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# Uneasy Neighbors: Comparative American and Canadian Counter-Terrorism

Kent Roach

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## UNEASY NEIGHBORS: COMPARATIVE AMERICAN AND CANADIAN COUNTER-TERRORISM

Kent Roach<sup>†</sup>

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## I. INTRODUCTION

The United States and Canada are dependent on each other in security matters by virtue of their shared border. Many in the United States believed widespread but false reports that some of the 9/11 terrorists had entered the United States through Canada. These reports were plausible because would-be millennium bomber Ahmed Ressam was apprehended by an alert American customs official in late 1999 entering the United States from Canada. Both the Ressam case and the false reports about the 9/11 terrorists help explain why part of the U.S. Patriot Act is entitled "Protecting the Northern Border."<sup>1</sup> Both countries responded to 9/11 with new antiterrorism laws, governmental reorganization, and increased spending on security. Concerns about keeping the border open but secure motivated a thirty-point Smart Border Declaration signed by Canada and the United States in late 2001 that focused

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1. Uniting and Strengthening America by Providing Appropriate Tools to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, H.R. 3162, 107th Cong., tit. IV, subsec. A (2001).

on better screening and preclearance of goods and people crossing the border. It also led to the Safe Third Country Agreement that generally prohibits refugee applicants present in either country from applying to the other.<sup>2</sup> A decade later, the two countries have agreed to a new action plan for perimeter security.<sup>3</sup>

Despite the close and intensified cooperation over the last decade, there have been some major irritants that underline differences between American and Canadian counter-terrorism and have made Canada and the United States uneasy neighbors. Maher Arar, a Canadian citizen born in Syria, was detained in the United States in 2002 as he was returning home to Canada. He was subsequently rendered to Syria where he was tortured and detained for almost a year before being allowed to return to Canada. Arar was exonerated in 2006 by a Canadian public inquiry conducted by a respected judge<sup>4</sup> and the Canadian government settled his civil claim for \$10.5 million. Arar became a national hero in Canada,<sup>5</sup> but he remains on American watch-lists. His civil claim against American officials has been dismissed by American courts,<sup>6</sup> and a heavily redacted Inspector General's report examining his

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2. *Canada-U.S. Smart Border Declaration: Building a Smart Border for the 21st Century on the Foundation of a North American Zone of Confidence*, FOREIGN AFF. & INT'L TRADE CANADA (Dec. 12, 2001), <http://www.international.gc.ca/anti-terrorism/declaration-en.asp>; see Safe Third Country Agreement, U.S.-Can., Dec. 5, 2002, available at <http://www.cic.gc.ca/english/department/laws-policy/safe-third.asp>.

3. UNITED STATES-CANADA BEYOND THE BORDER: A SHARED VISION FOR PERIMETER SECURITY AND ECONOMIC COMPETITIVENESS (2011) [hereinafter PERIMETER SECURITY ACTION PLAN], available at [http://www.whitehouse.gov/sites/default/files/us-canada\\_btb\\_action\\_plan3.pdf](http://www.whitehouse.gov/sites/default/files/us-canada_btb_action_plan3.pdf). In advance of this agreement, Canada enacted a law allowing advance airline passenger information required by the United States to be disclosed despite Canadian privacy legislation. See Strengthening Aviation Security Act, S.C. 2011, c. 9 (Can.), available at [http://laws.justice.gc.ca/eng/AnnualStatutes/2011\\_9/page-1.html](http://laws.justice.gc.ca/eng/AnnualStatutes/2011_9/page-1.html).

4. COMMISSION OF INQUIRY INTO THE ACTIONS OF CANADIAN OFFICIALS IN RELATION TO MAHER ARAR: ANALYSIS AND RECOMMENDATIONS (2006), available at [http://www.pch.gc.ca/cs-kc/arar/arar\\_e.pdf](http://www.pch.gc.ca/cs-kc/arar/arar_e.pdf), [hereinafter COMMISSION OF INQUIRY ANALYSIS AND RECOMMENDATIONS]. The author served on the research advisory committee of this inquiry.

5. He has won several awards and now runs an online magazine on security matters at PRISM MAGAZINE, <http://prism-magazine.com/> (last visited Apr. 14, 2012). Maher Arar received a nation-maker of the year award from Canada's national newspaper in 2006 along with Sergeant Patrick Tower, a soldier decorated for bravery in combat in Afghanistan. Rod Mickleburgh, *Sgt. Patrick Tower and Maher Arar, 2006*, THE GLOBE & MAIL, Dec. 30, 2006, [www.theglobeandmail.com/news/national/nation-builder/sgt-patrick-tower-and-maher-arar-2006/article862861](http://www.theglobeandmail.com/news/national/nation-builder/sgt-patrick-tower-and-maher-arar-2006/article862861).

6. *Arar v. Ashcroft*, 585 F.3d 559, 563 (2d Cir. 2009).

treatment makes no attempt at examining the merits of the intelligence that identified him as a security threat.<sup>7</sup> The contrasting approaches to Arar play into the stereotypes of Canada being concerned about human rights to the point of being unable to respond to perceived security threats and the United States being vigilant about security risks to the point of abusing human rights.<sup>8</sup> The Arar story is not simply a difficult chapter in the history of American-Canadian security relations. It has considerable symbolic resonance in Canada in part because it brings together Canada's concerns about human rights and multiculturalism. The Arar story has become part of Canada's security memory and perhaps even its constitutional culture.<sup>9</sup> At the same time, the American rendition and continued watch-listing of Arar has not stopped the two countries from agreeing to increased information sharing as part of the 2011 perimeter security agreement.<sup>10</sup>

If the Arar case symbolizes Canadian unease about the forceful unilateral nature of some American security policies, then the Khadr family symbolizes American concerns about Canada being a security risk. The Khadr family is a self-professed "al Qaeda family"<sup>11</sup> that was headed by Ahmed Said Khadr, a close associate of Osama bin Laden, until he was killed in a shootout in Afghanistan in 2003.<sup>12</sup> Although the Khadr family spent much of its time in Pakistan and Afghanistan, the children were born in Canada. Two

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7. DEP'T OF HOMELAND SECURITY OFF. OF INSPECTOR GENERAL, THE REMOVAL OF A CANADIAN TO SYRIA. OIG-08-18 (2008).

8. A good accessible repository of cultural stereotypes about Canadians and Americans was the 1990s syndicated Canadian television series *Due South*, which featured an RCMP officer working in Chicago, who always abided by rules and was very trusting to the point of being naive, and his American partner, a Chicago Police Department detective who was very cynical, street wise, and prepared to bend or break the rules to capture criminals. See *Due South*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Due\\_South](http://en.wikipedia.org/wiki/Due_South) (last visited Apr. 14, 2012).

9. For more information on the concept of Canadian constitutional cultures that can both resist and be challenged and changed by developments such as the increased emphasis on security, see David Schneiderman, *Property Rights and Regulatory Innovation: Comparing Constitutional Cultures*, 4 INT'L J. CONST. L. 371 (2006).

10. An action plan released in December 2011 calls for "increased informal sharing of law-enforcement intelligence, information and evidence through police and prosecutorial channels consistent with the domestic laws of each country[.]" PERIMETER SECURITY ACTION PLAN, *supra* note 3, at 3.

11. *The Khadr Family*, CBC NEWS, Oct. 30, 2006, <http://www.cbc.ca/news/background/khadr/>.

12. *Id.*

of these brothers were captured in Afghanistan and detained at Guantanamo Bay. One of them, Omar Khadr, was fifteen years of age when captured in 2002. He pled guilty in 2010 before a military commission to murder, attempted murder, conspiracy, spying, and material support of terrorism.<sup>13</sup> The Supreme Court of Canada twice held that Khadr's rights under the 1982 Canadian Charter of Rights and Freedoms<sup>14</sup> ("the Charter") and international human rights law were violated when he was interrogated by Canadian intelligence officials at Guantanamo. Nevertheless, it stopped short of ordering Canada to request his repatriation from the United States because of concern that such a judicial remedy might interfere with the executive's conduct of Canadian-American foreign relations.<sup>15</sup> The Canadian courts have recently permanently halted an extradition request by the United States for the oldest brother, Abdullah Khadr, on the basis that extradition on material support of terrorism charges would condone American misconduct when Abdullah Khadr was captured and detained in Pakistan from 2004 to 2005 before being released and allowed to return Canada.<sup>16</sup> The courts rebuffed arguments that its decision allowed a self-professed supporter of al Qaeda to walk free by observing that Canada could prosecute Khadr domestically.<sup>17</sup> Abdullah Khadr, however, has not been charged since his release in 2010. This raises the issue of Canada's troubled history of terrorism prosecutions.

The close connection between American and Canadian counter-terrorism makes it important to have a better understanding of each country's distinct national security traditions. Given the nature of national security matters, this requires an understanding of each country's constitution, including not only its text, but history and practice. Such understanding will not avoid conflicts, but will assist in placing

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13. See *infra* Part V.C.2.

14. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11 (U.K.).

15. Khadr v. Canada (Prime Minister), [2010] 1 S.C.R. 44 (Can.); Khadr v. Canada (Minister of Justice), [2008] 2 S.C.R. 125 (Can.) (finding violations of international human rights laws in order to apply the Charter extra-territorially to interrogations conducted by Canadian officials at Guantanamo in 2003 and 2004).

16. United States v. Khadr, 2010 ONSC 4338 (Can. Ont. Sup. Ct. J.), *aff'd* 2011 ONCA 358 (Can. Ont. C.A.), *leave denied*, 2011 CarswellOnt 11811 (Can.) (WL).

17. United States v. Khadr, 2011 ONCA 358, para. 77 (Can. Ont. C.A.).

them in a broader context. In the first part of this article, I briefly provide some background information about both Canada and the United States with a focus on the former, perhaps, in order to compensate for the fact that traditionally Americans “are benevolently ignorant about Canada, whereas Canadians are malevolently informed about the United States.”<sup>18</sup> In the second part of this article, I provide an overview of the pre-9/11 history of counter-terrorism in both the United States and Canada because of the relevance of such histories in understanding present responses. It is particularly important for Canadians who may be “malevolently informed” about the United States to understand that in the United States, terrorism has in part been seen, both before and after 9/11, as an external threat requiring a military response aimed at non-citizens, and that American constitutional doctrine and culture defers to the executive power in responding to external threats. The deference of American courts to these executive efforts fits into a pattern of what I have described elsewhere as American “extra-legalism,”<sup>19</sup> in which American law, through various devices including the political question doctrine, narrow standing, broad states secrets, and the *Ker/Frisbie* doctrine,<sup>20</sup> protects executive action from judicial review even though the executive action might be viewed as extra-legal in many other democracies.<sup>21</sup> Another dimension of American extra-legalism is the use of military detention and commissions to deal with suspected alien terrorists such as Omar Khadr. Although military detention and commissions are far from lawless, they depart from the reliance on criminal and administrative processes that most other democracies use to deal with the threat of terrorism.<sup>22</sup>

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18. Frank Underhill, *Canada and the North Atlantic Triangle*, in *IN SEARCH OF CANADIAN LIBERALISM* 255, 256–57 (1960).

19. KENT ROACH, *THE 9/11 EFFECT: COMPARATIVE COUNTER-TERRORISM* 164–65 (2011).

20. See *United States v. Alvarez-Machain*, 504 U.S. 655 (1992); *Frisbie v. Collins*, 342 U.S. 519 (1952); *Ker v. Illinois*, 119 U.S. 436 (1886) (accepting irregular extradition does not undermine jurisdiction of American courts).

21. Aharon Barak, *Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 97–162 (2002) (outlining rejection of political question doctrine, narrow standing, and restrictive remedial doctrines in the context of Israeli law relating to national security).

22. Israel is probably the only other democracy that places as much reliance on military detention and trials as the United States. See *GLOBAL ANTI-TERRORISM LAW AND POLICY* 2D 597–654 (Victor V. Ramraj et al. eds., 2012); ROACH, *THE 9/11 EFFECT*, *supra* note 19, at 77–160.

The bulk of the article in the next two sections features detailed case studies of the different treatment of Maher Arar and of the Khadr family in Canada and the United States. Each case study will provide concrete examples of how each country's distinct approach to terrorism has played out since 9/11. An important factor in the Canadian reaction to the American treatment of Maher Arar, Omar Khadr, and Abdullah Khadr has been the role of independent courts and independent judicial-led public inquiries in examining these cases from a human rights perspective. As will be seen, the three men had more trouble receiving remedies from American courts which deferred to the executive, the military, and Congress. American courts refused to allow Maher Arar to litigate his civil claim on the merits because of judicial deference to Congress on matters involving the separation of powers, foreign policy, and national security. They could not provide effective remedies for his continued watch-listing. They denied Omar Khadr habeas corpus relief because of their deference to ongoing military proceedings and their assumptions that he would receive justice and remedies in that process. Finally, American courts would not have provided remedies had attempts to render Abdullah Khadr from Pakistan for trial in the United States been successful. It will be suggested that all three cases are examples of American extra-legalism in action where courts defer to executive and congressional authority.

All three cases resulted in clashes between Canadian judicial and quasi-judicial processes and American executive actions that have not been closely reviewed by the courts. For Americans, these case studies should reveal how deferential courts have been to executive and congressional action in national security matters. For Canadians, these cases should reveal how active courts and quasi-judicial institutions have been in such matters. These differences have helped make Canada and the United States uneasy neighbors. Nevertheless, they have not undermined continued cooperation between American and Canadian governments who share similar security and economic interests. The last section of this article will examine post-9/11 security agreements between American and Canadian governments. The most recent agreement, the 2011 security perimeter action plan,<sup>23</sup> suggests that executive cooperation between the two governments will intensify

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23. See PERIMETER SECURITY ACTION PLAN, *supra* note 3.



even with respect to informal information sharing that, in part, led to American/Canadian conflicts over Maher Arar's rendition and continued watch-listing in the United States.

## II. CANADA AND THE UNITED STATES BRIEFLY COMPARED

There is a long tradition of comparative studies of the politics, laws, and institutions of Canada and the United States. Much of the literature has stressed traditional differences between Canada, as a parliamentary democracy with conservative, socialist, and statist traditions, and the United States, with its more diffused congressional system, localism, populism, and greater opposition to state power.<sup>24</sup> These comparisons need to be updated to better reflect the substantial impact of the 1982 enactment of a constitutional bill of rights in Canada, the Charter,<sup>25</sup> as well as the evolving nature of multiculturalism in both countries.

