court's choice of a 12-month delay might reflect its judgment about the minimal amount of time that was necessary to devise and enact new legislation. A six-month delay might have been an unrealistically short time to allow the government to draft legislation and to allow Parliament to debate it. That said, the government kept most of its work internal until eight months after the decision when Bill C-3 was given first reading. There was then a rushed parliamentary debate with the threat of the expiry of the Court's suspension of its declaration of invalidity hanging over the heads of the Parliamentarians. There is a tension in the dialogical model between giving legislatures enough time to respond to court judgments and minimizing the period of time during

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76 *Charkaoui*, *supra*, note 72, at para. 140.

77 [1992] S.C.J. No. 68, [1992] 2 S.C.R. 679 (S.C.C.).

78 *Charkaoui*, *supra*, note 72, at para. 140.

which individuals suffer the effects of unconstitutional laws.[79] An 18-month suspension would have given Parliament more time to debate its response, but it would also have increased the harms to the detainees who were detained under a law that had been found to be unconstitutional. It is also possible that government could have taken even longer before introducing its bill had an 18-month suspension been used.

Some might question why a suspended declaration of invalidity was used at all.[80] In this case, the detainees received no immediate benefit from their victory in Court and this is certainly contrary to traditional declaratory approaches associated with Blackstone and Dicey which stress the connection between rights and remedies and generally produce retroactive remedies or at least remedies that have immediate prospective effect.[81] It can be argued that detention under an unconstitutional law is in direct conflict with the direction in section 52 of the *Constitution Act, 1982* that unconstitutional laws are of no force and effect. That said, it may be unrealistic to expect the courts to take responsibility for the release of individuals that the government claims are dangerous. In this vein, it is significant that the House of Lords in its justly celebrated Belmarsh case also employed a remedy that did not result in the release of the detainees. Although it may have been unrealistic to have expected the Court to have struck down the law and ordered the release of those detained under it, the Court might have done more to minimize the harm caused to the successful applicants during the one year in which the declaration of invalidity was suspended.

One way of resolving the tension between giving Parliament adequate time for deliberation and minimizing harms to those detained under an unconstitutional law is for the Court to take supervisory steps to limit the harms to the successful applicants during the period of suspension. For example, an independent lawyer who already had a security clearance might have been allowed to see the secret evidence in the cases and to challenge the government's claims of secrecy. This may have led to more information being made available to the detainees and their lawyers even while the declaration of invalidity was suspended. Another possibility was expedited review of the conditions of release of detainees.

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[79] See generally Kent Roach, *Constitutional Remedies in Canada* (Aurora: Canada Law Book, 2006), at c. 14.

[80] For criticisms of suspended declarations of invalidity see Bruce Ryder, "Suspending the Charter" (2003) 21 S.C.L.R. (2d) 267.

[81] *Canada (Attorney General) v. Hislop*, [2007] S.C.J. No. 10, [2007] 1 S.C.R. 429, at para. 81 (S.C.C.).

Unfortunately, no steps were taken in this case to minimize the harms of the unconstitutional law during the 12 months that the Court's remedy was suspended.

There is a danger that an emphasis on dialogue between courts and legislatures may result in the affected individuals getting lost in the institutional interplay. The Court's judgment does not even provide basic details about the three men including the lengthy periods of detention and complex procedural history of their cases, the allegations that they face, or their countries of origin to which they face deportation. The Court may have been reluctant to say much about the detainees because it was not privy to the secret evidence that the government presented against the men and the secret evidence had never been subject to adversarial challenge. Nevertheless, courts should attempt to tell the public about all litigants who appear before them. Courts should also recognize that a large part of the justification for their role in institutional dialogue is the unique ability of courts to render justice to aggrieved litigants who cannot find relief from other branches of government.

7. Summary

The Court's unanimous decision in *Charkaoui* is far from the unambiguous victory for the detainees that it was initially presented as in the media. The Court's treatment of equality issues and its deferral of the issue of the ultimate constitutionality of indeterminate detention was troubling. The Court never really answered the question of why long-term detention without trial and secret evidence was acceptable when applied against non-citizens when they would be unacceptable if applied to citizens. The Court's use of one-case-at-a-time constitutional minimalism on the indeterminate detention issue ignored the long periods of detention already suffered by the detainees and the difficulties of deporting them without a substantial risk of torture. It sent the message that the government could continue to detain these men until at some time in the future, some judge declares that enough is enough. The Court never grappled with the (ir)rationality of using immigration law with its ultimate and problematic remedy of deportation as anti-terrorism law, as did the House of Lords in its Belmarsh case.[82]

The Court made a firm statement about the need for adversarial challenge to the state's case in order to satisfy the principles of

[82] *A. v. Secretary of State*, *supra*, note 71.

fundamental justice under section 7 of the Charter. On the issue of both justification under section 1 of the Charter and the ultimate remedy, the Court deferred to Parliament by simply outlining a range of less rights-intrusive alternatives. Although it was necessary for the Court to justify its decision that the present system of no adversarial challenge was unconstitutional, such surveys must be conducted with care lest the Court misunderstand the policy alternatives or appear to pre-approve any particular alternative. The Court's use of a suspended declaration of invalidity allowed Parliament to make policy choices and enact Bill C-3, but it did not guarantee that Bill C-3 or other aspects of security certificates will not be found to violate the Charter in future cases.[83] The Court's judgment started a process that will marginally improve the fairness of the security certificate process, but it rejected many of the other claims made by the applicants including their claims of unequal and discriminatory treatment when compared with the treatment received by citizens suspected of involvement in terrorism. The Court also did not place any limits on the indeterminate detention of the applicants or reject the possibility that they might be deported even if they faced a substantial risk of torture.

III. THE LIMITED DIALOGIC RESPONSE IN BILL C-3

In October 2007, the government introduced Bill C-3 providing for special advocates but only for use with respect to immigration law security certificates. As will be discussed below, the government did not follow the advice of both House of Commons and Senate committees that had recommended a wider use of special advocates whenever the government used secret evidence as well as in the *ex parte* part of proceedings under section 38 of the *Canada Evidence Act* to obtain non-disclosure orders. The fact that Bill C-3 only authorized the use of special advocates under IRPA was indicative of a general failure of Bill C-3 to expand the policy debate with the Court. The Court had only decided the issue under the IRPA and Parliament responded in a similar narrow manner.

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[83] For an example of a legislative reply that was itself held to be unconstitutional, see *Sauvé v. Canada (Chief Electoral Officer)*, [2002] S.C.J. No. 66, [2002] 3 S.C.R. 519 (S.C.C.). See also Peter Hogg, Allison A. Bushell Thornton & Wade K. Wright, "*Charter* Dialogue Revisited — or 'Much Ado About Metaphors'" (2007) 45 Osgoode Hall L.J. 1, at 19-25, 46-51; Kent Roach, "Sharpening the Dialogue Debate: The Next Decade of Scholarship" (2007) 45 Osgoode Hall L.J. 169, at 174-76.

1. The Role of Special Advocates

The special advocates contemplated in Bill C-3 are in some respects closer to the Arar commission's model of *amicus curiae* than the role of Commission counsel during the Arar Commission or the role of independent counsel for SIRC. Bill C-3 defines the duties of special advocates as follows:

> 85.1(1) A special advocate's role is to protect the interests of the permanent resident or foreign national in a proceeding under any of sections 78 and 82 to 82.2 when information or other evidence is heard in the absence of the public and of the permanent resident or foreign national and their counsel.
>
> (2) A special advocate may challenge
>
> (*a*) the Minister's claim that the disclosure of information or other evidence would be injurious to national security or endanger the safety of any person; and
> (*b*) the relevance, reliability and sufficiency of information or other evidence that is provided by the Minister and is not disclosed to the permanent resident or foreign national and their counsel, and the weight to be given to it.
>
> . . . . .
>
> 85.2 A special advocate may
>
> (*a*) make oral and written submissions with respect to the information and other evidence that is provided by the Minister and is not disclosed to the permanent resident or foreign national and their counsel;
> (*b*) participate in, and cross-examine witnesses who testify during, any part of the proceeding that is held in the absence of the public and of the permanent resident or foreign national and their counsel; and
> (*c*) exercise, with the judge's authorization, any other powers that are necessary to protect the interests of the permanent resident or foreign national.[84]

The Minister is only obliged to disclose the secret evidence that is presented to the judge.[85] The special advocate can challenge both the

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[84] S.C. 2008, c. 3.

[85] See s. 85.4(1) of Bill C-3, which provides: "The Minister shall, within a period set by the judge, provide the special advocate with a copy of all information and other evidence that is provided to the judge but that is not disclosed to the permanent resident or foreign national and their counsel."

government's claim to secrecy and the relevance, reliability and sufficiency of the secret evidence.

2. Section 85.2(c) and Additional Powers that are Necessary to Protect the Detainee

Section 85.2(c) will be critical in determining whether the special advocate has a role similar to that played by the Arar Commission's *amicus curiae* or the more robust role played by Arar Commission counsel or SIRC counsel. It is under subsection (c) that a judge will decide whether the special advocate can consult with the detainee and his counsel after having seen the secret information presented by the Minister and whether the special advocate will be able to demand the disclosure of evidence possessed by the Minister or call witnesses. Although the requirement for judicial authorization was designed in part to respond to the risk of inadvertent disclosure of the secret information, the only statutory criteria in section 85.2(c) is whether a requested power is "necessary to protect the interests of the permanent resident or foreign national". This in itself is a fairly stringent standard that requires the judge to conclude that the requested power is necessary and not just advisable in order to protect the interests of the non-citizen.

The ability of the special advocate to consult with the detainee or other experts about the secret information, as well as the special advocate's ability to demand further disclosure and call witnesses, can be critical to protecting the interests and defending the detainee. The proposed legislation essentially delegates the questions of whether the special advocate will be able to play such a role to the specially designated judge of the Federal Court who hears the case. Such delegation may allow the courts to expand the role of the special advocate in ways not specifically contemplated by Parliament if the judge determines that the new functions of the special advocate are necessary to protect the interests of the detainee. At the same time, presiding judges might take a restrictive view of what is necessary to protect the interests of the detainee. An important issue will be whether the judge's perceptions of the risks of inadvertent disclosure of secret information influences his or her approach to determining what is necessary to protect the detainee's interests. Such an approach would run contrary to the wording of the text and ignore the Court's observation in

Charkaoui[86] that with respect to the SIRC process that "there is no indication that these procedures increased the risk of disclosure of protected information". At the same time, there are other parts of Bill C-3 which signal a concern about the risk of inadvertent disclosure of information. Section 83(1.2) provides that a judge could deny a detainee's request for a specific special advocate because the special advocate already has had access to information that would be injurious to national security or endanger the safety of a person and in the circumstances "[t]here is a risk of inadvertent disclosure of that information or other evidence". This provision seems to discount the fact that security cleared counsel who have acted for both SIRC and Arar Commission were able to interact with affected people without inadvertently disclosing secret information.

The Commons committee that conducted the three-year review of the *Anti-terrorism Act* considered the practice of the Arar Commission during which Commission counsel with security clearances consulted with counsel for Mr. Arar and special security-cleared counsel challenged the government's case for secrecy. As the Commons committee noted, "The functions performed by the *amicus curiae* were somewhat different [than those of Commisson counsel]. During *in camera* hearings, he was mandated to make submissions challenging the national security confidentiality claims made by government agencies in opposition to the public disclosure of sensitive information. His function was to advocate in favour of accountability and transparency in the public interest."[87] The Senate committee specifically recommended that "[t]hat the special advocate be able to communicate with the party affected by the proceedings, and his or her counsel, after receiving confidential information and attending *in camera* hearings, and that the government establish clear guidelines and policies to ensure the secrecy of information in the interest of national security".[88] The Senate committee's approach built on Canada's experience with security-cleared lawyers conferring with the affected person both during the Arar commission and during the process that was used by the Security Intelligence Review Commission to review security certificates.

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[86] *Charkaoui*, *supra*, note 72, at para. 79.

[87] House of Commons, Subcommittee on the Review of the Anti-terrorism Act, *Rights, Liberty, Security: A Comprehensive Review of the Anti-Terrorism Act and Related Issues* (March 2007), at 78-79.

[88] Senate of Canada, Special Senate Committee on the *Anti-terrorism Act*, *Fundamental Justice in Extraordinary Times* (February 2007), at 42.

Parliament's delegation of the most critical issues to Federal Court judges casts some doubt on those who argue that judicial activism is a power grab by the judges and their supporters.[89] The reasons for increased judicial power in modern societies are more complicated. Delegation of tough issues to the courts can avoid debate and conflict when legislation is being enacted. The fact that Bill C-3 was enacted just as the 12-month suspension of the declaration of invalidity was about to expire may have given the government an incentive to make the reply legislation as uncontroversial as possible. In addition, the delegation of these issues to the Federal Court could be attractive because it can be assumed that the court's decisions will establish and follow relevant but perhaps unclear constitutional standards. Even if the presiding judge denies a special advocate an opportunity to contact the detainee or obtain further disclosure when such actions are required to ensure that the detainees' right to know and challenge the case are satisfied, the eventual remedy for any violation of section 7 of the Charter will be limited to the facts of the particular case and not result in a wholesale invalidation of the act. In this respect, Bill C-3 is a legislative mirror of the one-case-at-a-time orientation of the judicial minimalism advocated by Cass Sunstein.

3. The Broad Restrictions Placed on Special Advocates After They Have Examined the Secret Evidence

The restrictions imposed on the special advocate after having seen the secret information that the Minister presents to the judge apply not only to consultation with the detainee and his lawyers, but to all other persons. Section 85.4(2) provides that "After that information or other evidence is received by the special advocate, the special advocate may, during the remainder of the proceeding, communicate with another person about the proceeding only with the judge's authorization and subject to any conditions that the judge considers appropriate." Read by itself this provision is overbroad because it could restrict the special advocate from communicating about non-secret parts of the proceedings with other persons or from communicating with other special advocates or others with security clearances about the proceedings. The ability of special advocates to make effective adversarial challenge to secret intelligence that may draw on foreign events and the methods of foreign

[89] See, for example, F.L. Morton & Rainer Knopff, *The Charter Revolution and the Court Party* (Peterborough: Broadview Press, 2000).

intelligence agencies will be undercut if section 85.4(2) is interpreted to require a special advocate to function in splendid isolation once he or she has seen the secret information.

Section 85.5 provides a somewhat better tailored restriction on what the special advocate can reveal. It provides:

> 85.5 With the exception of communications authorized by a judge, no person shall
>
> (*a*) disclose information or other evidence that is disclosed to them under section 85.4 and that is treated as confidential by the judge presiding at the proceeding; or
>
> (*b*) communicate with another person about the content of any part of a proceeding under any of sections 78 and 82 to 82.2 that is heard in the absence of the public and of the permanent resident or foreign national and their counsel.

This provision seeks only to restrain the special advocate with respect to confidential information and information that is heard in the absence of the public and the affected party. Nevertheless, thought should be given to how a special advocate can obtain appropriate legal and factual assistance once the special advocate has been exposed to the secret information. It may be too much to assume that a single special advocate, or even two special advocates working together on a file,[90] will be able on their own and without assistance to discharge the burden articulated in *Charkaoui* of providing effective adversarial challenge to the government's case. The Court has underlined the importance of someone bringing to the attention of the reviewing judge all the relevant facts and laws. This process may in some cases require the special advocate to consult with others about the accuracy, reliability, relevance and significance of the secret information. In some cases, only the affected person may hold the clue to relevant facts that could rebut the secret evidence or at least place it in a fuller context. In other cases, the special advocate may need to consult experts on terrorism and geo-political events in order to put the intelligence into its full context. An intelligence report that may on first glance appear to be damming may appear significantly less so if the reliability of the underlying information is suspect or when reliable information is placed in its full context.

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[90] On this possibility see David Dunbar & Scott Nesbitt, "Parliament's Response to *Charkaoui*: Bill C-3 and the Special Advocate Regime under IRPA" (2008) 42 S.C.L.R. (2d) 415.

The special advocate will challenge both the government's claim that information cannot be disclosed to the detainee and any secret evidence presented by the Minister to the reviewing judge. As discussed above, both of these challenges can serve important functions. A special advocate with experience in matters concerning national security confidentiality could effectively challenge overbroad claims of secrecy. At the same time, the government may still have the upper hand with respect to claims that the disclosure of information will harm relations to allies, secret informers or ongoing investigations. Even an experienced special advocate may be at a disadvantage in challenging the reliability of secret evidence or placing the secret evidence in context. The special advocate can interview the detainee before seeing the secret information. At that point in time, however, there is a danger that the special advocate will not ask the right questions. Although special advocates are skilled lawyers with experience with matters affecting national security confidentiality, they will not generally be experts about the countries in which detainees are alleged to have supported or engaged in terrorism. If after receiving the secret information, the special advocate wants to return and ask the detainee more questions, or even if the special advocate wants to ask a third-party expert for assistance, the special advocate must seek the permission of the judge. Without such assistance, the special advocate may be unable to present to the reviewing judge facts that are necessary to make an accurate determination of whether the detainee is a threat to the security of Canada.

4. The Need for the Special Advocates to be Able to Make *Ex Parte* Representations under Section 85.2(c)

The special advocate may be reluctant to seek permission to consult the detainee or others after having seen the secret information if such a process means that his or her work product will be revealed to the government. Under section 38.11(2) of the *Canada Evidence Act*, those opposing the Attorney General's attempt to obtain non-disclosure orders can have *ex parte* hearings granted by the Federal Court judge. This process has the potential of allowing an accused to inform the judge of the accused's line of defence without revealing such information to the Attorney General of Canada or those who are prosecuting the case. The Federal Court has repeatedly stressed the utility of this provision in

making the court aware of the affected person's concerns.[91] Unfortunately, there is no such provision in Bill C-3 that would allow special advocates to seek permission from the presiding judge on an *ex parte* basis to consult the detainee, the detainee's lawyers or other experts.[92] The prospect of alerting the government to their lines of inquiry and their internal work product or simply their lack of knowledge about the political context of the intelligence may deter special advocates from seeking permission from the judge to obtain more information from the detainee and from experts.

The government may argue that they must be informed so that they can make submissions with respect to the harms to national security and the risk of inadvertent disclosure. In many cases, however, the harms of disclosure to national security will be obvious and acknowledged by all parties. The presiding judges will already have heard and accepted adversarial argument from the government about the harm to national security or other persons that prevents the disclosure of the information to the detainee and his lawyer. It is difficult to see what the government can add with respect to the risk of inadvertent disclosure or to the best way for the special advocate to conduct him- or herself after seeing the secret information. The government was not able to make such adversarial arguments when counsel for SIRC or the Arar Commission asked questions of the affected persons after having seen the secret information. With respect to the risk of inadvertent disclosure of information, there may be no alternative to relying on the discretion and the integrity of security-cleared counsel in this area. In any event, the prospect of full notice to the government when special advocates seek judicial authorization under section 85.2(c) may inhibit special advocates from seeking additional powers.

5. The Role of Special Advocates in Challenging the Reliability and Relevance of the Secret Evidence

Under section 85.1(2) of Bill C-3, the special advocate can challenge "the relevance, reliability and sufficiency" of the information provided

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[91] Canada (*Attorney General) v. Ribic*, [2003] F.C.J. No. 1964, 2003 FCA 246 (Fed. C.A.); *Canada (Attorney General) v. Khawaja*, [2007] F.C.J. No. 622, 2007 FC 490 (F.C.) [hereinafter "*Khawaja*"], revd on other grounds [2007] F.C.J. No. 1473, 2007 FCA 342 (F.C.A.).

[92] As a practical matter, the Attorney General of Canada would likely obtain notice of requests for further disclosure from the government, but the same cannot be said about requests to interview the detainee, his lawyer or other experts.

by the Minister. The reference to challenging the relevance of the information is particularly interesting. It opens up the possibility that the special advocate can argue that intelligence about a person's associations — indeed the very type of information that was at the heart of the Arar matter — is of limited or no relevance. It follows from a recommendation that was made by the British Columbia Civil Liberties Association[93] to the committees conducting the three-year review, but one that was rejected by the committees. Intelligence may be based on assumptions and presumptions of guilt that would be rejected under more disciplined evidentiary thinking requiring that the probative value of evidence be identified, that irrelevant evidence be excluded and that the prejudicial effect of evidence be balanced against its probative value.[94] The practical meaning of the reference to challenging the relevance of secret evidence may, however, be undercut by section 83(h) which provides:

> (*h*) the judge may receive into evidence anything that, in the *judge's* opinion, is *reliable and* appropriate, even if it is inadmissible in a court of law, and may base *a* decision on that evidence.
>
> (Emphasis added)

In other words, the special advocate is mandated to make submissions about the relevance of the information, but the judge is only mandated to determine whether the evidence is "reliable and appropriate". Section 83(j), however, contemplates that the judge shall return irrelevant material to the Minister by providing:

> (*j*) the judge shall not base a decision on information or other evidence provided by the Minister, and shall return it to the Minister, if the judge determines that it is not relevant or if the Minister withdraws it.

It remains to be seen whether these changes will move security certificates away from an intelligence-based paradigm to a more evidence-based paradigm. On an evidence-based paradigm, a reviewing judge could conclude that intelligence revealing that a detainee has strong and perhaps extreme religious or political views and associations with extremists may be of questionable relevance to the ultimate issue of whether the detainee is a threat to national security. There is, however, no guarantee that the

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93 I disclose that I am a member of the board of directors of that organization. I was also a member of the research advisory committee for Part II of the Arar Commission and have provided training for special advocates.