### A. *Attitudes Towards the State*

Canada's more statist traditions have, in the past, produced more judicial deference to state action than in the United States. Canada has reacted strongly to emergencies; it not only interned residents of Japanese descent during World War II, but even deported citizens of Japanese descent to Japan after the war.<sup>26</sup> Right after the war, an inquiry run by two Supreme Court of Canada Justices into a spy ring revealed by Soviet defector Igor Gouzenko, Canadians suspected of spying were detained and interrogated without access to the courts or counsel.<sup>27</sup> Before the Charter, Canadian courts traditionally refused to exclude evidence because it was improperly obtained.<sup>28</sup> It was not until 1985 that Canadian courts finally recognized that they had the power to stay proceedings as a result of abuse of the court's process and

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24. See DAVID T. JONES & DAVID KILGOUR, *UNEASY NEIGHBORS* (2007); SEYMOUR MARTIN LIPSET, *CONTINENTAL DIVIDE* (1990).

25. See Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982, c. 11 (U.K.).

26. See Co-operative Committee on Japanese-Canadians and Attorney-General for Canada, [1947] 1 D.L.R. 577 (Can. P.C.) (upholding an order issued by the Governor in Council for the deportation of Japanese nationals along with naturalized and natural-born British people of the Japanese race).

27. Reg Whitaker, *Keeping Up with the Neighbours? Canadian Response to 9/11 in Historical and Comparative Context*, 41 *OSGOODE HALL L.J.* 241 (2003).

28. *Rothman v. The Queen*, [1981] 1 S.C.R. 640 (Can.); *The Queen v. Wray*, [1971] 1 S.C.R. 272 (Can.).

integrity.<sup>29</sup> Until fairly recently, the differences between Canada and the United States were captured in Canada's collectivist emphasis on "peace, order and good government,"<sup>30</sup> in contrast to the United States' more individualistic pursuit of "life, liberty and the pursuit of happiness."<sup>31</sup> As will be seen, however, these slogans are no longer accurate. Canada now frequently places more emphasis on judicially enforced rights than the United States, where courts frequently defer to executive action designed to achieve security.

The 1982 Charter ushered in what Michael Ignatieff has called a "rights revolution"<sup>32</sup> that has altered Canada's constitutional culture. The Charter has made Canadian courts much less deferential to both executive and legislative action that infringes rights. The Supreme Court of Canada now enforces a number of due process restraints on the state more robustly than the U.S. Supreme Court.<sup>33</sup> For example, the Court has prohibited extradition to face the death penalty under the Charter.<sup>34</sup> The text of the Charter mandates the exclusion of unconstitutionally obtained evidence if its admission would bring the administration of justice into disrepute, as well as the right to obtain appropriate and just remedies from courts.<sup>35</sup> Canadian governments enjoy no absolute or qualified immunity from damage claims for executive violations of the Charter.<sup>36</sup> Canadian courts have rejected the idea that some military and foreign affairs matters are non-justiciable political questions under the Charter.<sup>37</sup> Constitutional disclosure

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29. *R. v. Jewitt*, [1985] 2 S.C.R. 128 (Can.).

30. Constitution Act, 1867, 30 & 31 Vict., c. 3, s. 91 (U.K.).

31. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

32. MICHAEL IGNATIEFF, *THE RIGHTS REVOLUTION* (2007).

33. KENT ROACH, *DUE PROCESS AND VICTIMS' RIGHTS: THE CHANGING LAW AND POLITICS OF CRIMINAL JUSTICE* 3 (1999); Robert Harvie & Hamar Foster, *Different Drummers, Different Drums: The Supreme Court of Canada, American Jurisprudence and the Continuing Revision of Criminal Law Under the Charter*, 24 OTTAWA L. REV. 39 (1992); Robert Harvie & Hamar Foster, *When the Constable Blunders: The Law of Police Interrogation in Canada and the United States, a Comparison*, 19 SEATTLE U. L. REV. 497 (1996).

34. *United States v. Burns*, [2001] 1 S.C.R. 283 (Can.).

35. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11, s.24(2) (U.K.).

36. *Vancouver v. Ward*, [2010] 2 S.C.R. 28 (Can.).

37. *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441 (Can.) (rejecting the idea that the government's decision to allow the United States to test cruise missiles in the Canadian north was a non-justiciable political question, but also finding that the testing would not violate the Charter).

requirements in Canada are much broader than the United States. They require the state to disclose to the accused all relevant, non-privileged information—not just exculpatory information.<sup>38</sup> Canada also has more liberal standing<sup>39</sup> and state secrets doctrines<sup>40</sup> than the United States.<sup>41</sup>

Canada is a parliamentary democracy where the executive is not directly elected but formed by those who have the confidence of Parliament. Legislative power is focused on the House of Commons where the prime minister and his ministers sit because senators are appointed and not elected. Although the Charter has emerged as an important restraint on Canadian national security activities, Canada's parliamentary system, especially in situations where the executive holds a majority in the legislature, facilitates a legislative approach to terrorism in common with other parliamentary democracies, such as the United Kingdom and Australia. In response to 9/11, a Canadian government that held a majority in Parliament was able to enact a massive new Anti-Terrorism Act that created many new terrorism offenses, increased police powers to include preventive arrest, and extended the powers of Canada's Signals Intelligence Agency to include warrantless spying involving citizens in a manner that in the United States was initially done through secret, and arguably illegal, executive action.<sup>42</sup> A new majority Conservative government in Canada is poised to enact new legislation that will reenact

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38. Compare *R. v. Stinchcombe*, [1991] 3 S.C.R. 326 (Can.), with *Brady v. Maryland*, 373 U.S. 83 (1963).

39. *Amnesty International Canada v. Canada*, 2008 FC 336, para. 329–49 (Can.), *aff'd*, 2008 FCA 401 (Can.) (holding that a public interest group not directly affected by a practice was allowed to bring a constitutional challenge to the actions of Canadian military forces in transferring detainees to Afghan custody, but also holding that there is no Charter violation even if there was a substantial risk of torture). See generally Kent Roach, *The Supreme Court at the Bar of Politics: The Afghan Detainee and Omar Khadr Cases*, 28 NAT'L J. CONST. L. 115 (2010).

40. Canada Evidence Act, R.S.C. 1985, c. C-5 § 38.06(2) (requiring a judicial balance between competing interests in disclosure and non-disclosure even with respect to material that if disclosed would harm national security, national defense, or international relations). Note that the Attorney General of Canada has a power to block a judicial disclosure pursuant to section 38.13, but this power has not yet been used. *Id.* § 38.13.

41. Compare *Amnesty International Canada v. Canada*, 2008 FC 336, para. 329–49 (Can.), *aff'd*, 2008 FCA 401 (Can.), with *Arar v. Ashcroft*, 585 F.3d 559, 563 (2d Cir. 2009).

42. See ROACH, THE 9/11 EFFECT, *supra* note 19, at 161–237, 361–425 (explaining the Canadian legislative response to 9/11 and the United States' more extra-legal response).

preventive arrest and investigative hearings, powers originally enacted in the 2001 Anti-Terrorism Act, but that were not renewed in 2007 when the Conservative government did not hold a majority in the House of Commons. Although increasingly restrained by judicial enforcement of the Charter, a majority government in Canada can enact legislation much more easily than the American government.

The United States is a congressional democracy where the elected President has the ability to veto legislation enacted by Congress. There is less party discipline in the United States than Canada, and unlike the Canada Senate the U.S. Senate is elected. All of these factors restrain legislative activism in the United States and, in the national security context, can make it difficult to enact controversial laws. The Patriot Act was enacted with overwhelming majorities in both houses of Congress, and many of its provisions have subsequently been renewed. Nevertheless, American political culture, on both the right and the left, was very suspicious of the legislative activism of the Patriot Act.<sup>43</sup> A proposed Patriot Act II was not enacted. The restraints of the American congressional system mean that American counter-terrorism is focused more in the executive realm than the legislature.<sup>44</sup> Unlike in Canada, judicial review of executive action in the United States is restrained by political question, case and controversy, narrow standing, broad state secrets, and absolute and qualified immunity doctrines. These doctrines have meant that American courts have resisted reviewing cases involving controversial policies such as targeted killing, extraordinary rendition, warrantless spying by the National Security Agency, and pretextual use of immigration law and material witness warrants as forms of preventive detention.

As will be explored in the next section, the United States has a long history of using military force to respond to and preempt terrorism. The comparative militarization of American counter-terrorism is related both to perceptions of the threat as primarily external and an American reluctance or unwillingness to experiment with counter-terrorism innovations in its domestic legal system. For all the criticism it received, the Patriot Act did not go as far as even Canada's post 9/11 legislation, and especially British legislation, in pushing the boundaries of domestic counter-

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43. MARK SIDEL, *MORE SECURE LESS FREE?* 61–64 (2004).

44. Daphne Barak-Erez, *Terrorism Law Between the Executive and Legislative Models*, 57 AM. J. COMP. L. 877, 885–86 (2009).

terrorism to include, for example, preventive arrests or laws targeting speech associated with terrorism.<sup>45</sup> Privacy and anti-statist traditions in the United States also explain why, even after 9/11, there is no domestic intelligence agency, as there is in Canada and many other democracies. Real and perceived restraints on explicit domestic legislative measures encourage the United States to use less-restrained measures abroad, including military and CIA detention and targeted killing. It also encourages the pretextual use of existing laws domestically. In the immediate aftermath of 9/11, immigration laws and material witness warrants were used pretextually as a means to engage in preventive and investigative detention and profiling in a manner that was not authorized in the Patriot Act.<sup>46</sup>

### B. *Multiculturalism*

There is also a need to account for how Canada and the United States have adapted to globalization and multiculturalism. Significantly more Canadians (20.1%) than Americans (13.6%) are foreign-born, with Canada having higher rates of immigration than the United States.<sup>47</sup> The Muslim populations of both countries are diverse and growing, but Canada's population appears to be growing faster than that in the United States.<sup>48</sup> Canada's multicultural heritage is recognized in section 27 of the 1982

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45. For arguments that the Patriot Act was comparatively mild and that it did not authorize the pretextual use of immigration law, the abuse of grand jury material witness warrants, military detention of citizens suspected of terrorism (such as Jose Padilla), or warrantless spying by the National Security Agency, see ROACH, *THE 9/11 EFFECT*, *supra* note 19, at 161-235.

46. For arguments about the pervasive pretextual nature of American criminal law enforcement, see WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 301-02 (2011).

47. For foreign-born statistics from the Organisation for Economic Co-operation and Development (OECD), see *Statistics From A to Z*, OECD, <http://dx.doi.org/10.1787/888932502904> (last visited Apr. 15, 2012).

48. Between 1991 and 2001, Canada's Muslim population doubled from 253,000 to 579,640. At present, Islam is the largest non-Christian religion in Canada with an estimated 2010 population of 940,000, compared to an estimated American population of 2.6 million. One estimate suggests that in 2030, Canada will have a Muslim population of 2.7 million compared to an estimated 6.2 million Muslims in the United States at that time. Kent Roach, *Canadian National Security Policy and Canadian Muslim Communities*, in *MUSLIMS IN WESTERN POLITICS* 219, 220-21 (2009); *The Global Muslim Population*, THE PEW FORUM ON RELIGION & PUB. LIFE (Jan. 27, 2011), <http://pewforum.org/future-of-the-global-muslim-population-regional-americas.aspx>.

Charter of Rights and Freedoms,<sup>49</sup> which instructs Canadian courts to interpret all Charter rights in a manner consistent with Canada's multicultural heritage. Immigration in Canada has not been viewed through the lens of illegal immigration as has often been the case in the United States. There is some evidence that Canadians view both immigration and multiculturalism more positively than Americans.<sup>50</sup>

### III. THE PRE-9/11 EXPERIENCE WITH TERRORISM IN CANADA AND THE UNITED STATES

In a recent comparative examination of counter-terrorism practices in nine countries, I concluded that while 9/11 led to an increased emphasis on security over liberty in all of them, there were also strong continuities in each country's response to terrorism before and after 9/11.<sup>51</sup> This finding suggests that it would be a mistake to forget each country's different national security traditions.

#### A. *The Canadian Experience*

Canada's experience with terrorism illustrates the dangers of both over-reaction and under-reaction that remain relevant to this day. The experience of over-reaction relates to the declaration of martial law in October 1970 in response to two terrorist kidnappings, an event that continues to influence Canadian counter-terrorism to this day. The danger of under-reaction relates to the planting of two bombs on Air India planes in 1985. These bombings resulted in 331 deaths, the most deadly act of aviation terrorism prior to 9/11. They also revealed failures and weaknesses that continue to present challenges for Canadian terrorism investigations and prosecutions today.<sup>52</sup>

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49. See Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982, c. 11 (U.K.).

50. Frank L. Graves, *The Shifting Public Outlook on Risk and Security*, 4 ONE ISSUE, TWO VOICES 10, 14 (2005), <http://www.wilsoncenter.org/sites/default/files/threats.pdf>.

51. ROACH, THE 9/11 EFFECT, *supra* note 19, at 441–42.

52. 1 COMMISSION OF INQUIRY INTO THE INVESTIGATION OF THE BOMBING OF AIR INDIA FLIGHT 182 (2010) [hereinafter COMMISSION OF INQUIRY REPORT, VOL. 1]. This inquiry contains five volumes, the first two examine the pre- and post-bombing history, but the last three examine continued problems in managing the relation between intelligence and evidence, conducting terrorism prosecutions, countering terrorism financing, and achieving aviation security. Note that the

### 1. *The October Crisis*

In October 1970, the federal government declared martial law under the War Measures Act<sup>53</sup> after two separate cells of the Front de Liberation du Quebec (FLQ) kidnapped a Quebec politician and a British diplomat. Troops filled the streets of Montreal and exercised wide and warrantless search and arrest powers. The FLQ was declared an illegal organization and membership in it was made a crime subject to five years imprisonment. The courts eventually dismissed a challenge to this law as a retroactive crime and an infringement of judicial powers.<sup>54</sup> Following British practices in Northern Ireland, those suspected of being a member or supporter of an unlawful organization could be detained without judicial review or access to habeas corpus relief for up to twenty-one days.<sup>55</sup> Almost 500 persons were detained and only eighteen of these were ever convicted of an offense, including the murder of one of the kidnapped victims.<sup>56</sup>

The October Crisis left scars on Canadian society and has had a lasting influence on Canadian counter-terrorism. It increased support for the enactment of a constitutional bill of rights, the Charter, in 1982. It also influenced an Emergencies Act that allows Parliament to review executive declarations of emergencies and requires the appointment of public inquiries to review executive conduct during declared emergencies.<sup>57</sup> Illegal activities by the Royal Canadian Mounted Police (RCMP) against suspected terrorists in the aftermath of the October Crisis led to the appointments of both provincial and federal public inquiries. The federal inquiry made recommendations which led to legislation enacted in 1984 that removed national security intelligence collection from the RCMP and transferred it to the Canadian Security Intelligence Service (CSIS), a civilian security intelligence agency that does not have law enforcement powers. CSIS is reviewed by an independent review body, the Security Intelligence Review Committee (SIRC), which has full access to secret

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author served as director of research (legal studies) to this inquiry.