94 See Gus Van Harten, "*Charkaoui* and Secret Evidence" (2008) 42 S.C.L.R. (2d) 251.

reviewing judges will take this approach and they could define relevance in a broad manner and rarely, if ever, send information back to the government on the ground that it was irrelevant. The specially designated judges of the Federal Court who review security certificates have experience with seeing secret intelligence and it remains to be seen how this experience will affect their determinations of relevance. That said, section 83(j) is a new and mandatory provision that should be given a generous and purposive interpretation. It seems intended to discipline the type of information that is used to support security certificates and to ensure that irrelevant but prejudicial intelligence about the detainees is not considered by the reviewing judge and is returned to the Minister.

6. The Role of the Special Advocate in Challenging Secret Evidence Obtained as a Result of Torture or Cruel, Inhuman and Degrading Treatment

Bill C-3 to its credit enters into the torture debate by providing in section 83(1.1) that "reliable and appropriate evidence does not include information that is believed on reasonable grounds to have been obtained as a result of the use of torture within the meaning of section 269.1 of the *Criminal Code*, or cruel, inhuman or degrading treatment or punishment within the meaning of the Convention Against Torture". Parliament has chosen a fairly broad prohibition on evidence derived from torture that does not on its face contemplate an exception for derivative evidence that is obtained from an independent source.

In addition to statements and derivative evidence obtained from torture, section 83(1.1) also prohibits the use of statements and derivative evidence obtained as a result of cruel, inhumane or degrading treatment or punishment. These conditions can include detention without basic amenities, prolonged isolation, restraints in very painful conditions, sleep deprivation for prolonged periods, threats and exposure to loud music for prolonged periods.[95] This provision will give both the detainees' lawyers and special advocates resources to challenge much intelligence received from countries with poor human rights records as well as some intelligence received from American agencies.[96] This provision takes a strong and appropriate legislative stand against evidence obtained as a

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[95] Craig Forcese, *National Security Law: Canadian Practice in International Perspective* (Toronto: Irwin Law, 2008), at 597-601.

[96] See Forcese & Waldman, *supra*, note 74.

result of torture, cruel, inhuman and degrading treatment. It raises questions about the viability of cases against detainees that may rely on intelligence supplied by countries prepared to use harsh interrogation techniques and impose harsh conditions of confinement.

The provisions which allow special advocates to challenge secret intelligence on the basis that it is irrelevant, unreliable or obtained as a result of torture, cruel, inhumane or degrading treatment have a potential to put the whole process of intelligence gathering on trial. Depending on the receptivity of the judges to such claims, these provisions may have far-reaching and perhaps unintended effects. They could be as important to the security certificate regime as the exclusion of improperly obtained evidence is to the criminal justice system. If the reviewing judges are willing to exclude a significant portion of the secret intelligence that is presented to them because of concerns about its relevance and reliability, these evidentiary challenges could shake the sustainability of security certificates, apart from other challenges based on indeterminate detention and deportation to torture which will be examined in the third part of this essay.

7. The Equal Treatment of Permanent Residents and other Non-Citizens: Dialogue or Obedience?

Bill C-3 followed the Supreme Court's *Charkaoui* decision by providing that non-citizens who do not have permanent resident status should have the same right to prompt initial judicial review of detention as permanent residents. In other words both permanent residents and foreign nationals have a right to judicial review of their initial detention within 48 hours of the detention.[97] Some would argue that such a response should not be characterized as dialogue between Parliament and the Court but rather as the obedience of Parliament to the Court.[98] There are, however, some instances when there is simply not a wide range of policy choices. This part of the legislative reply codifies the Court's immediate remedy in *Charkaoui* and is justified because the Supreme Court found the distinction between the treatment of permanent residents and other non-citizens for the purpose of reviewing detention was arbitrary and could not be justified in relation to any specific

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97 S.C. 2008, c. 3, s. 82(1).

98 Christopher Manfredi & James Kelly, "Six Degrees of Dialogue: A Response to Hogg and Bushell" (1999) 37 Osgoode Hall L.J. 513.

governmental purpose. If the government had a legitimate purpose for such a distinction and could justify differential treatment of permanent residents and other non-citizens for the purposes of the initial review of their detention, it could have enacted and defended a differential regime.

Even when legislatures appear to follow the dictates of Court decisions, however, they retain the ability to place subtle yet sometimes important qualifications into the new legislation. For example, Parliament's response to the Supreme Court's decision in *R. v. Duarte*[99] that judicial warrants were required when a person "wears a wire" by engaging in electronic surveillance of another person included not only the provision of new warrants, but also explicit legislative authorization for the use of warrantless wires in some limited circumstances.[100] Bill C-3 follows this trend of following the gist of the Court's decision while introducing a subtle yet potentially important difference in the new legislation. Bill C-3 provides for judicial review of detention under security certificates every six months, yet effectively extends the period between such judicial reviews by calculating the six-month period as only starting after the completion of the previous judicial review.[101] Depending on the time that the parties and the judge spends on conducting and completing the review, the result could be a significant extension of the periods between judicial review.[102] The merits of this change are not clear, but the institutional point is that even when the legislature may appear to obey a court decision, it retains the ability to introduce potentially significant variations in new legislation.

8. Recognition of House Arrest as an Alternative to Detention

Although Bill C-3 can be characterized as a truncated form of dialogue because it only provides special advocates for security certificate proceedings and because it delegates the toughest issues concerning the role of special advocates to the reviewing judge, it expands the policy debate about security certificates in some respects. For example, it builds on the practice of Federal Court judges granting those subject to long-term detention under security certificates conditional

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99 [1990] S.C.J. No. 2, [1990] 1 S.C.R. 30 (S.C.C.).

100 *Criminal Code*, R.S.C. 1985, c. C-46, s. 184.1 (warrantless wires authorized to prevent bodily harm); s. 184.4 (warrantless wires authorized in exceptional circumstances).

101 S.C. 2008, c. 3, s. 82(3) and (4) and s. 82.1(2) and s. 82.2(4).

102 I am indebted to Barb Jackman, Q.C. for bringing this point to my attention.

release. It does so by providing for arrest powers if the conditions of release are breached[103] and by providing for six-month judicial reviews of the conditions of release.[104] The practice of release under conditions was encouraged by the Supreme Court in *Charkaoui* which interpreted the relevant schemes "as enabling the judge to consider whether any danger attendant on release can be mitigated by conditions".[105] The Court also provided a general list of factors that the judge should consider including the reasons for detention, length of detention, reasons for the delay in deportation and anticipated future length of detention. In Bill C-3, Parliament was content to leave these matters, as well as the range of conditions that can be placed on security certificate detainees, to judicial discretion even though in other contexts including bail, the legislature provides judges with more guidance.

Section 82(5) requires that a person be detained if their release under conditions would harm national security, endanger the safety of any person or if they would be likely to abscond.[106] The same section is, however, silent on the criteria to be used to determine the conditions of release.[107] The conditions of house arrest imposed on the security certificate detainees has not surprisingly attracted a tremendous amount of litigation, and some of the conditions are quite harsh. For example, Mr. Harkat is subject to house arrest with only limited trips allowed outside the house and with all places and visits being vetted by the Canadian Border Services Agency.[108] He has been found in breach of some conditions.[109] The British legislation that responds to the House of Lords'

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103 S.C. 2008, c.3, s. 82.1.

104 *Id.*, s. 82.2.

105 *Charkaoui*, [2007] S.C.J. No. 9, [2007] 1 S.C.R. 350, at para. 120 (S.C.C.).

106 Detention on the basis of injury to the vague and broad notion of "national security" underlines the difference between the immigration and criminal processes where the denial of bail when it is in the "public interest" was found to violate the right of a person charged with an offence not to be denied reasonable bail without just cause. *R. v. Morales*, [1992] S.C.J. No. 98, [1992] 3 S.C.R. 711 (S.C.C.). But see *R. v. Hall*, [2002] S.C.J. No. 65, [2002] 3 S.C.R. 309 (S.C.C.) upholding a reformulated tertiary ground for the denial of bail on the basis of concerns about public confidence in the justice system.

107 There is reference in s. 82.1(1) to changing conditions of release if it is "desirable because of a material change in the circumstances that led to the order" but no statement of the criteria that should be used in ordering or varying the conditions of release. Nor are criteria found for confirming a release order or varying the conditions of release under s. 82.2 after a person has been arrested and detained for breaching the conditions of release.

108 *Harkat v. Canada (Minister of Citizenship and Immigration)*, [2007] F.C.J. No. 540, 2007 FC 416 (F.C.).

109 *Harkat v. Canada (Minister of Citizenship and Immigration)*, [2008] F.C.J. No. 222, 2008 FC 198 (F.C.).

Belmarsh decision provided more guidance regarding the content of control orders.[110] That said, the British legislation has not prevented extensive litigation over the content of the control orders.[111] The conditions imposed on security certificate detainees may, like bail conditions, inevitably be a topic for frequent judicial review.

9. Recognition of Limited Appeals

Bill C-3 also provides for a limited appeal from a judge's determination that a security certificate is reasonable or from a detention review. The right of appeal is limited to a question that the presiding judge certifies as "a serious question of general importance".[112] This process is much more limited than granting a full right of appeal. This provision cannot be characterized as a dialogic response to the Court's ruling because the Court in *Charkaoui*[113] rejected the argument that the Charter and the rule of law require an appeal. Nevertheless, the provision

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[110] *Prevention of Terrorism Act 2005* (U.K.), c. 2, s. 1(3): "The obligations that may be imposed by a control order made against an individual are any obligations that the Secretary of State or (as the case may be) the court considers necessary for purposes connected with preventing or restricting involvement by that individual in terrorism-related activity." Sections 1(4)(a)-(p) and (5)-(8) extensively characterize what the content of such obligations may include: for example, reporting and monitoring requirements and restrictions on movement, association, communication and possession of certain articles; prohibitions in respect of occupation; requirements that access or consent to search or seize be provided to the person's residence or other places; and a requirement that the person provide certain information (for example, information about proposed movements or activities). Reasonable grounds for suspecting involvement with terrorism-related activity are required, and the decision that there are such grounds is subject to judicial review. An order can be revoked or relaxed at any time, modified on consent, or modified where the Secretary of State or the court considers the modification necessary for purposes connected with preventing or restricting involvement by the controlled person in terrorism-related activity: s. 7.

[111] See, for example, *Secretary of State for the Home Department v. J.J.*, [2007] UKHL 45 (U.K.H.L.); *Secretary of State v. E*, [2007] UKHL 47, [2008] A.C. 499 (U.K.H.L.); *Secretary of State v. M.B. (F.C.)*, [2007] UKHL 46 (U.K.H.L.).

[112] S.C. 2008, c. 3, s. 82.3.