53. War Measures Act, S.C. 1914, c. 2 (Can.).

54. Gagnon v. The Queen, [1971] 14 C.R.N.S. 321 (Can. Que. C.A.).

55. Public Orders Regulation, SOR/1970-44 (Can.).

56. Dominique Clement, *The October Crisis of 1970: Human Rights Abuses Under the War Measures Act*, 42 J. CANADIAN STUD. 160, 167 (2008).

57. Emergencies Act, R.S.C. 1985, c. 22 (Can.); see Kim Lane Scheppele, *North American Emergencies: The Use of Emergency Powers in Canada and the United States*, 4 INT'L J. CONST. L. 213, 231 (2006).

information and can conduct audits as well as hear complaints against CSIS.<sup>58</sup>

The memory of the October Crisis, in addition to concerns about compliance with the Charter, help explain why Canada's Anti-Terrorism Act<sup>59</sup> (ATA), enacted after 9/11, did not criminalize membership in a terrorist organization. Although influenced by British law, the ATA was more restrained. For example, the ATA provided new powers of preventive arrests, but limited them to seventy-two hours,<sup>60</sup> as compared to British laws that topped out at twenty-eight days but only after Parliament resisted calls by Prime Ministers Blair and Brown to raise them to forty-two and ninety days.<sup>61</sup> Canada's ATA included an innovative and controversial new criminal justice power—the investigative hearing—but balanced it with use and derivative-use immunity protections broader than those imposed on testimony that is compelled by American grand juries.<sup>62</sup> Canadian investigative hearings, unlike American grand juries, provided for the safeguards of a presiding judge and counsel being present while a person was compelled to testify. The Supreme Court of Canada upheld these hearings under the Charter in 2004.<sup>63</sup> Perhaps in recognition of the prior abuses of judicially compelled incommunicado questioning during Canada's 1946 Gouzenko spy inquiry,<sup>64</sup> the Court ruled that investigative hearings would be subject to the open court presumption despite arguments by dissenting judges that publicity would undermine the investigative value of the hearings.<sup>65</sup> Despite these restraints,

58. Canadian Security Intelligence Service Act, R.S.C. 1985, c. C-23 Part III (Can.).

59. Anti-Terrorism Act, S.C. 2001, c. 41 (Can.).

60. Criminal Code of Canada, R.S.C. 1985, c. C-46, s. 83.3, amended by S.C. 2001, c.41 (Can.).

61. CLIVE WALKER, *TERRORISM AND THE LAW* § 4.47 (2011).

62. Criminal Code of Canada, R.S.C. 1985, c. C-46, s. 83.28(10) (Can.). See generally Kent Roach, *The Consequences of Compelled Self-Incrimination in Terrorism Investigations: A Comparison of American Grand Juries and Canadian Investigative Hearings*, 30 *CARDOZO L. REV.* 1089 (2008).

63. *In re An Application Under Section 83.28 of the Criminal*, [2004] 2 S.C.R. 248, paras. 3–4 (Can.).

64. The Gouzenko spy inquiry was triggered by Canadian fears that nuclear secrets, primarily American and British secrets, were leaked and featured incommunicado detention of suspected spies who were required by two Supreme Court judges to answer questions without the benefit of counsel or automatic and derivative use immunity of their compelled statements. See ROBERT BOTHWELL & J.L. GRANATSTEIN, *THE GOUZENKO TRANSCRIPTS: THE EVIDENCE PRESENTED TO THE KELLOCK-TASCHEREAU ROYAL COMMISSION OF 1946* (1982).

65. *Vancouver Sun v. Canada (Att'y Gen.)*, [2004] 2 S.C.R. 332, paras. 4, 60.



Canadian investigative hearings, as well as preventive arrest powers, were allowed to expire in 2007 subject to a statutory sunset, though a new majority Conservative government is expected to soon reenact them.

## 2. *The Air India Bombings and Failed Terrorism Prosecutions*

If the 1970 October Crisis was a lasting lesson about the dangers of over-reacting to threats to national security, the 1985 Air India bombings should have been a stark reminder of the dangers of under-reacting. The twin Air India bombings, however, were not fully internalized in Canada, because they were seen as events involving Sikh terrorists aimed at government of India targets, despite the fact that the two bombs were planted on planes in Canada by Canadian citizens and most of the 331 people killed in the bombings were Canadian citizens. The criminal trial of two men alleged to have been involved in the bombings ended in acquittals in 2005.<sup>66</sup> In 2006, a public inquiry was appointed to examine the bombings. Its five volume report is entitled *A Canadian Tragedy* in order to emphasize Canadian responsibility for failing to prevent the bombings and for the poor investigation of the bombings. In a manner somewhat similar to the findings of the 9/11 Commission, the Air India Commission concluded that the bombings might have been prevented had the intelligence held by the police, Air India, CSIS (then Canada's brand new civilian intelligence service), and Canada's Signals Intelligence Agency been better distributed. It also documented how the post-bombing investigation was marred by a lack of cooperation between CSIS and the RCMP, including CSIS's routine destruction of wiretaps, and the poor handling and protection of witnesses.<sup>67</sup>

Canada has had a troubled history with respect to terrorism investigations and prosecutions. The prosecution of the suspected mastermind of the Air India bombings for conspiring to commit acts of terrorism in India collapsed in 1987 when a judge ordered that a wiretap warrant could not be sustained under the Charter without the disclosure of information that would reveal the identity of an informer. The judge stressed that the Charter provided the accused with a right to disclosure. Even if the accused was engaged in "a fishing expedition" in demanding disclosure of the

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66. R. v. Malik, 2005 BCSC 350, para. 1345 (Can.).

67. COMMISSION OF INQUIRY REPORT, VOL. 1, *supra* note 52, at 1-2.

information used to obtain the wiretap, the court ruled that the accused was fishing in “constitutionally-protected waters.”<sup>68</sup> The prosecution decided to drop the case rather than expose the informer.<sup>69</sup> Another case of an alleged conspiracy to blow up another Air India 747 aircraft, this time one departing from New York in 1986, resulted in a stay of proceedings because the prosecution was unwilling to disclose the identity of an informer who had acted as a police agent in cooperation with both the RCMP and the FBI.<sup>70</sup>

The Air India inquiry warned in 2010 that many problems in translating intelligence into evidence and conducting terrorism investigations persisted.<sup>71</sup> The Canadian government has, however, refused to follow major recommendations of the inquiry relating to increasing powers of the Prime Minister’s national security advisor to resolve disputes between the RCMP and CSIS (and other security agencies), to create a specialized Director of Terrorism Prosecutions with responsibilities for both prosecutions and secrecy proceedings, and to allow trial judges as opposed to a specialized part of the Federal Court to determine whether unused intelligence must be disclosed to the accused.<sup>72</sup> The 1985 Air India bombing and its aftermath provides some support for American concerns that Canada is a potential weak link in counter-terrorism.

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68. R. v. Parmar, (1987) 61 O.R. 2d 132 (Can. Ont. Sup. Ct.).

69. See Kent Roach, *The Unique Challenges of Terrorism Prosecutions: Towards a Workable Relation Between Intelligence and Evidence*, SSRN, 141-144 (May 1, 2010), <http://ssrn.com/abstract=1629227>.

70. The Supreme Court of Canada affirmed the importance of disclosure in R. v. Khela, [1995] 4 S.C.R. 201 (Can.). An attempt to conduct a third trial resulted in a stay of proceedings on the basis that the prosecution refused to comply with broad disclosure rules requiring information about informers to be disclosed when they act as agents.

71. 3 COMMISSION OF INQUIRY INTO THE INVESTIGATION OF THE BOMBING OF AIR INDIA FLIGHT 182 REPORT 344-50 (2010) [hereinafter COMMISSION OF INQUIRY REPORT, VOL. 3].

72. GOV’T OF CAN., ACTION PLAN: THE GOVERNMENT OF CANADA RESPONSE TO THE COMMISSION OF INQUIRY INTO THE INVESTIGATION OF THE BOMBING OF AIR INDIA FLIGHT 182 (2010), available at [http://www.publicsafety.gc.ca/prg/ns/ai182/\\_fl/res-rep-eng.pdf](http://www.publicsafety.gc.ca/prg/ns/ai182/_fl/res-rep-eng.pdf) [hereinafter RESPONSE TO THE COMMISSION OF INQUIRY]; see also MINISTER OF PUB. SAFETY, CANADA BUILDING RESILIENCE AGAINST TERRORISM: CANADA’S COUNTER-TERRORISM STRATEGY (2011), available at [http://www.publicsafety.gc.ca/prg/ns/\\_fl/2012-cts-eng.pdf](http://www.publicsafety.gc.ca/prg/ns/_fl/2012-cts-eng.pdf) (neither response nor plan contemplates enhanced role for the prime minister’s national security advisor, the creation of a Director of Terrorism Prosecutions or allowing trial judges to determine whether unused intelligence must be disclosed to the accused).

### 3. *The Ahmed Ressam Case*

The case of Ahmed Ressam, the would-be Millennium bomber, underlines American security concerns about both Canada's immigration and criminal justice systems. Ressam entered Canada in 1994 on a false passport but was released pending his refugee claim. His refugee claim was denied in 1995, but no arrest warrant was issued. In any event, there was a reluctance to deport people to Algeria, Ressam's country of citizenship. He left Canada in 1998 for an al Qaeda training camp in Afghanistan, but subsequently reentered Canada under a false passport and name. He was apprehended by an alert American border official in December 1999 with fifty kilograms of explosives and false Canadian identification. Ressam has subsequently been convicted of terrorism in both the United States<sup>73</sup> and France,<sup>74</sup> but not Canada. The judge who convicted Ressam in the United States and sentenced him to twenty-two years imprisonment (a sentence subsequently overturned on appeal as too lenient) stressed that the conviction demonstrated the ability of the American criminal justice system to convict terrorists "in the sunlight of a public trial. There were no secret proceedings, no indefinite detention, no denial of counsel."<sup>75</sup> In contrast, Canada relied upon immigration law and extradition proceedings with respect to other alleged members of Ressam's cell with varying levels of success.<sup>76</sup> The use

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73. *United States v. Ressam*, 593 F.3d 1095, 1098–99 (9th Cir. 2010) (ruling that a twenty-two-year sentence was too lenient). Another accomplice was convicted of assisting Ressam and sentenced to twenty-four years imprisonment. *United States v. Meskini*, 319 F.3d 88, 90–91 (2nd Cir. 2003). The United States did not receive much help from Canada in the prosecution because CSIS had, in accordance with its standard practices, destroyed 400 hours of electronic surveillance on Ressam after making summaries. A CSIS agent was reluctant but finally did testify at Ressam's trial. KERRY PITHER, *DARK DAYS: THE STORY OF FOUR CANADIANS TORTURED IN THE NAME OF FIGHTING TERROR* 33–34 (2008). The same CSIS policy resulted in destruction of wiretap recordings and other raw intelligence in the Air India investigation and was found to violate the accused's rights. See *R. v. Malik & Bagri*, 2005 BCSC 350, para. 1000 (Can.). The Canada Supreme Court held in 2008 that the CSIS policy was based on an incorrect interpretation of its enabling legislation and discounted the overlap between intelligence and evidence. *Charkaoui v. Canada*, [2008] 2 S.C.R. 326, paras. 11, 60–64.

74. STEWART BELL, *COLD TERROR: HOW CANADA NURTURES AND EXPORTS TERRORISM AROUND THE WORLD* 143 (2004).

75. Hal Bernton & Sara Jean Green, *Ressam Judge Decries U.S. Tactics*, SEATTLE TIMES, July 28, 2005, [http://seattletimes.nwsourc.com/html/localnews/2002406378\\_ressam27m.html](http://seattletimes.nwsourc.com/html/localnews/2002406378_ressam27m.html).

76. Immigration law was used in *In re Ikhlef*, [2002] F.C.T. 263 (Can.)

of immigration measures meant that Canada could use secret evidence that did not expose domestic and foreign intelligence to disclosure. Canada's reliance on extradition meant that Canadian courts deferred to executive requests<sup>77</sup> and that the United States, not Canada, prosecuted Ressam. It also meant that Canada did not develop experience in terrorism prosecutions.

Counter-terrorism criminal investigations in Canada have historically been difficult because of tensions between Canada's

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(security certificate against alleged member of the terrorist cell found to be reasonable); *In re Charkaoui*, [2009] F.C. 1030 (Can.) (security certificate against alleged member of Ressam cell declared void after government withdrew information rather than disclose it to the detainee); *Fathi v. Canada* (Citizenship and Immigration), [2011] F.C. 558 (Can.) (alleged member of cell found to be inadmissible for admission to Canada). The detainee in *Charkaoui* won two victories in the Supreme Court which led to the creation of security-cleared special advocates who can see and challenge secret evidence used in the case and the retention of raw intelligence to enable adversarial challenge. *Charkaoui v. Canada* (Citizenship and Immigration), [2007] 1 S.C.R. 350 (Can.); *Charkaoui v. Canada* (Citizenship and Immigration), [2008] 2 S.C.R. 326 (Can.). Extradition was used in *France (Republic) v. Ouzghar*, 2009 ONCA 69 (Can. Ont. C.A.) (alleged member of Ressam's cell extradited to France on terrorism charges) and in the *Mokhtar Haaari* case which resulted in terrorism convictions in the United States. *United States v. Meskini*, 319 F.3d 88 (2d Cir. 2003). Another alleged member of the Ressam cell, Ahcene Zemiri, who resided in Canada from 1994 to June 2001, has been detained at Guantanamo Bay, and Canadian courts have rejected his request for disclosure of material obtained from him at Guantanamo by Canadian intelligence officials on the basis that he is not a Canadian citizen. *Slahi v. Canada* (Minister of Justice), [2009] F.C. 160 (Can.). A Canadian citizen who knew Ressam and testified for the prosecution in his American terrorism prosecution has been ordered by Canadian courts to be allowed to return to Canada from Sudan after Canada denied him travel documents. *Abdelrazik v. Canada* (Minister of Foreign Affairs), [2009] F.C. 580 (Can.). The man, Abousfian Abdelrazik, was delisted by the U.N. 1267 committee in December 2011 on the recommendation of the Ombudsperson, with Canada taking no position on the delisting but leaking intelligence reports that alleged that he discussed a terrorist plot in 2000 with Adil Charkaoui, another associate of Abdelrazik. *CSIS File Reveals Plot to Bomb Plane: La Presse*, CBC NEWS: POLITICS (Aug. 5, 2011, 10:06 PM), <http://www.cbc.ca/news/politics/story/2011/08/05/pol-la-presse-plane-plot.html>. The accuracy of these untested intelligence leaks is not known, but Canada's failure to commence terrorism prosecutions against Charkaoui, Abdelrazik, or any other associate of Ahmed Ressam underlines Canada's reluctance and caution in using criminal terrorism prosecutions.

77. Until 2001, when Canadian courts required assurances that the death penalty would not be applied, Canadian courts took a deferential approach to extradition requests. See Thomas Rose, *A Delicate Balance: Extradition, Sovereignty, and Individual Rights in the United States and Canada*, 27 YALE J. OF INT. L. 183 (2002) (examining Canada's changed stance on extradition in the context of American extradition requests in terrorism cases). Compare *In re Ng*, [1991] 2 S.C.R. 858 (Can.), with *United States v. Burns*, [2001] 1 S.C.R. 283 (Can.).

civilian intelligence agency, which has been concerned about developing secret sources and methods, and police and prosecutors, who are concerned about collecting and disclosing evidence in prosecutions. These tensions resulted in a flawed investigation of the 1985 Air India bombings.<sup>78</sup> Although Canada's use of immigration law as anti-terrorism law avoids some of the disclosure problems of criminal prosecutions, it also results in other problems, including successful Charter challenges about the fairness of using secret evidence, and problems related to the deportation of suspected terrorists to countries such as Egypt and Syria where they may be tortured.<sup>79</sup> Although Canada has had more success in recent terrorism investigations and prosecutions, most notably in relation to a terrorist plot in Toronto, many challenges remain. In large part, the challenges are related to Canada's status as a net importer of intelligence<sup>80</sup> and its consequent concerns about the disclosure of foreign intelligence under broad disclosure rules that apply in Canadian criminal trials.<sup>81</sup>

### B. *The American Experience*

As David Cole has argued when comparing American and British counter-terrorism,<sup>82</sup> those outside the United States often fail to appreciate that much American counter-terrorism both

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78. COMMISSION OF INQUIRY REPORT, VOL. 1, *supra* note 52, at 1–2.

79. In addition to the use of immigration law against many of the persons alleged to be part of the Ressam cell, immigration law was also used with respect to four other non-citizens alleged to be associated with al Qaeda in the period immediately before and after 9/11. One of these security certificates involving a man from Syria has been declared to be unreasonable. *In re Almrei*, [2009] F.C. 1263 (Can.). In the other cases, the detainees have been released on a form of house arrest. See Kent Roach, *Canada's Response to Terrorism*, GLOBAL ANTI-TERRORISM LAW AND POLICY 2D 525–29 (Victor V. Ramraj et al. eds., 2012).

80. *Charkaoui v. Canada* (Citizenship and Immigration), [2007] 1 S.C.R. 350, para. 68 (Can.); *Ruby v. Canada* (Solicitor Gen.), [2002] 4 S.C.R. 3, para. 44 (Can.).

81. *R. v. McNeil*, [2009] 1 S.C.R. 66 (Can.) (discussing the requirement for the prosecutor to obtain relevant documents from third parties, which in terrorism prosecutions could include the Canadian Security Intelligence Service); *R. v. Stinchcombe*, [1991] 3 S.C.R. 326 (Can.) (discussing the constitutional requirement to disclose all relevant non-privileged information held by the prosecutor without regard to whether the information is incriminating or exculpatory).

82. David Cole, *English Lessons: A Comparative Analysis of UK and US Responses to Terrorism*, 62 CURRENT LEGAL PROBS. 136 (2009).

before and after 9/11 has focused on external enemies of the United States and acts of terrorism outside of the United States.<sup>83</sup> This military tradition helps explain the post 9/11 reliance on military detention at Guantanamo and other military venues, the important role of targeted killings, and recent legislation giving the executive the option of using military detention and trials against non-citizens suspected of involvement with al Qaeda. As seen above, Canada has also used the military in counter-terrorism during the October Crisis, but this is generally seen as an over-reaction. American reliance on the strong force of the military is also related to the relative weakness of the American domestic state in responding to terrorism within the United States. Terrorism legislation, including the much-maligned Patriot Act, has stopped short of criminalizing membership in a terrorist group or even authorizing preventive arrests. The restraints placed on the American state are, however, counterbalanced by a long tradition of deferring to the executive in national security matters.

### 1. *The Military Tradition*

Although many Europeans and Canadians instinctively see terrorism as a crime, there is a long tradition pre-dating 9/11 in the United States of using military force to respond to terrorism. The Reagan administration developed a doctrine of using military force against terrorism after suicide bombings in Lebanon killed hundreds of Marines and other Americans.<sup>84</sup> Military force was used against Libya in 1986 following a bombing of a German disco and resulted in much international criticism.<sup>85</sup> Twenty-three cruise missiles were directed against Iraqi intelligence targets as a response to a 1993 plot to assassinate President George H. W. Bush.<sup>86</sup> Similarly, as responses to al Qaeda's 1998 bombings of two American embassies in Africa, Tomahawk missiles were launched against sites in Afghanistan and Sudan and attempts were made to

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83. *Id.*

84. Jackson Nyamuya Maogoto, *Walking an International Law Tightrope: Use of Military Force to Counter Terrorism—Willing the Ends*, 31 *BROOK. J. INT'L L.* 405, 429–30 (2006).

85. Stephen Erlanger, *4 Guilty in Fatal 1986 Berlin Disco Bombing Linked to Libya*, *N.Y. TIMES*, Nov. 14, 2001, available at <http://www.nytimes.com/2001/11/14/world/4-guilty-in-fatal-1986-berlin-disco-bombing-linked-to-libya.html>.

86. David Von Drehle & R. Jeffrey Smith, *U.S. Strikes Iraq for Plot to Assassinate Bush*, *WASH. POST*, June 27, 1993, at A01.

kill Osama bin Laden.<sup>87</sup> The military was used in 1979 in an unsuccessful attempt to free American hostages held in Iran.<sup>88</sup> The American emphasis on the use of the military as an instrument of counter-terrorism is related to a perception of the threat as primarily external to the United States. At the same time, however, it is also related to perceptions that the domestic legal system restrains the forcefulness of the response to domestic terrorism. Thus the CIA is limited to external threats while the United States lacks a domestic intelligence agency.

The American attraction to a war model of terrorism is in part related to perceptions of the limits on how far the crime model can accommodate the challenges of prosecuting terrorism. There is also a confidence that military responses to terrorism will not spill into the domestic arena given the restraints of the Posse Comitatus Act<sup>89</sup> and a general reluctance to apply military options to American citizens.<sup>90</sup> The idea that terrorism is a threat primarily located outside the United States also helps to explain provisions that prohibit the transfer of Guantanamo detainees to the United States.<sup>91</sup>

In Canada, there are still painful memories of troops patrolling the streets of Montreal in an attempt to stop terrorism. Moreover, there is a recognition that Canada's most significant terrorist threats have come from Canadian citizens first in the October Crisis and later in the Air India bombings and the post 9/11 Toronto terrorist plot. A comparison of American and Canadian counter-terrorism highlights the importance of military responses in the United States both before and after 9/11, as well as Canadian aversion to military responses that were used domestically in October 1970.

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87. ROACH, THE 9/11 EFFECT, *supra* note 19, at 169.

88. Amos N. Guiora, *Legislative and Policy Responses to Terrorism, A Global Perspective*, 7 SAN DIEGO INT'L L.J. 125, 128 (2005).

89. 18 U.S.C. § 1385 (2006).

90. *But see* *Munaf v. Geren*, 553 U.S. 674 (2008) (giving deference to military transfer of American citizens to Iraqi authorities); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (allowing detention of a citizen under the AUMF). Some new provisions providing for law of war detention and trial of al Qaeda or associated force members do not apply to American citizens. National Defense Authorization Act for Fiscal Year 2012, H.R. 1540, 112th Cong. § 1022 (b)(1) (2012).

91. H.R. 1540, §§ 1023, 1026–27 (2011).

## 2. *Successful Criminal Prosecutions*

Although many fear that terrorism prosecutions are too weak of an instrument in the United States, a comparison with Canadian terrorism prosecutions underlines the strength of American prosecutions. Before 9/11, convictions and long sentences—and in the case of Timothy McVeigh, the death penalty—were obtained in terrorism prosecutions. This can be compared to the failure of Canada in the Air India and related Sikh terrorism prosecutions, which in total only resulted in one man being convicted of manslaughter and perjury in relation to both bombings.<sup>92</sup> After 9/11, the United States has recorded many terrorism convictions and guilty pleas in terrorism cases.<sup>93</sup> American courts have engaged in both procedural and substantive innovations in these terrorism cases including broad and creative conspiracy charges alleging “global jihad” and material support charges based on individuals providing themselves to terrorist groups. American courts have also used extra-territorial criminal jurisdiction to prosecute acts of terrorism committed outside the United States.<sup>94</sup> The United States has also been prepared to use pretextual terrorism prosecutions resulting in lower sentences than might be expected for actual crimes of terrorism.<sup>95</sup> In Canada, there is not the same tradition of pretextual charges.<sup>96</sup> As will be seen,

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92. R. v. Reyat, 2011 BSCS 14 (Can.), available at <http://canlii.ca/t/2f6dv> (discussing a man sentenced for perjury in relation to his testimony in the trial that acquitted two other men of the Air India bombings); R. v. Reyat, 2003 BSCS 254 (Can.), available at <http://canlii.ca/t/5db6> (discussing how the same man pleads guilty to manslaughter in relation to the 1985 mid-air bombing of Air India Flight 182 that killed 329 people); R. v. Reyat, 1991 CanLII 1371 (Can. B.C.S.C.), available at <http://canlii.ca/t/1crh9> (discussing how the same man was convicted of manslaughter in relation to planting the bomb in the 1985 Narita explosion).

93. For recognition of the difficulties of terrorism prosecutions, but also their viability and resilience compared to the alternatives, see Stephen I. Vladeck, *Terrorism Trials and the Article III Courts after Abu Ali*, 88 TEX. L. REV. 1501 (2010); and see also *United States v. Moussaoui*, 382 F.3d 453 (4th Cir. 2004); *United States v. Abu Marzook*, 412 F. Supp. 2d 913 (N.D. Ill. 2006).

94. Robert M. Chesney, *Beyond Conspiracy? Anticipatory Prosecution and the Challenge of Unaffiliated Terrorism*, 80 S. CAL. L. REV. 425 (2007); Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STAN. L. REV. 1079 (2008).

95. Robert M. Chesney, *Federal Prosecution of Terrorism Related Offenses: Conviction and Sentencing Data in Light of the “Soft-Sentence” and “Data-Reliability” Critiques*, 11 LEWIS & CLARK L. REV. 851 (2007); Todd Lochner, *Sound and Fury: Pretextual Prosecution and Department of Justice Antiterrorism Efforts*, 30 LAW & POL’Y 168 (2008).

96. The only example of a pretextual terrorism charge in Canada failed in



Canadian reluctance to use pretextual or terrorism charges appeared to frustrate American officials in both the Maher Arar and Abdullah Khadr cases. Canadian reticence in this regard helps explain why the United States rendered Maher Arar to Syria and attempted, without success, to have Abdullah Khadr rendered to the United States for trial.

### 3. *Executive Dominance and Extra-Legalism*

Legislative responses to terrorism have not been easy to achieve in the American congressional system. The legislative response to the first World Trade Center bombing and the 1995 Oklahoma City bombings did not come until 1996 and only after bills that had proposed to criminalize membership in a terrorist organization had been defeated on the basis that they would violate the First Amendment.<sup>97</sup> Even though enacted by overwhelming majorities horrified by the killing of 168 people in the Oklahoma City bombings, much of the 1996 Anti-Terrorism and Effective Death Penalty Act focused on immigration law and attempts to restrict habeas corpus review. There were important expansions of the crime of material support of terrorism including the repeal of a prohibition on the investigation of activities protected by the First Amendment. Nevertheless, this expansion of the capacity of the criminal justice system to deal with terrorism did not stop arguments that military commissions as opposed to Article III courts should try terrorists in order to avoid *Miranda* and other constitutional restrictions placed on the domestic legal system.<sup>98</sup> These calls were radical before 9/11, but have become more mainstream after 9/11 and have gained ground with the National Defense Authorization Act enacted at the end of 2011.<sup>99</sup> Rightly or wrongly,<sup>100</sup> perceptions about the weakness of the American

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2010 when child pornography seized by CSIS from a terrorism suspect was excluded under the Charter because CSIS had not properly obtained a warrant to search a computer. *R. v. Mejid*, 2010 ONSC 5532 (Can.).

97. Roberta Smith, *America Tries to Come to Terms with Terrorism: The United States Anti-Terrorism and Effective Death Penalty Act of 1996 v. British Anti-Terrorism Law and International Response*, 5 *CARDOZO J. INT'L & COMP. L.* 249 (1997).

98. Spencer J. Crona & Neil A. Richardson, *Justice for War Criminals of Invisible Armies: A New Legal and Military Approach to Terrorism*, 21 *OKLA. CITY U. L. REV.* 349, 384–85 (1996).

99. National Defense Authorization Act for Fiscal Year 2012, H.R. 1540, 112th Cong. §§ 1023, 1026–27 (2012).

100. For recognition of the difficulties of terrorism prosecutions, but also their viability and resilience compared to the alternatives, see Vladeck, *supra* note 93.

criminal justice system in responding to terrorism help explain recent congressional restrictions on the ability to transfer Guantanamo detainees for trial in federal courts in the United States.<sup>101</sup> Real and perceived restrictions on the American state and legislative responses to terrorism have encouraged use of executive action that is not specifically authorized or regulated by legislation, and use of military and foreign policy responses to terrorism.<sup>102</sup>

Many have been shocked by the use of extra-legal counter-terrorism by the United States as most dramatically revealed by the use of torture in interrogations and incommunicado detention at off-shore sites. Without in any way condoning such abuses, it is important to understand the deep roots of extra-legal conduct in the American national security tradition. President Lincoln's suspension of habeas corpus review without congressional authorization has been defended as an "extra-legal approach,"<sup>103</sup> as has President Roosevelt's unwillingness<sup>104</sup> to hand over German saboteurs had the Supreme Court not ratified their military trial in *Ex parte Quirin*.<sup>105</sup> Extra-legal measures, as defended by Oren Gross, are acts that are done in knowing violation of legal restraints, but are restrained by the possibility that a person who engages in such measures may subsequently be held criminally or civilly liable.<sup>106</sup> The prospect of subsequent prosecution or civil suit is meant to restrain individual actions while the extra-legal approach means that laws need not be permanently changed to accommodate emergencies that may never end. A paradigmatic case might be the actions of an interrogator who assaults, abuses, or tortures a terrorist suspect to obtain information about the proverbial ticking bomb, but in doing so is prepared to face the risk of subsequent criminal prosecution. This may explain the situation in Israel where there is no legislative authorization for enhanced

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101. FIONA DE LONDRAS, DETENTION IN THE 'WAR ON TERROR': CAN HUMAN RIGHTS FIGHT BACK? 124–27 (2011).