[113] The Court concluded:

> … there is no constitutional right to an appeal (*Kourtessis v. M.N.R.*, [1993] 2 S.C.R. 53); nor can such a right be said to flow from the rule of law in this context. The Federal Court is a superior court, not an administrative tribunal: *Federal Courts Act*, R.S.C. 1985, c. F-7, s. 4. Federal Court judges, when reviewing certificates under the *IRPA*, have all the powers of Federal Court judges and exercise their powers judicially. Moreover, the Federal Court of Appeal has reinforced the legality of the process by holding that it is appropriate to circumvent the s. 80(3) privative clause where the constitutionality of legislation is challenged (*Charkaoui (Re)*, 2004 FCA 421, at paras. 47-50) or where the named person alleges bias on the part of the designated judge (*Zündel, Re* (2004), 331 N.R. 180, 2004 FCA 394).

Charkaoui, *supra*, note 105, at para. 136.

reveals how Parliament retains the ability to deny and shape appeal rights. Indeed, the provision harkens back to pre-Charter traditions when Parliament reformed appeals from jury acquittals and capital punishment even in the face of Court decisions that the existing provisions did not violate the *Canadian Bill of Rights*.

10. Release to Permit Departure from Canada

The Supreme Court in *Charkaoui* considered the possibility of release of a detainee to allow their departure from Canada, but was not optimistic that this constituted a realistic remedy in these cases. The Court stated:

> The Federal Court suggested that Mr. Almrei "holds the key to his release": *Almrei v. Canada (Minister of Citizenship and Immigration)*, [2004] 4 F.C.R. 327, 2004 FC 420, at para. 138. But voluntary departure may be impossible. A person named in a certificate of inadmissibility may have nowhere to go. Other countries may assume such a person to be a terrorist and are likely to refuse entry, or the person may fear torture on his or her return. Deportation may fail for the same reasons, despite the observation that "[i]n our jurisdiction, at this moment, deportation to torture remains a possibility" in exceptional circumstances: *Almrei*, 2005 FCA 54, at para. 127. The only realistic option may be judicial release.[114]

Despite these comments, Bill C-3 allows the Minister to authorize the release of a detainee to permit their departure from Canada.[115] It is possible that this provision could be used in situations where the detainee cannot be returned to their country of origin because of concerns that they will be tortured, but where some third country agrees to accept the person. This provision demonstrates Parliament's ability to pursue policy options even in the face of skepticism from the Court about whether they are viable.

11. Summary

Bill C-3 responded to the specific flaws in security certificates that were found to exist in *Charkaoui*. Parliament has taken the narrow lesson of *Charkaoui* seriously and provided for adversarial challenge to

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[114] *Id*., at para. 99.

[115] S.C. 2008, c. 3, s. 82.4.

the secret intelligence used to support security certificates. In doing so, Parliament has opted for the one example of adversarial challenge to secret information — the special advocate system — that the Supreme Court in *Charkaoui* recognized had been criticized. Parliament has opted for a special advocate system that attempts to limit the risk of inadvertent disclosure of secret information by requiring judicial permission and supervision of the ability of the special advocate to contact others after having seen the secret information as opposed to a system that follows the SIRC or Arar Commission model and relies on the integrity and ingenuity of security cleared counsel in ensuring that secrets are not inadvertently disclosed when they discuss matters with the affected party and their counsel. Parliament also chose not to follow the model of section 38 of the CEA that would allow judges to balance the harms of disclosure of secret information against the harms caused to the affected person by non-disclosure. Parliament has responded to *Charkaoui*, but in a manner that maximizes its policy interests in secrecy while at the same time still allowing some adversarial challenge to the secret information. Finally, Parliament has deferred many of the important procedural details about how the special advocate system will operate to the decisions of the Federal Court judges who preside at security certificate hearings.

Bill C-3 slightly expands the policy debate because it goes beyond the narrow issue of adversarial challenge and addresses some other important issues including prohibiting evidence obtained by torture and other forms of cruel and degrading treatment and allowing the reviewing judge to send irrelevant information back to the Minister. These provisions have the potential to result in the exclusion of secret information that could have been accepted and used by the reviewing judges before the enactment of Bill C-3. Bill C-3 implicitly recognizes the practice of releasing security certificate detainees under strict house arrest conditions, and it allows some limited appeals.[116] Although Bill C-3 goes somewhat beyond a response to *Charkaoui*, it leaves unanswered many important issues about both security certificates and the treatment of secret information.

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[116] Dunbar & Nesbitt, *supra*, note 90.

IV. THE TRUNCATED DIALOGIC RESPONSE OF BILL C-3

Bill C-3 will not end the dialogue between courts and legislatures about either security certificates or the treatment of secret information. To some extent, it may be inevitable that there are many outstanding issues still to be resolved. The treatment of those who cannot be deported because of concerns that they will be tortured and the treatment of secret evidence that cannot be disclosed are two of the most difficult issues that arise in anti-terrorism law and policy.[117] There are no easy answers. That said, however, both the Court and Parliament could have decided more in this episode of dialogue. As suggested above, the Court avoided grappling with the equality implications of security certificates and the questions that a section 1 analysis would have raised about the rationality and proportionality of using immigration law as anti-terrorism law. It also deferred and finessed the issue of when indeterminate detention will become unconstitutional, the issue of deportation to torture and the degree of connection that should be required between detention and a realistic prospect of deportation.

As will be seen, Parliament took its lead from the Court's silence on the larger issues of indeterminate detention, torture and the treatment of secret information. Parliament's silence on these critical issues is consistent with a model of dialogue in which judicial decisions are often necessary to force legislatures to consider the rights of the unpopular. The Court's minimalist decision in *Charkaoui* did not force Parliament to deal with these larger issues. In Bill C-3, Parliament was more than happy to avoid them.[118] Parliament also ignored clear recommendations by both Parliamentary committees that special advocates be used whenever the government presents secret information on an *ex parte* basis. Finally, Parliament did not appear to turn its mind to the long-term sustainability of security certificates or the related issue of how Canada's treatment of secret information can be reformed in order to ensure that criminal prosecutions are a viable alternative should immigration law security certificates prove not to be sustainable.

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[117] For an earlier general discussion see Kent Roach, "Must We Trade Rights for Security? The Choice Between Smart, Harsh, or Proportionate Security Strategies in Canada and Britain" (2006) 27 Cardozo L. Rev. 2151, at 2188-96.

[118] See generally Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law, 2001), for an argument that robust judicial review can force democratic debate about the rights of the unpopular and the treatment of fundamental principles that legislatures, as majoritarian institutions tied to the electoral cycle, may be inclined to ignore.

It could be argued with some justification that it is unrealistic to expect Parliament to deal with all the difficult issues related to security certificates and secrecy in one go. Still, there are examples of Parliament taking a broader response to the task of responding to Charter decisions about the requirements of adjudicative fairness and section 7 of the Charter. A good example of Parliament's unique ability to broaden the policy debate when crafting a reply to a Charter decision by the courts is Parliament's multi-faceted response to the Court's decision in *R. v. Seaboyer*[119] that the so-called "rape shield" law restricting the admissibility of a complainant's prior sexual conduct was an unjustified violation of the section 7 rights of the accused. The Court's decision was controversial and unpopular. Indeed, there was some initial interest in using the section 33 override to restore the evidentiary rule that the Court had struck down with immediate effect. Nevertheless, the Department of Justice consulted widely on the issue including with women's groups and rape crisis centres and was eventually persuaded to take a broader approach that would define consent for the purposes of sexual assault law — the widely known "no means no" provisions. Parliament also changed the fault level for sexual assault, replacing the controversial defence of honest but unreasonable mistaken belief in consent with a new requirement that the accused take reasonable steps in the circumstances known to him to ascertain consent. Only after making these two fundamental changes to the law of sexual assault, changes that were not required to respond to the Court's narrow ruling in *Seaboyer*, did Parliament also respond to the narrow ruling in *Seaboyer* by enacting new and more flexible restrictions on the admissibility of evidence of the complainant's prior sexual conduct. Even then, Parliament broadened the debate by extending the restrictions to any prior sexual contact that the complainant may have had with the accused. This episode of dialogue demonstrates the ability of Parliament to change the rules of the game when devising responses to the Court's Charter decisions.

A similarly robust response to *Charkaoui* might have attempted to change the rules of the game by providing for special advocates whenever the government relies upon secret evidence and changing the rules that are used to define and assert governmental interests in secrecy. A robust response might also have anticipated further Charter challenges to the security certificate regime with respect to indeterminate detention and the deportation to torture issues, even though these issues were not

[119] [1991] S.C.J. No. 62, [1991] 2 S.C.R. 577 (S.C.C.).

decided by the Court in *Charkaoui*. As will be seen, Parliament decided not to expand the policy debate about secrecy and security certificates in this manner. It could be argued that the Court's 12-month suspended declaration of invalidity did not give the government enough time to devise such a broad response to *Charkaoui*. Nevertheless, Parliament's broad and seemingly successful response to *Seaboyer* was crafted in just over a year. One difference may be that the government's response to *Seaboyer* was only devised after broad consultation that allowed the people on the ground to inform the government about practical issues that were arising in sexual assault cases and that needed to be resolved.[120] In contrast, Bill C-3 did not seem to have been preceded by widespread consultation with those who worked on the security certificate cases and other cases involving governmental claims of secrecy. The *Seaboyer* saga suggests that more democracy and consultation in devising replies to Charter decisions may enrich the nature of the legislative reply.

1. Special Advocates in Other Proceedings

Both parliamentary committees that conducted the three-year review of anti-terrorism legislation recommended that special advocates should have a role to play under not only the security certificate provisions of the *Immigration and Refugee Protection Act*, but also the national security confidentiality provisions of the *Canada Evidence Act* and the provisions for the listing of terrorist groups and the de-registering of charities because of alleged involvement in terrorism. The government decided not to follow this approach and Bill C-3 only provides for special advocates for security certificate proceedings under the *Immigration and Refugee Protection Act*. Parliament has the capacity to take a broader approach to policy issues such as challenges to secret information, but it can also take a narrower approach if it simply responds to specific Court decisions.

Parliament's failure to provide for a broader role for special advocates does not, however, mean that security cleared lawyers will not be appointed in other proceedings. Indeed, security cleared lawyers have already been appointed to assist with section 38 proceedings both in

[120] For accounts of this process see Sheila McIntyre, "Redefining Reformism: The Consultations That Shaped Bill C-49" in Julian Roberts & Renate Mohr, eds., *Confronting Sexual Assault: A Decade of Legal and Social Change* (Toronto: University of Toronto Press, 1994).

relation to extradition proceedings[121] and a criminal terrorism trial.[122] Nevertheless, the availability of special advocates will be litigated on a case-by-case basis. Indeed, there may be differences within the Federal Court on these matters: in his decision in *Khawaja*, Chief Justice Lutfy indicated that special advocates might have to be available to uphold section 38 against constitutional challenge,[123] whereas the Federal Court of Appeal did not address this possibility, with one judge hinting that section 38 would prohibit disclosure of the information to anyone, possibly including a security cleared lawyer.[124] Litigation over such issues would not be necessary had Parliament clearly indicated in Bill C-3 that special advocates would be available in all proceedings where the government was able to make *ex parte* representations about secret information.