102. For arguments about the need for more counter-terrorism legislation in the United States, see PHILIP BOBBITT, TERROR AND CONSENT (2008) and see also LEGISLATING THE WAR ON TERROR: AN AGENDA FOR REFORM (Benjamin Wittes ed., 2009).

103. RICHARD A. POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY 153–57 (2006).

104. JACK GOLDSMITH, THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION 49–53, 102 (2007).

105. *Ex Parte Quirin*, 317 U.S. 1 (1942).

106. Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L.J. 1011, 1111 (2003).

interrogations and a ban on torture is maintained in the law, but the courts have left open the possibility of a successful necessity defense being raised after the fact.<sup>107</sup>

An open willingness to engage in extra-legal conduct and risk the consequences, however, does not capture the dynamic revealed by the torture memos wherein the Office of Legal Counsel narrowly and legalistically interpreted various restrictions on torture and concluded that practices such as waterboarding were not torture and were not illegal.<sup>108</sup> This phenomenon is better captured by what I have described elsewhere as extra-legalism.<sup>109</sup> Extra-legalism refers to the use of legalism so that what is in essence illegal activity, such as torture, is preauthorized and masked by claims of legality that also continue to serve to defeat meaningful accountability for the conduct. Extra-legalism also covers other legal doctrines such as political question, narrow standing, broad state secrets, and absolute and qualified immunity that shelter arguably illegal actions from meaningful judicial review. This process helps explain why lawyers have played such a central role in American counterterrorism policy.<sup>110</sup> It also helps to explain why there have been so few successful attempts to hold officials responsible for arguably extra-legal actions ranging from extraordinary rendition, targeted killing, pretextual uses of material witness warrants, immigration detention, military detention, and warrantless spying.

The political question doctrine supports extra-legalism by rendering some security related decisions legally immune from judicial review. In addition, the broad states secret doctrine and narrow standing doctrine also support extra-legalism by similarly hindering judicial review of many security actions and civil lawsuits, most notably the use of extraordinary renditions and targeted killing. In 1992, the U.S. Supreme Court affirmed the *Ker/Frisbie* doctrine by ruling that irregular rendition of a fugitive would not

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107. HCJ 5100/94 *Pub. Comm. Against Torture v. Israel*, 53(4) PD 817 [1999] (Isr.), available at [http://elyon1.court.gov.il/files\\_eng/94/000/051/a09/94051000.a09.pdf](http://elyon1.court.gov.il/files_eng/94/000/051/a09/94051000.a09.pdf). Even in such instances, however, the restraints of the extra-legal approach depend on the willingness to prosecute officials.

108. See Memorandum from Jay S. Bybee, Assistant Attorney General, to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002), in *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB* 172 (Karen J. Greenberg & Joshua L. Dratel eds., 2005).

109. ROACH, *THE 9/11 EFFECT*, *supra* note 19, at 164.

110. JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* 129–34 (2007).

deprive American courts of jurisdiction,<sup>111</sup> and this was followed by a post 9/11 decision in the same case dismissing a civil action against the irregular rendition.<sup>112</sup> Another form of extra-legalism is the pretextual use of existing legal powers for preventive ends. Pretextual law enforcement uses existing laws, but in unintended ways. In the aftermath of 9/11, American officials revived pretextual, or “Al Capone,” strategies to hold noncitizens under existing immigration laws and hold citizens under material witness warrants for reasons of preventive detention related to suspicion of terrorism.<sup>113</sup> Here, as in other contexts, there is at best technical and cynical observance of the law as the law is used for other ends.

Canadian and European perceptions<sup>114</sup> of the United States as a lawless cowboy in counter-terrorism need to be balanced with a better understanding of how judicial review of many national security activities in the United States is fettered by political questions, state secrets, and limited standing and remedial doctrines.<sup>115</sup> What may appear to be extra-legal conduct may frequently be a more complex matter in the United States that is supported either by determinations in courts, or in the executive branch, that the action is legal and/or claims that the legality of the national security activity cannot be reviewed or remedied by the courts.

There are erroneous perceptions that extra-legalism only applies to conduct involving non-American citizens. These perceptions stem from the fact that only non-American citizens are detained at Guantanamo and subject to trial by military commission. Nevertheless, extra-legalism is a feature of the American legal system that does affect its citizens, at least in the

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111. *United States v. Alvarez-Machain*, 504 U.S. 655, 660–62 (1992) (issuing a holding consistent with *Ker v. Illinois*, 119 U.S. 436 (1886) and *Frisbie v. Collins*, 342 U.S. 519 (1952), that irregular renditions would not deprive American courts of jurisdiction). On the role of these cases in laying the foundations for post 9/11 extraordinary renditions see Alan W. Clarke, *Rendition to Torture: A Critical Legal History*, 62 RUTGERS L. REV. 1, 12–19 (2009).

112. *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

113. See Daniel C. Richman & William J. Stuntz, *Al Capone’s Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583, 618–20 (2005).

114. For a good example of continued European criticism of American counter-terrorism even under President Obama, see Manfred Nowak, et al., *The Obama Administration and Obligations Under the Convention Against Torture*, 20 TRANSNAT’L L. & CONTEMP. PROBS. 33 (2011).

115. For arguments that the American legal system supports what many in other parts of the world see as extra-legal conduct, see ROACH, *THE 9/11 EFFECT*, *supra* note 19, at 161–237.

national security context. A recent example of extra-legalism that has deprived an American citizen of remedies is the refusal to allow Jose Padilla's civil claim for his military detention to proceed on the basis of special factors counseling hesitation in extending a *Bivens*<sup>116</sup> cause of action for violating constitutional rights in the absence of specific Congressional authorization.<sup>117</sup> In that case, the courts denied a remedy to an American citizen on essentially the same basis as they deprived a remedy to Maher Arar, a Canadian citizen. Another similar example is the decision of a D.C. District Court that Anwar al-Aulaqi's father did not have standing to challenge his inclusion on a targeted kill list, which also hinted that the political question and state secrets doctrines might preclude the judicial challenge to the targeted killing of an American citizen in any event.<sup>118</sup> Extra-legalism should not be confused with openly admitted extra-legal conduct. Indeed, the targeted killing of Anwar al-Aulaqi was supported by the Obama administration's internal legal interpretations about the legality of his targeted killing.<sup>119</sup> Extra-legalism and executive dominance are established features of the American national security tradition that intensified after 9/11.

#### 4. Summary

The national security traditions of both Canada and the United States have influenced the countries' responses to 9/11. The domestic responses of both countries were restrained in part by constitutional rights. For example, neither country followed the British example of criminalizing membership in a terrorist group, though Canada was more willing to experiment with new criminal justice mechanisms such as preventive arrests and investigative hearings. Canada did not want to over-react, as it did in the October Crisis, but it also had to respond to real concerns about

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116. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

117. *Lebron v. Rumsfeld*, 670 F.3d 540, 548 (4th Cir. 2012).

118. *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010).

119. The memo, which has not yet been released, is said to conclude that the killing was authorized by the 2001 AUMF, that statutes prohibiting the murder of American citizens did not apply, and that the killing would neither be a war crime, nor violate the Fourth or Fifth Amendments of the Bill of Rights. It also reportedly notes that prosecution under Yemeni laws was possible, but not likely. Charlie Savage, *Secret U.S. Memo Made Legal Case to Kill a Citizen*, N.Y. TIMES, Oct. 8, 2011, [http://www.nytimes.com/2011/10/09/world/middleeast/secret-us-memo-made-legal-case-to-kill-a-citizen.html?\\_r=1&pagewanted=all](http://www.nytimes.com/2011/10/09/world/middleeast/secret-us-memo-made-legal-case-to-kill-a-citizen.html?_r=1&pagewanted=all).

harboring terrorists raised by the Ressam case as well as its troubled pre-9/11 history of terrorism investigations and prosecutions. The United States faced the challenges of real and perceived domestic restraints, particularly with respect to criminal justice responses and domestic invasions of privacy, coupled with much less restraint in using the military or foreign intelligence agencies to respond to terrorism. Although the Bush administration would receive much international criticism, extra-legal conduct was part of the American national security tradition long before 9/11. Similarly, the American response to 9/11 drew on prior histories of using the military to respond to terrorism and pretextual administration of laws. The stage was already set before 9/11 for post-9/11 confrontations between aggressive American executive power verging on the extra-legal, and more cautious Canadian restraint that would be especially frustrating for the United States given Canada's difficulties in conducting effective terrorism investigations and prosecutions.

#### IV. MAHER ARAR: CONTRASTING CANADIAN AND AMERICAN APPROACHES

Counter-terrorism, perhaps more so than other forms of government policy, can be shaped by individual events and cases. The phenomenon of counter-terrorism laws being enacted in response to specific acts is well known, but the post-9/11 era has seen a small number of cases shape general policies. For example, there were real concerns that disclosure by the British courts in *Binyam Mohammed*<sup>120</sup> would adversely affect the sharing of intelligence between the United Kingdom and the United States. These concerns eventually motivated the British decision to settle the civil claims made by Mohammed and other Guantanamo detainees, to appoint a public inquiry to examine whether there was British complicity with respect to torture in Guantanamo, and to propose methods to use closed material to defend itself in civil litigation. The Maher Arar case examined below similarly has had a very large impact on Canadian national security policy. Although the case in which a Canadian citizen transiting through the United States was rendered to Syria would hopefully not be repeated today, it reveals many of the challenges facing closer Canadian-American

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120. *Mohamed v. Sec'y of State for Foreign & Commonwealth Affairs*, [2010] EWCA (Civ) 65 (Eng.).

security cooperation and the sharing of intelligence.

A. *The Canadian Experience*

1. *Problematic Canadian Cooperation with American Post-9/11 Security Efforts*

In the immediate aftermath of 9/11, there was much concern about a second attack and Canadian security officials cooperated with the United States in ways that have subsequently been found to be improper in various Canadian reviews. The extent to which Canadian officials were trying to make up for the Ressam case and erroneous American impressions that some of the 9/11 terrorists had entered the United States from Canada, or whether they were simply motivated by post-9/11 security concerns, is not known.

Although the Maher Arar case is the best known, there are other examples of extra-legal forms of Canadian-American cooperation. The day after 9/11, Benamar Benatta, an asylum seeker from Algeria suspected of involvement with terrorism, was summarily transferred from Canadian custody to American custody. He was held in the United States for five years. His detention was part of pretextual post-9/11 uses of immigration laws that led to the detention of thousands in the United States, uses that were defended by Attorney General John Ashcroft who warned, "Let the terrorists among us be warned: If you overstay your visa—even by one day—we will arrest you."<sup>121</sup> This approach harkens back to a long tradition of pretextual use of laws including Al Capone's prosecution under income tax laws and Attorney General Robert Kennedy's fight against organized crime.<sup>122</sup> Benatta was kept in solitary confinement in an immigration detention facility in Brooklyn, New York and his detention continued even after the FBI cleared him in November 2001 of any involvement in terrorism. He was subsequently indicted on carrying false identification papers before those charges were dropped.<sup>123</sup> Canada and the United States negotiated a deal that allowed Benatta to return to Canada and he was granted refugee

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121. John Ashcroft, U.S. Attorney General, Prepared Remarks for the U.S. Mayors Conference (Oct. 25, 2001), *available at* [http://www.justice.gov/archive/ag/speeches/2001/agcrisisremarks10\\_25.htm](http://www.justice.gov/archive/ag/speeches/2001/agcrisisremarks10_25.htm).

122. See Richman & Stuntz, *supra* note 113, at 584 n.3.

123. Michael Powell, *A Prisoner of Panic After 9/11*, WASH. POST, Nov. 29, 2003, <http://www.washingtonpost.com/ac2/wp-dyn/A20028-2003Nov28>.

status in Canada in 2007. He is now suing Canadian authorities for transferring him to the United States without proper legal process.<sup>124</sup> As in the Arar case, the United States was most directly responsible for Benatta's treatment, but he is seeking redress in Canadian courts, in part because of perceptions that such redress would not be available in American courts. American extra-legalism can inspire litigants to litigate in other jurisdictions.

In April 2002, the CSIS transferred a Canadian citizen and admitted al Qaeda member, Mohammed Mansour Jabarah, to the United States after it was advised that Jabarah could not be prosecuted in Canada because his crimes predated the 2001 Anti-Terrorism Act, which was enacted in response to 9/11, and Security Council Resolution 1373 and created new terrorist crimes in Canada.<sup>125</sup> Like Benatta, Jabarah was simply handed over to American officials at the Niagara Falls border crossing without any legal process. A review agency subsequently concluded that CSIS had breached Jabarah's Charter right not to be arbitrarily detained, his right to counsel, and his right to remain in Canada unless subject to lawful extradition.<sup>126</sup> Jabarah cooperated with American officials and was sentenced to life imprisonment for plotting to bomb U.S. embassies in Singapore and Malaysia.<sup>127</sup>

Maher Arar was a person of interest in a Canadian investigation that focused on two suspects, Abdullah Almalki and Ahmad El-Maati, both of whom are Canadian citizens. Both Almalki and El-Maati voluntarily left Canada by November 2001, but were subsequently detained and tortured in Syria before being

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124. *Benatta v. The Attorney Gen. of Canada*, 2009 CarswellOnt 7946 (Can. Ont. Sup. Ct.) (WL); Anushka Asthana, *Domestic Detainee from 9/11 Released*, WASH. POST, July 21, 2006, <http://www.washingtonpost.com/wp-dyn/content/article/2006/07/20/AR2006072002007.html>; *Man, Claiming 'Illegally Transported' to U.S. by Canada, Granted Refugee Status*, CBC NEWS, Nov. 29, 2007, <http://www.cbc.ca/news/canada/toronto/story/2007/11/29/benemar-benatta.html>.

125. Anti-terrorism Act, S.C. 2001, c. 41 (Can.). The new crimes include those of terrorism financing and participating in a terrorist group for the purpose of facilitating a terrorist activity. See Criminal Code of Canada, R.S.C. 1985, c. C-46 §§ 83.03, 83.18 (Can.) (as amended).