Another consequence of only including special advocates in immigration matters under Bill C-3 is that its provisions restricting the communications of special advocates after they have seen the secret information will not apply when special advocates are appointed in other proceedings. Justice Mosley has fashioned conditions on the appointment of a security cleared lawyer that are similar to Bill C-3 in the *Khadr*[125] case. But this remains a matter of judicial discretion. To the extent that the restrictions that are placed on special advocates under Bill C-3 are overbroad or may result in a violation of section 7, however, the fact that judges are not bound by Bill C-3 when appointing special advocates in other proceedings may produce some beneficial flexibility, albeit not flexibility that was intended by Parliament.

2. Deportation to Torture and the Sustainability of Security Certificates

The Supreme Court asserted at the start of its *Charkaoui* judgment that the issue of deportation to torture did not arise on the three cases it had before it.[126] The Court also refused to hold that the long-term

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

122 *Canada (Attorney General) v. Khawaja*, [2008] F.C.J. No. 702, 2008 FC 560 (F.C.).

123 *Canada (Attorney General) v. Khawaja*, [2007] F.C.J. No. 648, 2007 FC 463, at para. 59 (F.C.).

124 *Khawaja v. Canada (Attorney General)*, [2007] F.C.J. No. 1635, 2007 FCA 388, at paras. 132-35 (F.C.) *per* Pelletier J.A.

125 *Khadr v. Canada*, *supra*, note 121.

126 *Charkaoui*, *supra*, note 105, at para. 15.

detention of the three applicants violated sections 7 and 12 of the Charter. It distinguished the situation in the House of Lords' Belmarsh case on the basis that the Canadian regime did not authorize indeterminate detention, but only long-term detention pending deportation.[127] The issue of whether detention is pending deportation will inevitably raise the issue of whether there is a realistic possibility of deportation. In turn, when deportation would result in suspected terrorists being returned to countries such as Egypt and Syria, the issue of whether there is a realistic possibility of deportation will depend on whether the *Suresh* exception that contemplates deportation to a substantial risk of torture will be employed. Although the *Suresh* exception may not have been raised squarely on the records of the cases heard in *Charkaoui*, it hangs over all the security certificate cases. Nothing would have stopped Parliament from grappling with the torture issue that was avoided by the Court. A clear rejection of the *Suresh* exception would have responded to international criticisms and have been consistent with the prohibition in Bill C-3 on the use of secret evidence obtained from torture. It also would have made clear the need for alternatives to deportation in the security certificate cases.

Justice Mackay has rejected the government's attempt to invoke the *Suresh* exception to allow the deportation of Mr. Jaballah given the findings that he faced a "serious risk that he would face torture, death or inhumane treatment" if he was deported to Egypt.[128] Justice Mackay recognized that the *Suresh* exception was anomalous and interpreted it narrowly, ruling:

> *Suresh*, thus far, has led to debate, whether it is within the discretion of the MCI to deport an inadmissible person to a country where there is a serious risk of torture. Mr. Justice Dennis O'Connor,

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[127] *Id*., at para. 126. See also Chief Justice McLachlin's conclusion that

> In summary, the *IRPA*, interpreted in conformity with the *Charter*, permits robust ongoing judicial review of the continued need for and justice of the detainee's detention *pending deportation*. On this basis, I conclude that extended periods of detention *pending deportation* under the certificate provisions of the *IRPA* do not violate s. 7 or s. 12 of the *Charter*, provided that reviewing courts adhere to the guidelines set out above. Thus, the *IRPA* procedure itself is not unconstitutional on this ground. However, this does not preclude the possibility of a judge concluding at a certain point that a particular detention constitutes cruel and unusual treatment or is inconsistent with the principles of fundamental justice, and therefore infringes the *Charter* in a manner that is remediable under s. 24(1) of the *Charter*."

Id., at para. 123 (emphasis added).

[128] *Re Jaballah*, [2006] F.C.J. No. 1706, 2006 FC 1230, at para. 73 (F.C.).

> as Commissioner, in his Report of the Events Relating to Maher Arar, Analysis and Recommendations, (2006) (Vol. 3) Part II pp. 51-52, wrote of the right to be free from torture as an absolute right. In his view, "The infliction of torture, for any purpose, is so fundamental a violation of human dignity, that it can never be legally justified." He makes reference to the Universal Declaration of Human Rights, to several international agreements, including the Convention against Torture, to which Canada is a party, and to the *Canadian Charter of Rights and Freedoms* as well as the *Criminal Code of Canada*, all of which confirm the absolute rejection of torture. Article 3 of the Convention Against Torture prohibits a state party from expelling, returning or extraditing a person to another state where there are substantial grounds for believing that the person would be in danger of being subjected to torture.
>
> That prohibition is now widely recognized and accepted in many countries of the world, including those within the European Union. It is reflected in the judgment of the Supreme Court of Canada in *Suresh*. That judgment's reference to exceptional cases left open for future consideration cannot have been intended to leave many cases to be classed as exceptional. Rather, the general principle, as I read *Suresh*, is that deportation to a country where there is a substantial risk of torture would infringe an individual's rights, in this case Mr. Jaballah's rights, under s. 7 of the *Charter*, and, in my view, infringement generally would require that the exceptional case would have to be justified under s. 1.
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> Here, no case has been argued that Mr. Jaballah's circumstances are exceptional, or that they could be so qualified under s.1 of the *Charter*. I have found the Ministers' certified opinion to be reasonable. By inference that opinion signifies that his continuing presence in Canada, without restraints, would constitute a danger to the security of the country. Yet there is no case argued that he has been personally involved in violence.
>
> I conclude that the facts of this case do not create an exceptional circumstance that would warrant Mr. Jaballah's deportation to face torture abroad.[129]

If it is accepted that this decision is good law, and in my view it should be,[130] then it is unlikely that the *Suresh* exception will be used in any of

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[129] *Id.*, at paras. 80-83.

[130] For my criticisms of the *Suresh* exceptions see Kent Roach, "Constitutional, Remedial and International Dialogues About Rights: The Canadian Experience" (2005) 40 Tex. Int'l L.J. 537.

the remaining security certificate cases. It would be especially odd to do so when Bill C-3 itself repudiates evidence obtained as a result of torture, as well as degrading, cruel and unusual treatment. If Canada rightly does not want to have blood on its hands with evidence obtained as a result of torture, it surely would not want to deport a person to a substantial risk of torture.

Parliament had available to it some sound advice on how the issue of deportation to torture lies at the heart of our present security certificate cases. The Senate Committee that conducted the three-year review of our anti-terrorism legislation noted a few days before the Supreme Court delivered its judgment in *Charkaoui* that both the United Nations Committee Against Torture and the Human Rights Committee had called on Canada to reaffirm its commitment to the absolute right against torture despite the controversial statement in *Suresh v. Canada* that in some "exceptional circumstances" deportation to torture might be consistent with the Canadian Charter (though not with international law). The Senate Committee recommended that the immigration law be amended to repeal the *Suresh* exception that would allow deportation to the substantial risk of torture.[131] At the same time, the Senate Committee was not naïve about the dilemmas posed by suspected terrorists who cannot be deported to home countries with poor human rights records. It recommended work on ensuring the effectiveness of assurances that a person would not be tortured. It also recommended that Canada show leadership at the United Nations in resolving the dilemmas created by suspected terrorists who may be subject to indeterminate detention and control in circumstances where they cannot be deported to their country of citizenship because they will be tortured. Canada is not alone in grappling with the difficulties of how to treat terrorist suspects who cannot be deported because of concerns that they will face torture if returned to their country of citizenship.

Parliament in Bill C-3 ignored the conundrum of deporting non-citizens suspected of terrorism to torture or subjecting them to indeterminate detention in Canada. On the one hand, Canada should honour its international commitments against being involved with torture. On the other hand, refusal to deport such persons could result in indeterminate detention that may eventually be held to violate sections 7 and 12 of the Charter. It is perhaps understandable that Parliament did not rush in to

[131] Senate of Canada, Special Senate Committee on the *Anti-terrorism Act*, *Fundamental Justice in Extraordinary Times*, at 110.

solve this thorny dilemma. The release of most of the security certificate detainees under very restrictive house arrest conditions is the present solution, but it is unlikely to be a satisfactory or permanent one. The detainees will continue to exercise their Charter rights to challenge the very tight restrictions placed on them. The Supreme Court in *Charkaoui* has made clear that the detainees have Charter rights to such regular reviews and it has not precluded the possibility that a court might in the future hold that continued restrictions on liberty will violate the Charter. Bill C-3 only postpones the day of reckoning when courts will have to decide whether to deport these detainees despite the risk of torture or release them because their indeterminate detention under immigration law without realistic prospect of deportation violates their rights under the Charter.

If one accepts the government's position that the detainees are a danger to national security with connections to international terrorist groups, then the ultimate response to the security certificate cases may be to attempt to bring criminal prosecutions against the detainees. These prosecutions could possibly relate to actions before their detention, though in most cases charges under the *Anti-terrorism Act* would not be possible because those offences could not be charged in relation to events that occurred before December of 2001. Conversely, if the detainees are really terrorists, it could be expected that after release they might engage in activities that could lead to charges under the *Anti-terrorism Act* or other criminal charges. One of the obstacles to using the criminal law as a means to incapacitate and punish terrorists, however, is the recently documented tendency of the Government of Canada to make overbroad claims of secrecy. Such claims not only limit the type of evidence that can be used in criminal prosecutions where secret evidence is not accepted, but they also cause extensive litigation under section 38 of the *Canada Evidence Act* in order to obtain non-disclosure orders. Such orders are not costless because the trial judge retains the ultimate ability to decide whether a fair trial is possible in light of the non-disclosure orders.[132]

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[132] *Canada Evidence Act*, R.S.C. 1985, c. C-5, s. 38.14. The use of s. 38 in criminal trials also prolongs criminal trials by requiring litigation of issues concerning national security confidentiality in the Federal Court. See, generally, Kent Roach, *The Unique Challenges of Terrorism Prosecutions: Towards a Workable Relation Between Intelligence and Evidence*, Vol. 4 of the Research Studies of the Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182 (forthcoming).

3. The Problems Presented by Overclaiming of Secrecy

The use of security certificates against suspected terrorists in the immediate aftermath of 9/11 allowed Canadian officials to use secret evidence, including intelligence provided by our allies, without risking disclosure. As a result of the Court's decision in *Charkaoui*, it will become more difficult to rely on such secret evidence. Special advocates under Bill C-3 will be able to see the secret information. They will be able to argue that the secret evidence presented by the government should be ignored by the reviewing judge because it is irrelevant or obtained as a result of torture or degrading or inhumane treatment. Special advocates will also be able to challenge the government's claims that the information must be kept secret to prevent harms to national security or other persons. Given the experience with overclaiming to be examined below, there is reason to believe that special advocates will enjoy some success in resisting governmental claims of secrecy. Indeed, the government may have recognized that it had engaged in overclaiming in the security certificate cases: it declassified a good deal of material when it recommenced security certificate proceedings after Bill C-3 had been proclaimed in force.[133] This may have been a pre-emptive move to minimize the chances that special advocates could succeed in arguing that the release of some of the previously secret material would not harm national security or any person. The new special advocate regime may have scored a significant victory for more disclosure even before it became operational.

4. The Arar Commission and the Problems of Overclaiming Secrecy

The Arar Commission experience provides a number of lessons about the dangers of excessive claims of secrecy by the government. The Arar Commission recognized from the outset its duty to protect secrets. Its terms of reference instructed it not to release information "if in the opinion of the Commissioner, the disclosure of that information would be injurious to international relations, national defence or national security". The Commission repeatedly stressed the importance of respecting caveats or restrictions on the use of information according to the third

[133] Stewart Bell *et al.*, "Ottawa Reveals Classified Files on Five Terror Suspects" *National Post*, February 22, 2008. The newly revealed material included the existence of CSIS wiretaps and surveillance as well as allegations against the detainees that were made public for the first time.

party rule. It also recognized that there were many types of injurious information including "confidential sources of information (informers) and details of ongoing national security investigations".[134] In recognition of its national security confidentiality ("NSC") obligations, the Commission also agreed to conduct much of its hearings *in camera*, but with the expectation that periodic summaries of the information would be prepared to inform the public and the excluded parties as much as possible about what was happening behind closed doors.

Despite its awareness of NSC concerns, the Arar Commission and the government came into conflict over the release of a summary of evidence concerning the involvement of CSIS. Justice O'Connor proposed a summary of about seven pages that he concluded could be released without causing injury, whereas the government proposed a summary of about three pages that it believed could be disclosed. Moreover, the government indicated that it would initiate proceedings under section 38 of the *Canada Evidence Act* if the Commission released its more extensive summary.[135] In order to avoid what it concluded would be protracted and repeated litigation under section 38 that would delay the inquiry, the Commission abandoned its attempts to produce summaries. Instead, the commission continued its *in camera* hearings until April 2005. In the end, the Commission had 75 days of *in camera* hearings and 45 days of public hearings.

In his report, O'Connor J. noted that the government had abandoned some of its previous NSC claims, particularly in relation to the inflammatory and inaccurate request by the RCMP for border lookouts that described Maher Arar and Monia Mazigh as Islamic extremists with connections to Al Qaeda and in relation to the RCMP sending questions for Syrian Military intelligence to ask Mr. Almalki. Although he noted that it may have been understandable for the government to err on the side of caution, O'Connor J. was critical of the government's approach to NSC claims. He commented that:

> … overclaiming exacerbates the transparency and procedural fairness that inevitably accompany any proceeding that cannot be fully open because of NSC concerns. It also promotes public suspicion and

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[134] 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), at 283.

[135] Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar: Factual Background*, vol. 2 (Ottawa: Public Works and Government Services, 2006), at 738.

> cynicism about legitimate claims by the Government of national security confidentiality. … I am raising the issue of the Government's overly broad NSC claims in the hope that the experience in this inquiry may provide some guidance for other proceedings. In legal and administrative proceedings where the Government makes NSC claims over some information, the single most important factor in trying to ensure public accountability and fairness is for the Government to limit from the outset, the breadth of those claims to what is truly necessary. Litigating questionable NSC claims is in nobody's interest. Although government agencies may be tempted to make NSC claims to shield certain information from public scrutiny and avoid potential embarrassment, that temptation should always be resisted.[136]

These comments reflected the particular experience of the Arar inquiry, but they also produce questions about whether the government has engaged in similar overclaiming in security certificate proceedings. They also foreshadowed some of the Supreme Court's concerns about security certificates in *Charkaoui* by indicating the inverse relation between the breadth of secrecy claims and the fairness of proceedings. As the Supreme Court would subsequently note, secrecy in security certificate hearings prevents the detainee from fully defending himself. They even preclude the judge from asking critical questions of the detainee for fear of revealing secrets.[137]

Despite the reduction of the government's NSC claims during the course of the Arar inquiry, the commission and the government could not agree on the release of certain portions of the report. Although there was agreement between the government and the commission about the release of 99.5 per cent of the report, a quantitative approach would be misleading. The Commission's report was long, comprising three volumes, in large part because so much of the hearings were heard *in camera*. The release of the majority of the disputed 1,500 words as authorized by the Federal Court under section 38 of the *Canada Evidence Act* revealed

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[136] 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*, *supra*, note 134, at 302, 304.

[137] *Charkaoui*, *supra*, note 105, at para. 64:

> … the judge's activity on behalf of the named person is confined to what is presented by the ministers. The judge is therefore not in a position to compensate for the lack of informed scrutiny, challenge and counter-evidence that a person familiar with the case could bring. Such scrutiny is the whole point of the principle that a person whose liberty is in jeopardy must know the case to meet. Here that principle has not merely been limited; it has been effectively gutted. How can one meet a case one does not know?

some matters that certainly caught public attention, even if the initial non-disclosure of these matters did not prevent the commission from discharging its mandate of investigating the actions of Canadian officials in relation to Mr. Arar.

In reaching a conclusion that parts of the disputed passages could be released, Noël J. indicated that some of the information redacted from the Arar Commission report if released would not injure national security, national defence or international relations.[138] This is an extraordinary finding given the deference that is generally paid to the government on the existence of injury[139] and the breadth of state interests protected under the rubric of national security, national defence and international relations. Such a finding of no harm to national security would have led to the release of secret information in security certificate proceedings even though in such proceedings, unlike under section 38 of the *Canada Evidence Act*, the judge has no discretion to balance the competing public interests in disclosure and non-disclosure.

The release of the majority of the information from the public Arar Commission report that the government had challenged under section 38 of the CEA has added more fuel to concerns about government overclaiming of NSC. Some of the new information that was ordered released by the Federal Court simply related to the fact that the RCMP had contacts with the FBI and the CIA. In one case, the government's redactions were lifted on references to the RCMP and CSIS.[140] In other cases, the redactions applied to a suspicion held by a senior CSIS official that the Americans wanted to have Arar removed to Jordan where "they can have their way with him".[141] The precise nature of the government's NSC claim in relation to this statement is not outlined in the public judgment in the matter, but likely relates to claims that such observations

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[138] *Canada (Attorney General) v. Canada (Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar — O'Connor Commission*), [2007] F.C.J. No. 1081, 2007 FC 766, at para. 91 (F.C.) [hereinafter "*Canada v. Commission of Inquiry*"].

[139] Justice Noël for example commented: "It is trite law in Canada, as well as in numerous other common law jurisdictions, that courts should accord deference to decisions of the executive in what concerns matters of national security, national defence and international relations, as the executive is considered to have greater knowledge and expertise in such matters than the courts." *Id.*, at para. 46.

[140] Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Addendum to Report of the Events Relating to Maher Arar: Analysis and Recommendations* (Ottawa: Public Works and Government Services, 2007), at 160.

[141] Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Addendum to Report of the Events Relating to Maher Arar: Factual Background*, vol. 1 (Ottawa: Public Works and Government Services, 2007), at 245.

might damage our relations with the CIA. Although such claims could perhaps be squeezed into the broad confines of Canada's national security or international relations interests, they also suggest concerns about a disclosure that might be embarrassing to Canadian and American agencies.

Another portion of the Arar report that was authorized for release related to findings that the RCMP used information obtained from Mr. El Maati in Syria without mention of the possibility of torture or that the DFAIT's observations about him being observed in good condition were made nine months after his alleged confession.[142] Although the exact nature of the government's NSC argument is not disclosed in the public judgment, the relation to national security or international relation interests seem tenuous, especially compared to the public interest in disclosure of such practices. Finally, it should be emphasized that the government's decision to oppose the release of the above information was not lightly made. Justice Noël has stated that it was made in a process that involved several deputy ministers and the briefing of the responsible Ministers.[143]

5. Other Cases of Overclaiming Secrecy

Justice Noël's conclusions in the Arar Commission case should also be combined with Mosley J.'s statement in his first section 38 decision in *Khawaja*[144] that "those holding the black pens seem to have assumed that each reference to CSIS must be redacted from the documents even when there is no apparent risk of disclosure of sensitive information such as operational methods or investigative techniques or the identity of their employees" and his statement in his second section 38 decision in the same case that he would have been inclined to find no injury to national security with respect to the information that the government had claimed secrecy. In that case, Mosley J. remarked that "there tends to be an excessive redaction of innocuous information in these cases".[145]

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[142] Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Addendum to Report of the Events Relating to Maher Arar: Analysis and Recommendations*, *supra*, note 140, at 127 and 127a.

[143] *Canada v. Commission of Inquiry*, *supra*, note 138, at para. 13.

[144] *Canada (Attorney General) v. Khawaja*, [2007] F.C.J. No. 622, 2007 FC 490, at para. 150 (F.C.).

[145] *Canada (Attorney General) v. Khawaja*, *supra*, note 122, at para. 14.

These three decisions by specially designated judges of the Federal Court with extensive experience with national security matters provide independent confirmation of O'Connor J.'s observations that not all is right with respect to the government's secrecy claims. It is troubling that the government has continued to overclaim national security confidentiality after O'Connor J.'s criticisms of their position at the Arar Commission. In both the *Khawaja* and the Arar Commission cases, the government has claimed NSC over some material that judges of the Federal Court have determined would not cause injury to national security, national defence or international relations. These findings raise serious questions about whether there has been similar overclaiming in the security certificate cases.

The reasons why the government might overclaim NSC are speculative and will probably never be known, given that the process itself is protected by both NSC and attorney-client privilege. It is likely affected by a number of factors including the fact that the Attorney General of Canada represents all the various agencies that may want to assert NSC claims, limits on resources and capacity in the redaction process, and concerns that Canada's oft-noted position as a net importer of intelligence makes it particularly vulnerable to concerns, legitimate or not, that allies might have about disclosure of information that they have shared with Canada. Indeed, the government argued in the section 38 proceedings in relation to the Arar Commission that the mere fact of asking other countries to consider amending caveats or restrictions on the use of information could cause damage to information sharing with allies.[146] This position is contrary to that taken by the Arar Commission which stressed the importance of caveats, but also made clear that it was perfectly acceptable to request an originating agency to make changes to caveats. Indeed, the passage of time may make it possible for caveats to be amended to allow the disclosure of material that would no longer reveal ongoing investigations or vulnerable sources.