126. SEC. INTELLIGENCE REVIEW COMM., SIRC ANNUAL REPORT 2006–2007 18-23, available at [http://www.sirc-csars.gc.ca/pdfs/ar\\_2006-2007-eng.pdf](http://www.sirc-csars.gc.ca/pdfs/ar_2006-2007-eng.pdf).

127. *United States v. Jabarah*, 292 F. App'x 140 (2d Cir. 2008); Josh White & Keith B. Richburg, *Terror Informant for FBI Allegedly Targeted Agents*, WASH. POST, Jan. 19, 2008, [http://www.washingtonpost.com/wp-dyn/content/article/2008/01/18/AR2008011803766\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2008/01/18/AR2008011803766_pf.html); see also STEWART BELL, *THE MARTYR'S OATH: THE APPRENTICESHIP OF A HOMEGROWN TERRORIST* (2005); Terence McKenna, *Passport to Terror*, CBC NEWS (Oct. 2004), <http://www.cbc.ca/news/background/jabarah>.



released and allowed to return to Canada. By the end of September 2001, the RCMP had sent foreign authorities information identifying both men as associated with al Qaeda and an “imminent threat” to the safety and security of Canada. An inquiry headed by Frank Iacobucci, a retired Justice of the Supreme Court of Canada who was appointed to follow up from the Arar inquiry, found that this and other information subsequently played a role in the detention and torture of Almalki and El-Maati in Syria. He also commented that even if the suspicions that the men were associated with al Qaeda were correct, the reference to an “imminent threat” was “inflammatory, inaccurate and lacking investigative foundation.”<sup>128</sup> He stressed that the description was sent to the United States:

Less than one month after the events of September 11, 2001, when governments around the world were under intense pressure to cooperate and collaborate in the U.S. ‘war on terror’. Several witnesses told the Inquiry that U.S. agencies were exerting pressure on intelligence and law enforcement agencies everywhere to detain and question individuals who might in some way be implicated in or supportive of another round of attacks. At this time, being labeled a member or associate of al-Qaeda potentially entailed serious consequences for an individual’s rights and liberties.<sup>129</sup>

Both Almalki and El-Maati have returned to Canada since their release from Syria. They have never been charged with any terrorism offense and they are presently suing the Canadian government for their treatment.<sup>130</sup>

## 2. “Caveats are down:” Post 9/11 Information Sharing

Maher Arar became a person of interest in the Almalki and El-Maati investigation when he was observed in October 2001 having

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128. HON. FRANK IACOBUCCI, INTERNAL INQUIRY INTO THE ACTIONS OF CANADIAN OFFICIALS IN RELATION TO ABDULLAH ALMALKI, AHMAD ABOU-ELMAATI AND MUYAYYED NUREDDIN 400, para. 12 (2010).

129. *Id.* at 400–01, para.13; *see also id.* at 112, 349–51, 400–02; KERRY PITHER, DARK DAYS: THE STORY OF FOUR CANADIANS TORTURED IN THE NAME OF FIGHTING TERROR (2008).

130. The litigation is ongoing and a security cleared amicus has been appointed to assist with state secrecy claims. *See Canada (Att’y Gen.) v. Almalki*, [2011] F.C. 199 (Can.) (holding that the judge erred in granting disclosure of documents covered by the Third Party Rule); *Canada (Att’y Gen.) v. Almalki*, [2011] F.C. 54 (Can.) (relating to the appointment of amicus curiae).

lunch and walking in the rain with Almalki. Although Arar was never a target of the investigation, by the end of October 2001, the RCMP had requested that both Canadian and American customs officials impose terrorism border lookouts for both Arar and his wife. From October 2001 to the summer of 2002, the RCMP freely shared information with American officials in an environment that was described by some RCMP officers as “caveats are down.”<sup>131</sup> Caveats are restrictions that intelligence and law enforcement generally place on information shared in an attempt to maintain control over the information and ensure that it is not shared further or used for other purposes without the consent of the agency that originally distributed the information. The height of this information sharing occurred in April 2002 when the RCMP transferred to American agencies three CD’s containing entire investigative files, including the fruits of Canadian searches and customs inspections, without attaching caveats to the materials or reviewing the material for relevance or reliability.<sup>132</sup>

The shared material included a copy of a previous request by the RCMP to U.S. Customs requesting a lookout for Arar and his wife and identifying them both as “Islamic Extremist individuals suspected of being linked to the al Qaeda terrorist movement.”<sup>133</sup> The Canadian public inquiry that subsequently examined the holdings of all Canadian officials on Arar concluded that there was no evidence to support this characterization of Arar. It noted:

Everyone who testified accepts that this description [“Islamic Extremist individuals suspected of being linked to the Al Qaeda terrorist movement”] was wrong and should not have been given to the Americans. There was no basis for such an assertion. The request was sent to U.S. Customs in late October 2001, but it was also given directly to the American agencies five months later, in April 2002. The potential consequences of labeling someone an Islamic Extremist in post-9/11 America are enormous.<sup>134</sup>

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131. 1 COMMISSION OF INQUIRY INTO THE ACTIONS OF CANADIAN OFFICIALS IN RELATION TO MAHER ARAR REPORT 38 (2006).

132. *Id.* at 93–94. The report also contained material that CSIS had shared with the RCMP but subject to caveats and without obtaining CSIS’ consent for the disclosure of the information to American agencies. *Id.* at 95, 97. The FBI also supplied the RCMP with information that it had previously shared with CSIS but that CSIS had not shared with the RCMP. *Id.* at 90–91.

133. *Id.* at 95.

134. COMMISSION OF INQUIRY ANALYSIS AND RECOMMENDATIONS, *supra* note 4, at

The Canadian inquiry could not determine the exact role that the Canadian information played in Arar's detention in New York City in September 2002 and his subsequent transfer to Syria by way of Jordan, because the U.S. government declined an invitation to participate in the inquiry. It nevertheless concluded it was "very likely" that "American authorities relied on information provided by the RCMP."<sup>135</sup>

From the start of the Canadian investigation, American officials asked Canadian officials to charge and detain various suspects. At a September 22, 2001, meeting, the RCMP indicated that it was not prepared to detain the named individuals at that time.<sup>136</sup> A RCMP officer told the FBI, during a phone call on the weekend before Arar's removal to Syria in October 2002, that there was not enough evidence either to charge Arar criminally if he was returned to Canada or to prevent his entry to Canada.<sup>137</sup> This information may well have influenced the United States' decision that Arar would be a threat to the United States if allowed to return to Canada and that consequently he should be sent to Syria. Although he admits that it is only speculation, Fred Hitz, a former CIA officer and the first Inspector General for the CIA, has stated:

I can only conclude that, when the RCMP stated it would have no basis on which to hold Arar if he were returned to Canada, the United States assumed that Canada would be obliged to object to his transfer to Syria. Perhaps the U.S. authorities assumed that the Canadians were strapped in what they could do and, since they appeared to believe that Arar was tied to Al Qaeda, they decided it was best to remove him to Syria for further questioning without involving the RCMP in what for them would have been an impossible decision.<sup>138</sup>

The Canadian officials were justified in their decision not to

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135. *Id.* at 14, 157. The inquiry noted that "on many occasions after the event, several American officials, including then Secretary of State Colin Powell, said that the American authorities had relied on information provided by Canada in making the decision to send Mr. Arar to Syria." *Id.* at 30.

136. COMMISSION OF INQUIRY REPORT, VOL. 1, *supra* note 52, at 14.

137. COMMISSION OF INQUIRY ANALYSIS AND RECOMMENDATIONS, *supra* note 4, at 29; COMMISSION OF INQUIRY REPORT, VOL. 1, *supra* note 52, at 168–69.

138. Frederick P. Hitz, *Tighten Up the Terms of Cooperation—Don't End It!*, in ONE ISSUE TWO VOICES: INTELLIGENCE SHARING BETWEEN CANADA AND THE UNITED STATES: A MATTER OF NATIONAL SURVIVAL 9 (2007), available at [http://www.wilsoncenter.org/sites/default/files/Canada\\_6.pdf](http://www.wilsoncenter.org/sites/default/files/Canada_6.pdf).

detain or charge Arar because they had no evidence that would support such a charge. As mentioned above, Canada did not have the same tradition of pretextual uses of the criminal law and did not follow American practices of using immigration law and material witness warrants pretextually after 9/11 as a means to detain terrorist suspects and associates of terrorist suspects.<sup>139</sup> It is possible that Canadian rectitude in this respect may have influenced American decisions that Canada could not be trusted to detain Arar and that Syria was a better option.<sup>140</sup>

### 3. *The Public Inquiry*

The Arar story attracted widespread attention in both Canada and the United States. This attention increased after Arar was freed by Syria in October 2003 and returned to Canada. Separate complaints were made on his behalf to the public complaints commissions for the RCMP and the review body for the Canadian Security Intelligence Service. However, these were pre-empted by a decision made by the Canadian government in late January 2004 to appoint a public inquiry run by a respected sitting appellate court judge, Dennis O'Connor, to examine the actions of all Canadian officials in relation to Arar. The decision to appoint the inquiry in this case (commonly called either the Arar inquiry after its subject or the O'Connor inquiry after the presiding judge) came only after the RCMP searched the home and office of an Ottawa newspaper reporter as part of an investigation about leaked information about Arar.<sup>141</sup> The spectacle of the search of a reporter's home seemed to

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139. Immigration law was used as anti-terrorism law in Canada but generally in a more focused manner than the post-9/11 U.S. round-ups. In August 2003, twenty-one non-citizens in Canada from Pakistan were initially detained under Canadian immigration law on security grounds with allegations that they constituted an al Qaeda cell, but none were found to be a security threat though some were found to be in Canada illegally. See Kent Roach, *Canada's Response to Terrorism*, *supra* note 79, at 523–24. One recent attempt in Canada to bring child pornography charges against a person repeatedly interviewed by CSIS failed when the court excluded the evidence after finding that CSIS had conducted an unconstitutional search of his computer to obtain the pornography. *R. v. Mejid*, 2010 ONSC 5532 (Can.).

140. For arguments that the U.S. decision to send Arar to detention in Syria rather than surveillance in Canada was part of a “preventive paradigm,” see Jules Lobel, *Extraordinary Rendition and the Constitution: The Case of Maher Arar*, 28 REV. LITIG. 479, 487–89 (2008).

141. The Arar commission was strongly critical of these leaks which contained information about what Arar was supposed to have told his Syrian interrogators, and concluded that the leaks were a “deliberate act” and “purposefully misleading

have motivated the federal Cabinet to make a discretionary decision to appoint the inquiry.<sup>142</sup>

Public inquiries in Canada are generally high profile events, typically lasting two years or more, involving public hearings and media coverage, research, and multi-million dollar budgets. They are called at the discretion of either the federal or provincial governments and they are prohibited from making findings of criminal or civil liability. Their recommendations are only advisory for the government and are frequently not followed. Nevertheless, public inquiries serve as important vehicles for organizational and social accountability for various forms of misconduct and disasters.<sup>143</sup> Public inquiries have played an important role in national security matters, in part, because legislative committees in Canada do not have access to secret information and are not particularly well staffed. Canadian public inquiries are often called “judicial inquiries” because they are generally headed by a sitting or retired judge, even though they are technically part of the executive and what has been called the “watchdog” or quasi-judicial arm of the executive.<sup>144</sup>

The Arar inquiry provided accountability for government

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in a way that was intended to do him harm” and “[i]t is disappointing that, to date, no one has been held accountable.” COMMISSION OF INQUIRY ANALYSIS AND RECOMMENDATIONS, *supra* note 4, at 263. The investigation of the leaks was conducted under official secrets legislation that extended to possession of leaked information. See *O’Neill v. Canada (Att’y Gen.)* (2006), 82 O.R. 3d 241, para. 1 (Can. Ont. Sup. Ct. J.). The offense of possessing leaked information was held to be unconstitutionally vague and an unjustified restriction on freedom of expression in a case brought by the Ottawa reporter who had her home searched. *Id.* at para. 109. The investigation into the leaks has now been closed without any arrests or charges. Jim Bronskill, *RCMP Lays No Charges in Maher Arar ‘Terrorist’ Leaks, Declares Case Closed*, STATISMWATCH.CA (Sept. 3, 2008), <http://statismwatch.ca/2008/09/03/rcmp-lays-no-charges-in-maher-arar-terrorist-leaks-declares-case-closed>.

142. See Audrey Macklin, *From Cooperation, to Complicity, to Compensation: The War on Terror, Extraordinary Rendition, and the Cost of Torture*, 10 EUR. J. MIGRATION & L. 11, 14 (2008) (noting that “[a]s media attention and public pressure on the government mounted” the inquiry was appointed).

143. Kent Roach, *Canadian Public Inquiries and Accountability*, in ACCOUNTABILITY FOR CRIMINAL JUSTICE 268, 269 (Philip C. Stenning ed., 1995) (discussing “the distinctive ability of inquiries to hold organizations and society accountable” in the context of “three recent Canadian public inquiries appointed in response to concerns about the behavior of actors in the criminal process”).

144. See Kent Roach, *Review and Oversight of National Security Activities and Some Reflections on Canada’s Arar Inquiry*, 29 CARDOZO L. REV. 53, 62 (2007) (noting that public inquiries “are generally conducted by sitting or retired judges, which gives public inquiries quasi-judicial qualities”).

responses to national security by examining the actions of various police, intelligence, customs, and consular officials.<sup>145</sup> It lasted two years and featured subsequent litigation between the inquiry and the Canadian government over the extent to which details in its three volume report on the actions of Canadian officials in relation to Maher Arar could be made public.<sup>146</sup> The Arar inquiry had stronger powers to press for the release of classified information than a subsequent internal inquiry on related questions,<sup>147</sup> and much more than the British inquiry into complicity with torture in respect to Guantanamo detainees, which made the Cabinet of elected ministers, and not the independent courts, the ultimate arbitrator of what could be publicly disclosed.<sup>148</sup> It also had stronger powers than the American Inspector General to insist on access to classified information and, if necessary, to seek judicial review in an attempt to disclose classified information.

The Arar inquiry made a number of recommendations relating to the training and information sharing practices of Canadian officials and also recommended policies and training to prevent racial, religious, or ethnic profiling. It did not find discriminatory profiling in Arar's case, but its recommendations on this issue speak to sensitivity about such issues in Canada given its multicultural population. The inquiry found that Canadian agencies had sent mixed messages about whether they wanted Arar

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145. See *id.* at 67 (noting that the inquiry “had jurisdiction to inquire into the activities of all Canadian officials in relation to Maher Arar”).

146. Canada (Att’y Gen.) v. Canada (Comm’n of Inquiry into the Activities of Canadian Officials in Relation to Maher Arar), [2008] 3 F.C.R. 248 (Can.) (allowing publication of previously secret information in commission’s report).

147. See FRANK IACOBUCCI, INTERNAL INQUIRY INTO THE ACTIONS OF CANADIAN OFFICIALS IN RELATION TO ABDULLAH ALMALKI, AHMAD ABOU-ELMAATI AND MUAYYED NUREDDIN 44 (2010) (subsequent inquiry “was required to be internal and presumptively private”).

148. See *generally About the Inquiry*, THE DETAINEE INQUIRY, <http://www.detaineeinquiry.org.uk/about/> (last visited Apr. 15, 2012) (describing inquiry’s purpose to determine “whether Britain was implicated in the improper treatment of detainees, held by other countries, that may have occurred in the aftermath of 9/11”). This inquiry will be aborted in light of ongoing criminal investigations into whether British officials were complicit in torture. Peter Gibson, *Statement by the Chairman of the Detainee Inquiry*, THE DETAINEE INQUIRY (Jan. 18, 2012), <http://www.detaineeinquiry.org.uk/2012/01/statement-by-the-chairman-of-the-detainee-inquiry/>. On the role of public inquiries in the United States, the United Kingdom, Canada, and Australia in filling accountability gaps created by integrated government responses to terrorism see ROACH, THE 9/11 EFFECT, *supra* note 19, at 455–65.

returned to Canada. It also recommended that the government should have a unified and coordinated approach when Canadians were held in countries with poor human rights records where they may be tortured.<sup>149</sup> It also recommended that Canada register a formal objection with the United States and Syria about Arar's treatment, including what it determined was a breach of the Vienna Convention by an initial delay in granting Arar's request to see a Canadian consular official when he was detained in New York.<sup>150</sup> The Canadian government agreed to all these recommendations, and Prime Minister Harper made an official objection to President Bush in 2006.<sup>151</sup>

It is significant that Mr. Harper, who, as the leader of the Conservative opposition, had criticized the Canadian government for not participating in the invasion of Iraq, followed the recommendation of the inquiry that Canada lodge an official protest with the United States. The treatment of Arar had a widespread political salience in Canada that it might not have had in the United States. As discussed in the first part of this article, Canada has considerably more foreign-born citizens than the United States, and its 1982 constitutional bill of rights instructs judges to interpret rights in a manner consistent with Canada's multicultural heritage. Arar is far from a shunned figure in Canada and has won a number of awards. The government also quickly settled Arar's civil claim for \$10.5 million dollars in the wake of the Arar report. The Arar case has become an important part of Canada's national security tradition. It focused Canadian concerns about the need to respect both human rights and multiculturalism while countering terrorism. Both Canadian governments and the public will, for the foreseeable future, view much security cooperation with the United States through the lens of the Arar case.

#### 4. *The 2003 Monterrey Protocol*

In January 2003, President Bush and Prime Minister Martin agreed to the Monterrey Protocol which provides that the United

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149. COMMISSION OF INQUIRY ANALYSIS AND RECOMMENDATIONS, *supra* note 4, at 349.

150. *Id.* at 361. Arar was detained on September 26, 2002 and his one consular visit occurred on October 3, 2002.

151. 'Come Clean' on Arar, *Harper Asks US*, CBC NEWS (Oct. 6, 2006), <http://www.cbc.ca/news/canada/story/2006/10/06/harper-bush.html>.

States will notify the Canadian Director of Consular Affairs about any proposed removal of a Canadian to a third country.<sup>152</sup> The Protocol allows either country to request the other to consult about a proposed removal. The Arar inquiry heard testimony from Canadian officials that the Protocol stopped short of preventing the removal of Canadian citizens to third countries because “[t]here is never a guarantee of these things . . . the President himself made it clear that the U.S. is going to do what is right for their [sic] citizens.”<sup>153</sup> The Protocol is more in the nature of diplomatic assurances, and it is not a treaty that would require Senate approval in the United States. Canadians need to understand that American counter-terrorism will often be based on an executive-based approach both because of policy preferences for flexibility and secrecy, and because of the practical difficulties of winning Congressional support for executive initiatives. It will often be unrealistic to expect legislative guarantees or indeed even extensive legislative regulation of executive American counter-terrorism.

## B. *The American Experience*

### 1. *Continued Watch-listing of Arar*

The Prime Minister of Canada and several of his Ministers asked for Maher Arar to be removed from American watch-lists in the wake of the Canadian public inquiry that found no evidence linking Arar to terrorism.<sup>154</sup> The American government, however, consistently refused to remove Arar from watch-lists, with State department officials citing Arar’s associations and travel history as justification for keeping him on the watch-list.<sup>155</sup> American officials, in an attempt to explain their reasons for watch-listing Arar, shared information about him with Canadian Public Safety

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152. *Standing Committee on Public Safety and National Security*, 39th Parliament, 1st Session, No. 22 (2006) (statement of Alan Kessel, Legal Advisor, Dep’t Foreign Affairs), available at <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=2529912&Language=E&Mode=1>.

153. COMMISSION OF INQUIRY REPORT, VOL. 1, *supra* note 52, at 529 (quoting Wright testimony from April 6, 2005).

154. *Wilkins Slams Day for Questioning U.S. on Arar*, CBC NEWS, Jan. 24, 2007, <http://www.cbc.ca/news/world/story/2007/01/24/us-arar.html?ref=rss>.

155. *US Refuses to Take Arar Off Watch List*, CBC NEWS (Jan. 27, 2007), <http://www.cbc.ca/news/canada/story/2007/01/26/arar-us.html>.



Minister Stockwell Day in January 2007.<sup>156</sup> Mr. Day, a conservative minister in a Conservative government, announced that nothing he had seen had changed his mind about the need to remove Arar from the watch-list.<sup>157</sup> After some testy exchanges involving the U.S. Ambassador to Canada and the Canadian Prime Minister, the two countries agreed to disagree over the matter. The transition from the Bush to the Obama Administration has not changed the matter.<sup>158</sup> U.S. Homeland Security Secretary, Janet Napolitano, affirmed in April 2009 that Maher Arar would remain on American watch-lists, barring admission to the United States. Although she had not personally reviewed his case, she noted “there has been a[n] unanimity among all the people who have reviewed it that his status should not now be changed.”<sup>159</sup>

The nature of secret intelligence, and the particularly non-transparent and multiple nature of American watch-lists, make it difficult to evaluate the reasons why the U.S. government continues to flag Arar as a security risk.<sup>160</sup> Some information has surfaced but must be considered with caution because it has not been subject to independent review or adversarial challenge. An FBI agent who testified at Omar Khadr’s military commission said that Omar Khadr had identified Maher Arar as a person he saw at al Qaeda sites in Afghanistan though he later admitted that Khadr had not initially recognized Arar. There are reasons to doubt the reliability of this intelligence which was obtained from Omar Khadr in Afghanistan in September and October 2001, a time when Arar is known to have been in Canada and when the fifteen-year-old Omar Khadr was severely injured and mistreated when detained at

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156. ‘We Agree to Disagree’ with U.S. on Arar: MacKay, CBC NEWS (Feb. 23, 2007), <http://www.cbc.ca/news/canada/story/2007/02/23/trilateral-talks-070223.html>.

157. *Id.*

158. U.S. Refuses to Reverse its Ban on Arar, CBC NEWS (Apr. 16, 2009), <http://www.cbc.ca/news/canada/story/2009/04/16/arar-us-ban016.html>.

159. Interview with U.S. Homeland Security Secretary Janet Napolitano, CBC NEWS (Apr. 20, 2009), <http://www.cbc.ca/news/canada/story/2009/04/20/f-transcript-napolitano-macdonald-interview.html>; see also U.S. Refuses to Reverse its Ban on Arar, CBC NEWS (Apr. 16, 2009), <http://www.cbc.ca/news/canada/story/2009/04/16/arar-us-ban016.html>.

160. Norberto E. Luongo, *Watchlists in United States and Canada: An Intricate Web*, 35 AIR & SPACE L. 157 (2010); Daniel J. Steinbock, *Designating the Dangerous: From Blacklists to Watch Lists*, 30 SEATTLE U. L. REV. 65, 78 (2006) (“Currently, there are twelve federal antiterrorism watch lists for individuals.”); Justin Florence, Note, *Making the No Fly List Fly: A Due Process Model for Terrorist Watchlists*, 115 YALE L.J. 2148, 2170 (2006) (“The watchlists are overwhelmingly based on secret information gathered by confidential sources . . .”).

Bagram.<sup>161</sup> If this is the basis for Arar's watch-listing, it is surely wrong. Another report suggests that a person convicted of immigration fraud told U.S. authorities that he saw Arar in Afghanistan. Here again, there are reasons to doubt the reliability of such information.<sup>162</sup> In general, the lessons from wrongful convictions relating to mistaken eyewitness identification, informers with incentives to lie, and false confessions need to be applied to counter-terrorism activities, especially those informed by intelligence.<sup>163</sup> When questioned by video link in U.S. Congressional hearings, Arar stated that he had never been to Afghanistan, but that he had made a false confession to that effect when he was tortured in Syrian custody.<sup>164</sup>

In September 2008, the Terrorist Screening Database in the United States included over 400,000 individual identities, but over a million records because of name variants and aliases. Only three percent of those on these vast watch-lists were U.S. persons.<sup>165</sup> The American watch-lists that include Arar are an example of American extra-legalism because they provide little in the way of tangible remedies for possible wrongful listings. Someone such as Maher Arar who does not have a substantial connection to the United States and cannot demonstrate a risk of harm might be denied standing in American courts to challenge his watch-listing. Even if granted standing, the state secrets doctrine protects much of the information used to place a person on a watch-list. American courts have rejected class actions designed to challenge watch-lists. In one case, Chief Justice Easterbrook of the Seventh Circuit refused to certify a class action challenging terrorist watch-lists concluding that: "Presidents, Cabinet officers and members of

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161. *Khadr Saw Arar at Al-Qaeda Sites in Afghanistan: FBI Agent*, CBC NEWS (Jan. 20, 2009), <http://www.cbc.ca/news/world/story/2009/01/19/khadr-hearing.html>; *Khadr Couldn't Pick Out Arar Immediately, FBI Agent Admits*, CBC NEWS (Jan. 20, 2009), <http://www.cbc.ca/news/world/story/2009/01/20/khadr-hearing.html>.

162. Colin Freeze, *Why the US Won't Remove Arar From No-Fly List*, GLOBE & MAIL, Oct. 20, 2007.

163. Kent Roach & Gary Trotter, *Miscarriages of Justice in the War Against Terror*, 109 PENN ST. L. REV. 967 (2005).

164. *Rendition to Torture: The Case of Maher Arar, Joint Hearing before the S. Comm. on Int'l Orgs., Human Rights, and Oversight of the Comm. on Foreign Affairs and the S. Comm. on the Const., Civil Rights, and Civil Liberties of the Comm. on the Judiciary H. of Rep.*, 110th Cong. 27-28 (2007) (statement of Maher Arar).

165. WILLIAM J. KROUSE & BART ELIAS, CONGRESSIONAL RESEARCH SERV., TERRORIST WATCHLIST CHECKS AND AIR PASSENGER PRESCREENING 3-4 (2009), available at <http://www.fas.org/sgp/crs/homsec/RL33645.pdf>.

Congress can be dismissed by the people if they strike an unwise balance between false positives and false negatives, between inconvenience today and mayhem tomorrow. . . .”<sup>166</sup> In other words, American courts have, consistent with extra-legalism, deferred to the executive and the legislature on many matters relating to watch-lists.

Canada has its own watch-list, a component of the Passenger Protect Program, but it is much more modest, having reportedly only 2,000 names.<sup>167</sup> The Canadian list is subject to both judicial review and review by an independent Privacy Commissioner. Indeed, the Canadian list was challenged under the Charter by the first person denied boarding.<sup>168</sup> It was also reviewed by the Privacy Commissioner who found no evidence that it was based on information that was inaccurate.<sup>169</sup> These independent reviews are not limited to Canadian citizens. In part because of the Charter and the Arar experience, Canada has built more safeguards into its watch-lists than the United States. These safeguards, however, will not apply if Canada shares information from its watchlist with the United States.

## 2. *The Homeland Security Inspector General’s Report*

The United States did not have a comparable process to the Canadian public inquiry into the Arar matter. As seen above, the Canadian inquiry was extraordinary and might not have been appointed except for various events, but the contrast between the review done in the United States and Canada is striking. A redacted report by the Inspector General of the U.S. Department of Homeland Security was not released until March 2008. The IG report concluded that Arar was appropriately determined inadmissible on the basis of being suspected of affiliations with a

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166. *Rahman v. Chertoff*, 530 F.3d 622, 628 (7th Cir. 2008). Other courts have, however, found that persons with a substantial connection with the United States, but not tourists, business travelers, or those on student visas, would have standing to challenge inclusion on no-fly lists. *Ibrahim v. Dep’t of Homeland Sec.*, 538 F.3d 1250 (9th Cir. 2012).

167. Kenneth C. Werbin, *Fear and No-Fly Listing in Canada: The Biopolitics of the “War on Terror,”* 34 CAN. J. COMM. 613, 614 (2009).

168. *See Canada (Att’y Gen.) v. Al Telbani*, 2011 CarswellNat 3695 (Can. Fed.Ct.) (WL) (denying advance costs to a permanent resident of Canada to litigate the issue under section 7 of the Charter).

169. OFFICE OF THE PRIVACY COMM’R OF CAN., AUDIT OF THE PASSENGER PROTECT PROGRAM, TRANSPORT CANADA, at para. 47 (2009), available at [http://www.priv.gc.ca/information/pub/ar-vr/ar-vr\\_ppp\\_200910\\_e.pdf](http://www.priv.gc.ca/information/pub/ar-vr/ar-vr_ppp_200910_e.pdf).

terrorist organization. It noted, however, that the INS could neither dismiss nor independently verify “the derogatory information” provided about Arar.<sup>170</sup> In this way, the IG accepted bureaucratic limits on jurisdiction and did not attempt, as the Canadian inquiry did, to determine whether the intelligence claims made against Arar were justified.

The IG noted that the expedited nature of Arar’s removal process under section 235(c) of the Immigration and Nationality Act was used to prevent the disclosure of classified information.<sup>171</sup> This meant that Arar “was not entitled to a complete statement of the facts about him, a hearing before an immigration judge, or any appeal.”<sup>172</sup> This summary approach is consistent with American extra-legalism because even though it is specifically authorized in law, it avoids the most rudimentary measures of fairness. Despite this, the only IG recommendation was that more time should be allowed for a detainee to defend himself under this expedited process. The INS accepted that fifteen days should generally be allowed for a detainee to provide written representations.<sup>173</sup> It is difficult to see this as a meaningful reform because it simply gives detainees more time to respond to allegations based on secret intelligence that they will not have seen.