There are aspects of Bill C-3 that speak to a culture in Ottawa that places a premium on secrecy and is very anxious about the risk of inadvertent disclosure of secret information. As discussed above, section 85.4(2) contains a stunningly broad provision that essentially prohibits a special advocate from communicating "with another person about the proceeding" without judicial authorization after the special advocate has seen the secret information. This provision exists despite the fact that the

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[146] *Canada v. Commission of Inquiry*, *supra*, note 138, at para. 72.

special advocate has received a security clearance and is a person permanently bound to secrecy under the *Security of Information Act*.[147] Likewise, section 83(1.2)(c) requires a judge to deny the detainee's request for a specific special advocate in cases where the special advocate already has had access to secret information the disclosure of which would be injurious to national security or endanger the safety of a person if "there is a risk of inadvertent disclosure of that information or other evidence". This provision seems to require a zero risk of inadvertent disclosure of information. It discounts the records of SIRC and Commission counsel in handling secret information in a careful manner.[148]

6. Has There Been Overclaiming in Security Certificate Cases?

The above cases raise concerns that there has been overclaiming of secrecy in security certificate cases. Concerns about overclaiming are in some respects even more pressing in the security certificate context. Under section 78 of the IRPA, the specially designated judge is not allowed to disclose any evidence that he or she concludes would be injurious to national security or the safety of any person. Unlike under section 38.06 of the *Canada Evidence Act*, the judge is not given the power to balance and weigh the degree of injury against the public interest in disclosure. At the same time, section 78 of the IRPA does not include the broad concepts of injury to national defence and international relations found in section 38 of the CEA. This is probably a neglected advantage of the IRPA over the CEA.

The government's decision to make public much more information when it refiled the security certificates after the proclamation of Bill C-3 is consistent with the idea that the government had overclaimed NSC in past security certificate cases. Some of the new allegations included in the public documents include allegations that Adil Charkaoui was overheard discussing a 1998 stay in a terrorist training camp in Afghanistan; that Mahmoud Jaballah was in regular contact with al-Qaeda's second in command, Ayman al Zawahiri after Jaballah came to

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147 R.S.C. 1985, c. O-5.

148 There have been inadvertent disclosures of secret information in recent cases, but not by security cleared independent counsel but rather by government lawyers attempting to discharge their disclosure obligations. See *Khawaja*, *supra*, note 144, at paras. 46 and 104-11; *Khawaja*, *supra*, note 122, at para. 16; *Khadr v. Canada (Attorney General)*, [2008] F.C.J. No. 770, 2008 FC 549, at paras. 40-42 (F.C.).

Canada; that Hassan Almrei gained access to a restricted area of Toronto's Pearson airport shortly after his arrival in Canada and that Mohamed Harkat was heard saying in 1998 that he would soon be "ready" to take part in jihad.[149] The accuracy of these new allegations are not known, but the fact that they were revealed in public for the first time when new security certificates were filed suggests that the government had reconsidered its initial decision that the release of such information would harm national security.

7. Rehabilitating and Disciplining Secrecy Claims

Given the problems documented above in overclaiming national security confidentiality under section 38 of the *Canada Evidence Act*, it might be a mistake to amend the reference to harm to national security or persons in section 78 of the *Immigration and Refugee Protection Act* to track the broader formulation of harm to international relations, national security or national defence found in the CEA. One problem with the broad terms used in the CEA is that they can support arguments that even asking for amendments of caveats could harm Canada's relations with its allies including perhaps damage caused by embarrassment. The Special Senate Committee that conducted a three-year review of the *Anti-terrorism Act* was concerned that the vague reference to international relations could be used to shield information that may cause some embarrassment to the government.[150]

In his section 38 decision with respect to the Arar Commission, Noël J. attempted the difficult task of defining the operative terms of section 38. He suggested that national security "means at minimum the preservation of the Canadian way of life, including the safeguarding of the security of persons, institutions and freedoms in Canada".[151]

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[149] Stewart Bell *et al.*, "Ottawa Reveals Classified Files on Five Terror Suspects" *National Post*, February 22, 2008.

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> Although the concept of injuring international relations existed in the CEA prior to the changes brought by the ATA, the Committee believes that it requires legislative clarification. There are ways in which international relations may be injured without necessarily warranting confidentiality in the same way as when national defence or national security is at stake. An example might be a minor diplomatic slight to another country in its dealings with another government … .

Senate of Canada, Special Senate Committee on the *Anti-terrorism Act*: *Fundamental Justice in Extraordinary Times*, February 2007, at 63.

[151] *Canada v. Commission of Inquiry*, *supra*, note 138, at para. 68.

International relations "refers to information that if disclosed would be injurious to Canada's relations with foreign nations".[152] National defence includes "[a]ll measures taken by a nation to protect itself against its enemies" and "a nation's military establishment".[153] Although the attempt at definition is admirable, the result is not satisfactory. It is difficult to imagine broader and vaguer statutory terms, and these terms seem to have become even broader in the process of definition. The problem may be the vagueness of the statutory terms. I am reminded of my colleague Marty Friedland's introduction to his study for the McDonald Commission: "I start this study on the legal dimensions of national security with a confession: I do not know what national security means. But then, neither does the government."[154] In the investigative hearing cases, the Supreme Court pointedly refused to accept the government's argument that the purpose of the *Anti-terrorism Act* was to protect "national security" in part because of a concern about the "rhetorical urgency"[155] of the broad term. Although Parliament has made a specific choice to use the term "national security" in both section 38 of the CEA and section 78 of the IRPA, there is a need to discipline and rehabilitate the abused concept. There are some good reasons to protect secrets, including threats to the safety of informers, threats to ongoing investigations and promises made to our allies. These reasons, however, may be lost in references to the vague generalities of national security and threats to international relations.

The breadth of the definitions of national security, national defence and international relations may play a role in encouraging the government to overclaim NSC. In some respects, references to the vague and intangible notions of national security, national defence and international relations have taken on a rhetorical life of their own. In my view, thought should be given to rebuilding the NSC process from the ground up. One possibility would be to list the specific and serious harms that the disclosure of secret information can cause in some cases. Section 78 of the IRPA already starts this process by referring to injury to the safety of any person. Greater specificity about the danger to informers or undercover agents could perhaps provide even greater discipline to this

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[152] *Id.*, at para. 61.

[153] *Id.*, at para. 62.

[154] M.L. Friedland, *National Security: The Legal Dimensions* (Ottawa: Supply and Services, 1980), at 1.

[155] *Re Application under s. 83.28 of the Criminal Code*, [2004] S.C.J. No. 40, [2004] 2 S.C.R. 248, at para. 39 (S.C.C.).

concept. A disciplined harm-based approach might help the government think through their NSC claims and avoid overclaiming in the future. It could also address the public suspicion and cynicism that O'Connor J. accurately noted would follow patently overbroad NSC claims made by the government.

There are reasons to believe that this may be a particularly opportune time to rethink NSC concepts. Several recent decisions have begun to question some of the main pillars of our traditional approach to NSC. The courts have begun to re-examine one old chestnut, namely, the government's penchant for invoking the mosaic effect as justification for withholding information that might on its face appear innocuous. The informed reader that the mosaic effect has traditionally been concerned with is a member of a well-resourced foreign intelligence agency such as the former KGB. Although some terrorist groups may try to develop a web-based counter-intelligence capacity, they do not have the resources of the KGB. Both Mosley J. and Noël J. have recently warned that mechanical invocation of the mosaic effect will not be sufficient to justify a non-disclosure claim.[156] In my view, the mosaic effect has its roots in concerns about counter-intelligence and the Cold War when the usual remedy was continued surveillance or expulsion of suspected spies. Its use should be rethought in a context in which secrecy claims are made to withhold information from suspected terrorists who face prolonged deprivations of liberty under immigration or criminal law. In the contemporary context, there may be both less harm from disclosure of "apparently innocuous information" and more harm from its non-disclosure.

Even the most basic rule of the NSC regime, the third party rule that prohibits the disclosure of caveated information without the permission of the originating agency, is being rethought in light of new realities and new developments such as changes in information technology and the

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[156] Justice Mosley has observed that

> in light of the difficulty of placing oneself in the shoes of such an 'informed reader', by itself the mosaic effect will usually not provide sufficient reason to prevent the disclosure of what would otherwise appear to be an innocuous piece of information. Something further must be asserted as to why that particular piece of information should not be disclosed.

Khawaja, *supra*, note 144, at para. 136. Justice Noël expressed agreement with Mosley J.'s comments while not excluding the possibility of a valid mosaic effect claim. He concluded "[s]imply alleging a 'mosaic effect' is not sufficient. There must be some basis or reality for such a claim, based on the particulars of a given file." *Canada v. Commission of Inquiry*, *supra*, note 138, at para. 84.

growth of information that is in the public domain. Justice O'Connor in the Arar Commission report stressed that caveats are not absolute barriers to the further disclosure of information. They simply establish proper channels for the authorization of further disclosure.[157] The Arar Commission also raised concerns about applying the third party rule to information that is already in the public domain.[158]

The Arar Commission is not alone in questioning a mechanical application of the third party rule. Justice Mosley in *Khawaja* has observed that although it is important, the third party rule "is not all encompassing". He expressed agreement with the proposition that "it is not open to the Attorney General to merely claim that information cannot be disclosed pursuant to the third party rule, if a request for disclosure in some form has not in fact been made to the original foreign source".[159] He also indicated that the third party rule does not protect the existence of relationships where no information is exchanged or apply to information that the Canadian agency was aware of before receiving the information from the foreign source.[160] These are significant and emerging limitations on the scope of the third party rule that take into account changing circumstances. There may be a case for including them in a new and more specific harm based approach that moves beyond the discredited generalities of references to national security or international relations.

The above discussion of the dangers of overclaiming could have been relevant to Parliament's response to *Charkaoui* in a number of ways. Parliament could have taken the opportunity to provide a role for special advocates in all proceedings in which the government claims national security confidentiality without the other side being present. By providing adversarial challenge to all claims of secrecy, an expanded

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> Caveats should not be seen as a barrier to information sharing … They can easily provide a clear procedure for seeking amendments or the relaxation of restrictions on the use and further dissemination of information in appropriate cases. This procedure need not be time consuming or complicated.

Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Addendum to Report of the Events Relating to Maher Arar: Analysis and Recommendations* (Ottawa: Public Works and Government Services, 2006), at 339.

158 Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, "Ruling on National Security Confidentiality" in *Report of the Events Relating to Maher Arar: Factual Background*, vol. 2 (Otttawa: Public Works and Government Services, 2006), at 728.

159 *Khawaja*, *supra*, note 144, at para. 146.

160 *Id*., at paras. 147-48.

special advocate system would have placed government claims of secrecy under more critical scrutiny.

Another pre-emptive response to past experiences with overclaiming would have been for Parliament to have attempted to categorize with more precision the range of legitimate secrets and harms to national security both as they are defined under IRPA and section 38 of the *Canada Evidence Act*. Indeed, reform of the section 38 process might become an even more urgent priority had policy-makers reached the conclusion that deportation or indeterminate detention of the five men presently held under security certificates was not sustainable. When such conclusions are reached, then it becomes even more important that the criminal process be able to respond to the challenges of terrorism prosecutions. In such a scenario, Canada must be prepared to seek non-disclosure orders under section 38 in a disciplined and timely fashion in order to protect promises made to allies, confidential sources of information and ongoing investigations.

The end game and the exit strategy with respect to security certificates may be the use of the criminal process, including the use of a reformed section 38 process. In Bill C-3, however, Parliament did not address either the sustainability of security certificates or the need to discipline secrecy claims.

8. Summary

Parliament's response to *Charkaoui* was an example of dialogue, but a truncated dialogue that did not capitalize on the ability of the legislature to place the particular issues examined by the courts into a larger policy context. Bill C-3 is partial dialogue because it ignores larger questions about how secret information is treated in other legal proceedings. It only makes special advocates available in immigration proceedings and it fails to address any of the causes of overclaiming of secrecy including the breadth and vagueness of the concept of causing harm to national security.

Although Bill C-3 addressed the issue of intelligence produced by torture, the legislation, as well as the Court in *Charkaoui*, ducked the question of whether the government should be allowed to continue to rely on the infamous *Suresh*[161] exception that contemplates deportation to

[161] *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] S.C.J. No. 3, [2002] 1 S.C.R. 3 (S.C.C.).

torture. Although it appears increasingly unlikely that courts will approve the use of such an exception, its potential availability can play a role in sustaining the illusion that indeterminate detention is still related to deportation. It would have been best for the government to face up to the fact that it will not be able to deport the detainees to Egypt and Syria and likely not to Morocco or Algeria. Such a realization would have forced the government to recognize that the security certificate regime is not sustainable. Instead, the government interpreted the refusal of the Court to strike down prolonged detention under security certificates as an indication that the security certificate regime is, except for the absence of adversarial challenge, fundamentally sound. Although the Supreme Court in *Charkaoui* sent some hints that indeterminate detention, even under strict conditions of house arrest, will eventually become unconstitutional and may well become unconstitutional if there is no reasonable prospect of deportation, Parliament ignored these warnings and decided to wait until the courts finally say enough is enough.

V. CONCLUSION

The Court's decision in *Charkaoui* does not resolve most of the outstanding issues with respect to security certificates. One limit of judicial policy-making is that courts are to some extent captives of the case before them. Courts can push against the episodic nature of judicial policymaking by deciding issues that may not be strictly necessary to resolve the dispute or they can embrace it by adopting a form of judicial minimalism that focuses on the case before them. The Court's approach in *Charkaoui* tended towards minimalism. Constitutional minimalism has been defended as a form of judicial review that maximizes space for legislative policy-making and recognizes the limits of the judiciary's ability to make policy.[162] Contrary to this theory, however, the Court's minimalism in *Charkaoui* appears to maximize the ability of courts, not legislatures, to make important decisions in future cases. Thus the Court's decision in *Charkaoui* leaves it to other courts to decide whether the *Suresh* exception for deportation to torture will be utilized. In turn, other courts will have to decide whether the possible application of the *Suresh* exception will justify long-term detention as necessarily tied to deportation or whether rejection of the exception will lead to a conclusion that continued detention violates the Charter. The day of reckoning both

[162] See note 22.

with respect to deportation to torture and the limits of indeterminate detention under security certificates was only postponed by *Charkaoui* and Bill C-3. Such a postponement has huge costs for the detainees who, even when released from actual imprisonment, are detained under strict conditions. The dialogue produced by *Charkaoui* failed to deal with the issues of continued detention and the possibility of deportation to torture that are likely the main concerns of the detainees.

The Court only addressed the need for adversarial challenge with respect to secret evidence used in security certificate cases. The Court's focus in this respect is easier to defend than its avoidance of deportation of torture and indeterminate detention because *Charkaoui* only raised immigration law issues. Parliament, however, was not the captive of the *Charkaoui* case. It could have followed the advice it received from its Parliamentary committees and made special advocates available in other proceedings where secret evidence is used. Parliament's failure to do so, however, will leave these questions to be determined by the judiciary on a case by case basis.

Parliament also deferred to the judiciary the critical questions of whether special advocates will be able to consult with detainees and others after they have seen the secret information and whether special advocates will be able to demand further disclosure and call witnesses. All of these activities may in some cases be critical to the ability of special advocates effectively to challenge the government's case against the detainees. If the presiding Federal Court judges are cautious about allowing special advocates to play this more robust role because of concerns about the inadvertent leakage of secrets, then special advocates will not likely be successful in providing adversarial challenge to the secret evidence. This is unfortunate because both counsel representing SIRC and commission counsel in the Arar Commission had more flexibility with respect to their ability to question affected persons and their lawyers after having seen the secret information or to demand further disclosure from the government.

The fact that Parliament has selected the regime of adversarial challenge that is most sensitive to the state's interest in preserving secrets should not be surprising, especially given Canada's notorious anxiety about being a net importer of intelligence. Nevertheless, Parliament's decision will adversely affect the detainee's interests in having the most effective challenge to the government's secret evidence. It is possible that special advocates may be reluctant to request the presiding judge for further powers because of a fear of signalling their

case to the government. Under either of the above scenarios, the main flaws identified by the Supreme Court in *Charkaoui* — the lack of effective challenge to the government's secret case against the detainee — would remain largely unaddressed. That said, special advocates could still play a valuable role in providing adversarial challenges to governmental claims about the need for secrecy. In fulfilling this role, special advocates may very well be able to push more of the government's case into the open where the detainee and his lawyers can mount their own effective challenge. If past experiences with overclaiming of secrecy by the government are any indication, special advocates may enjoy considerable success when they engage in adversarial challenge to governmental claims of secrecy even though the judges presiding in security certificate cases continue to be required to prohibit disclosure once they conclude that the release of information will harm national security or other persons. Indeed, the government's decision to make public much more of the secret intelligence that it had previously used to justify the security certificates suggests that the special advocate regime has already won a significant victory for more generous disclosure to the detainees.

Although the independent security-cleared counsel contemplated by the Court in *Charkaoui* and created in Bill C-3 could help combat overclaiming of secrecy, its role in ensuring the fair treatment of the accused is more problematic. Unfortunately, the Supreme Court in *Charkaoui* focused on the role that security-cleared *amicus curiae* played in the Arar Commission in challenging and evaluating the government's claims to secrecy. The Supreme Court did not discuss the more important role played by security-cleared Commission counsel in ensuring that the government disclosed all relevant information; in calling and cross-examining relevant witnesses; and in consulting with Mr. Arar and his counsel after Commission counsel had examined the secret information. Any new security-cleared counsel that is injected into the security certificate process that cannot play such a role will be, at best, a half measure.

An Arar-style *amicus curiae* or one based on British special advocates may respond to the manifest danger of overclaiming of NSC, but it will be at a disadvantage in responding to the dangers of unfair and inaccurate decisions based on secret material. The special advocate may have to be allowed to demand further disclosure, call witnesses and interview the detainees and others about the secret material in order to be able effectively to challenge that material. Effective challenge will also

require the special advocate to be able to make informed arguments that the secret evidence has been obtained as a result of torture or cruel, inhumane and degrading treatment or that it is irrelevant when it is assessed in its proper context. Under Bill C-3, judges will make decisions about whether it is necessary for special advocates to consult the detainee or others after having seen the secret information or demand further disclosure on a case-by-case basis.

There is a danger that attempting to "Charter proof" security certificates by adding security-cleared special advocates to the process will gloss over more fundamental questions about the fairness of relying on secret intelligence as opposed to evidence to justify indeterminate detention or deportation of suspected terrorists. Moreover, Bill C-3 does not address the critical question of the ultimate disposition of the security certificate detainees given concerns that they will be tortured if deported and that the tight conditions of qualified release that have been placed on them will eventually become intolerable and unconstitutional. Bill C-3 does not even address some of the most important questions about the role of special advocates including whether they will be able to consult with detainees after having seen the secret information and whether they will be able to demand further disclosure from the government or call their own witnesses. Bill C-3 leaves those questions to the decision of the judges presiding at security certificate proceedings.

The extent of the dialogue between Parliament and the courts will depend on the willingness of both institutions to play their respective roles. In *Charkaoui*, the Court took a relatively minimalist approach to the exercise of its role in determining whether the security certificate regime was consistent with the Charter. In Bill C-3, Parliament similarly pursued a minimalist agenda with respect to reform of security certificates and delegated some of the most important and difficult issues to the courts.

The dialogue model which facilitates legislative responses to Charter decisions provides an opportunity for the legislature to place the injustices revealed by successful Charter litigation into a larger context. But dialogic constitutionalism only provides such an opportunity, it does not guarantee it. It could not be otherwise in a model that claims to be democratic and to preserve the prerogatives of the elected legislatures to make good or bad policy or to decline to make policy at all. Bill C-3 largely failed to take the opportunity of expanding the policy debate in responding to *Charkaoui* to deal with other issues concerning the

sustainability of security certificates or the treatment of information that the government claims should be secret.

Even if Bill C-3 is found to be a perfectly acceptable response to *Charkaoui* that allows adversarial challenge to secret evidence and ensures fair treatment of detainees in that particular respect, it is only a matter of time before detainees bring Charter challenges to the long-term restrictions on their liberty that have been imposed under security certificates and before it is recognized that the detainees face a substantial risk of torture if they are returned to their home countries. The day of reckoning on torture and indeterminate detention with respect to security certificates awaits. Meanwhile the detainees must wait and live under very tight controls. The detainees eventually will be released because the status quo even after Bill C-3 is not and should not be sustainable. At that point in time, there may be another day of reckoning with respect to the viability of criminal prosecutions as an alternative to the extraordinary procedures of security certificates. As suggested above, such prosecutions will implicate the way that the government treats secret information and the need for a fair and efficient process to determine what material can be subject to non-disclosure under section 38 of the *Canada Evidence Act*. Although cases such as *Charkaoui* and *Khadr* focus on extraordinary procedures, there is a need to ensure that the criminal process remains a viable response to the threat of terrorism and a fairer alternative to reliance on extraordinary procedures.

Charkaoui and Bill C-3 are only partial responses to the many dilemmas raised by security certificates and secrecy. They provide some improvements on the margin, but much work remains to be done. The detainees will have no choice but to continue to challenge in court their indeterminate detention and their possible deportation to torture. They may also challenge the adequacy of the new special advocate regime. *Charkaoui* and Bill C-3 only represent a minimalist episode in a continued dialogue between courts and legislatures that must occur about the justice and necessity of the security certificate regime.