The IG report is heavily redacted, but does reveal that at least one of the reasons why the acting Attorney General, Larry Thompson, designated Arar to be transported to Syria and not Canada was that “the porous nature of the United States-Canadian border would enable Arar to easily return to the United States.”<sup>174</sup> This supports the speculation above that Canadian statements that Arar would not be detained or charged if he were returned to Canada played an important role in the United States’ decision to send him to Syria. American perceptions of the northern border as porous and unguarded, combined with Canadian refusal to use pretextual or unjustified charges, played important roles in the decision not to return a Canadian citizen to Canada.

The parts of the IG’s report dealing with determinations of whether Arar faced a risk of torture in Syria, and any

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170. DEP’T OF HOMELAND SECURITY OFF. OF INSPECTOR GENERAL, THE REMOVAL OF A CANADIAN TO SYRIA, OIG-08-18 (2008).

171. *Id.* at 9.

172. *Id.* at 4.

173. *Id.* at 19, 35.

174. *Id.* at 12, 21.

determinations or assurances received by the United States from Syria are almost completely redacted in the report, including most of the recommendations in this regard. One recommendation that was not redacted was that immigration officials should consult with Department of State officials before accepting assurances.<sup>175</sup> This suggests that the Department of State may not have been included in the high-level decisions in Washington that resulted in Arar's rendition to Syria. It also suggests that Syria may have provided assurances that it would not torture Arar. If so, this again fits a pattern of cynical extra-legalism in the form of non-credible assurances by a state widely known for its use of torture. This part of the report also indicates that even within the executive branch, there are important rivalries and divisions between the law enforcement, intelligence, and foreign affairs departments. The Inspector General for Homeland Security, unlike the Canadian inquiry, did not have subpoena powers or powers to contest governmental claims of privilege and secrecy. Moreover, his jurisdiction was limited and could not extend to all governmental officials involved in the case, and a number refused to cooperate with the report.<sup>176</sup> The resulting IG report is both more heavily redacted and much less hard-hitting than the three-volume Canadian inquiry report.<sup>177</sup>

### 3. *Maher Arar's Failed Attempt at Civil Redress*

Arar's claim for declaratory relief that his detention and rendition violated the Fifth Amendment was dismissed on the grounds that he did not have standing because the relief would not address any ongoing injury relating to his inadmissibility in the United States.<sup>178</sup> This decision demonstrates how narrow standing rules, combined with political question and state secrets doctrines, contributes to "extra-legalism"—a process in which the American legal system itself provides barriers to accountability for arguably extra-legal state conduct in the national security realm.

The majority of the en banc Second Circuit in *Arar v. Ashcroft*<sup>179</sup> held that it would not, in the absence of legislative action, extend a

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175. *Id.* at 26–30, 36.

176. Inspector General Act of 1978, 5 U.S.C. app. 3 §§ 1–13 (2006); Homeland Security Act of 2002, Pub. L. No. 107-296, § 811(b), 116 Stat. 2135, 2221 (2002).

177. *See supra* text accompanying notes 141–51.

178. *Arar v. Ashcroft*, 414 F. Supp. 2d 250, 259 (E.D.N.Y. 2006).

179. *Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. 2009).

*Bivens* tort claim to renditions. In a recognition and acceptance of an executive model of national security, Chief Judge Jacobs stated that “[a]dministrations past and present have reserved the right to employ rendition . . . and notwithstanding prolonged public debate, Congress has not prohibited the practice, imposed limits on its use, or created a cause of action for those who allege they have suffered constitutional injury as a consequence.”<sup>180</sup> Recognizing a cause of action against officials “would have the natural tendency to affect diplomacy, foreign policy, and the security of the nation” all factors said to support not recognizing the claim.<sup>181</sup> Chief Judge Jacobs also noted the difficulties of litigating matters involving secrecy in open court. Citing Canada’s settlement of Arar’s claim, he stressed the danger of “graymail”<sup>182</sup> that would force governments to settle in order to avoid disclosing secrets. The majority’s judgment did not preclude Arar’s claim simply because he was not an American citizen. The judgment was heavily influenced by concerns about state secrets, separation of powers, political questions, and narrow standing that would also counsel judicial deference in cases involving claims by American citizens.<sup>183</sup>

Chief Justice Jacobs’ judgment seemed to take the undisclosed intelligence used to render Arar to Syria at face value. It deferred not only to the American executive but to the Canadian executive’s identification of Arar as a security threat, ignoring that a quasi-judicial institution in Canada—a public inquiry conducted by an appellate judge—had determined that the RCMP’s identification of Arar as a terrorist was not supported by any evidence.<sup>184</sup> Chief Judge Jacobs even suggested that allowing Arar to return to Canada was not an option because of the danger of allowing Arar to board a plane and the danger that once in Canada he could return to the United States “at will.”<sup>185</sup> In this way, the judgment appears to

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180. *Id.* at 565.

181. *Id.* at 574.

182. *Id.* at 580. The actual likelihood of “graymail” was significantly diminished by the many public disclosures made by the Arar Commission of Inquiry report, but Chief Justice Jacobs ignored both the report and its effect on potential “graymail.”

183. See *Munaf v. Geren*, 553 U.S. 674 (2008) (deferring to military transfer of American citizens to Iraqi authorities); *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010) (narrow standing, states secrets, and political questions concerns preclude judicial review of the targeted killing of an American citizen).

184. *Arar v. Ashcroft*, 585 F.3d 559, 580 (2d Cir. 2009).

185. *Id.*

provide a judicial seal of approval to the executive's decision that it was not safe to allow Arar to return to Canada.

A number of strong dissents were entered. Judge Sack stressed that the concern about state secrets could be addressed more directly rather than by precluding the *Bivens* remedy in its entirety.<sup>186</sup> At the same time, he recognized that it would be "extremely unlikely" that the litigation would have been determined on its merits given that similar cases have been effectively shut down by the government's successful invocation of the broad American state secrets doctrine.<sup>187</sup> It is a significant sign of the hold of extra-legalism in the United States that even the dissenting judges did not seem to hold up much hope that Arar's case could ever be litigated on the merits given the restrictive American state secrets doctrine. To be sure, litigation in Canada and other democracies would also be made more difficult because of the state secrets doctrine, but both Canadian and British doctrines accept the need for judges, perhaps assisted by security cleared special advocates to provide adversarial challenge, to inspect documents and balance the competing public interests in disclosure and non-disclosure of the material.<sup>188</sup> By contrast, the American state secrets doctrine has acted as a complete bar that can preclude even judicial inspection of material, even when, as in the Arar case, much of that material has been placed in the public domain. This broad state secrets bar would apply regardless of whether a claim was made by an American citizen or a foreign national such as Maher Arar.

Judge Sack also resisted the legalism<sup>189</sup> of the majority's approach by arguing that high pleading standards should not require "a plaintiff to obtain his abusers' business cards in order to state a civil rights claim."<sup>190</sup> Again, the picture that emerges is of a legal system that is unwilling and unable to consider complicity in torture claims. Judge Pooler would not have dismissed the Alien Torture claim on the basis that American officials may have acted

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186. *Id.* at 583 (Sack, J., dissenting).

187. *Id.*; see *El Masri v. Tenet*, 479 F.3d 297 (4th Cir.), *cert. denied*, 552 U.S. 947 (2007); Erin E. Langley, *The Loss of American Values in the Case of Erroneous Irregular Rendition*, 98 GEO. L.J. 1441 (2010).

188. Sudha Setty, *Litigating Secrets: Comparative Perspectives on the State Secrets Doctrine*, 75 BROOK. L. REV. 201, 236 (2009).

189. The hyper-legalism of the majority's approach can also be seen as a form of extra-legalism. See POSNER, *supra* note 103.

190. *Arar*, 585 F.3d at 592 (citing *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)).

jointly and under cover of Syrian law if they, like the Canadian officials, had sent questions for Syrian authorities to ask.<sup>191</sup> Judge Calabresi stressed that the majority's ruling held that there could be no constitutional remedies, even if Arar's allegations were true, when it was possible for the litigation to proceed without such a broad ruling and for Congress to act if it wished to clearly preclude remedies or provide alternative remedies.<sup>192</sup> This approach recognized, however, that Congress could preclude redress if it was prepared to make a clear statement to that effect.<sup>193</sup> Only Judge Parker among the dissenters directly confronted the majority's separation of powers anxieties. He concluded that Arar was not asking the courts to usurp any executive functions, but simply to enforce the constitution and clear statutory and treaty prohibitions on torture.<sup>194</sup>

#### 4. *Summary*

The different treatment of Maher Arar in Canada and the United States cannot be attributed solely to the fact that Arar is a Canadian citizen but a foreign national in the United States. There has been considerably more accountability for executive conduct in Canada than in the United States. In Canada, an independent public inquiry spent two years and many millions examining the actions of Canadian officials and issued a three volume report in 2006. The Arar inquiry report offers a much fuller account than the heavily redacted report that was released in 2008 by the Inspector General of the Homeland Security Department. The Canadian government settled Arar's civil claim for \$10.5 million, while the Second Circuit held that his claim against the U.S. government was precluded because specific congressional authorization was required to allow lawsuits in such a sensitive area. Even if allowed to proceed, the civil litigation would have likely been impossible because of the state secrets doctrine that would have precluded litigation even if Arar was an American citizen. Arar remains on American watch-lists under both the Bush and

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191. *Id.* at 629 (Pooler, J., dissenting).

192. *Id.* at 630 (Calabresi, J., dissenting).

193. In Canada, the legislature could not preclude such litigation to the extent that it was based on the right under section 24(1) of the Charter to seek an appropriate and just remedy for a constitutional violation. *Mills v. The Queen*, [1986] 1 S.C.R. 863 (Can.).

194. *Arar*, 585 F.3d. at 613.



Obama Administrations, and is unable to travel to the United States without any apparent means of redress. Such redress would be difficult to obtain even if Arar was an American citizen or substantially connected to the United States. The American response to Maher Arar stands as a reminder of the enduring importance of executive action, secrecy, entrenched attitudes, and the subjectivity of intelligence in identifying security threats. The Arar affair suggests that extra-legalism in the United States can prevent effective review and accountability even for complicity in torture.

Although it may be tempting for both the United States and Canada to close the book on the Maher Arar incident, it will be difficult to do so. The exchange of security information between Canada and the United States continues, as it must, given the shared border and security threats. The Arar Commission recognized that information sharing must continue and was vital to security, but it also recommended enhanced and coordinated review of information sharing.<sup>195</sup> Unfortunately, the Canadian government has refused to implement these recommendations. The United States has entered into various security agreements with Canada but these agreements stop short of committing the United States not to return Canadians with dual nationality to other countries. Although it is unlikely that the United States would render a Canadian dual-citizen to Syria,<sup>196</sup> the Obama Administration's policy on irregular renditions remains unclear.<sup>197</sup> The Arar affair has become part of Canada's national security memory and culture because it touches on both human rights and multiculturalism. In part because of the Arar case, Canada has been much more cautious about compiling watch-lists and no-fly lists than the United States, and these lists have been subject to Charter challenge and independent review by the Privacy Commissioner. The American government continues to disagree with Canada over whether Arar is a security risk and this suggests

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195. COMMISSION OF INQUIRY INTO THE ACTIONS OF CANADIAN OFFICIALS IN RELATION TO MAHER ARAR, A NEW REVIEW MECHANISM FOR THE RCMP'S NATIONAL SECURITY ACTIVITIES 499-609 (2006).

196. Even in 2007, one knowledgeable commentator argued that a repeat of the Arar rendition was extremely unlikely. See Hitz, *supra* note 138.

197. For a disturbing argument made by Assistant General Counsel for the CIA that there are effectively no legal impediments to extraordinary rendition see Daniel L. Pines, *Rendition Operations: Does U.S. Law Impose Any Restrictions?*, 42 LOY. U. CHI. L.J. 523 (2011).

that some within the American government at least must believe that Canada has made a serious mistake in exonerating Arar. Such fundamental disagreements over such a high profile case will continue to make many uneasy about increased American-Canadian information sharing under the 2011 perimeter security action plan.

## V. THE KHADR FAMILY AND CANADIAN-AMERICAN RELATIONS

If the Maher Arar case confirms Canadian suspicions about the harshness of American counter-terrorism and the lack of accountability for complicity in torture, then the story of the Khadr family confirms American concerns that Canada is a source of a real terrorist threat and that its legal system prioritizes respect for rights over security.

The Khadr family was headed by Ahmed Khadr, who was born in Egypt but subsequently obtained Canadian citizenship. He was detained on terrorism charges in Pakistan in 1996, but was released after Prime Minister Chretien intervened on his behalf. Ahmed Khadr became a close associate with bin Laden before he was eventually killed on the Pakistan-Afghanistan border in 2003.<sup>198</sup> His four sons, who were all born in Canada, have all been involved in activities with their father. The youngest son, Abdul, was paralyzed from the waist down in the same shootout that killed his father. Another son, Abduraham, was captured in Afghanistan in November 2001 and spent some time in 2003 at Guantanamo Bay, Cuba before being released and eventually returning to Canada. He claims to have cooperated and worked for the CIA both in Afghanistan and Guantanamo.<sup>199</sup> Another brother, Abdullah, was captured and detained in Pakistan in 2004 before being released and allowed to return to Canada.<sup>200</sup> As will be discussed below, he was the subject of a failed attempt by the United States to extradite him on material support of terrorism charges. The most well-known of the Khadr brothers is Omar Khadr, who at fifteen years of age was captured by American forces in Afghanistan in 2002. He was detained at Guantanamo and pled guilty in 2010 before a military commission to the murder of an American soldier,

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198. See BELL, *supra* note 74, at 156.

199. *CIA Paid Me to Spy: Abdurahman Khadr*, CBC NEWS, Mar. 5, 2004, [http://www.cbc.ca/news/canada/story/2004/03/04/khadr\\_reax040304.html](http://www.cbc.ca/news/canada/story/2004/03/04/khadr_reax040304.html).

200. See generally *The Khadr Family*, CBC NEWS, Oct. 30, 2006, <http://www.cbc.ca/news/background/khadr/>.

Sergeant Christopher Speer, and other offenses.

*A. Guantanamo and Canadian Alternatives to the Criminal Law Compared*

Much has been written about the use of military detention and trials of suspected terrorists at Guantanamo Bay, Cuba. Guantanamo, both as originally planned and conceived in the first Bush administration and sustained by more recent Congressional restrictions on transfers from it, represents a continuation of the American military tradition in counter-terrorism and a lack of confidence in the criminal law. Canada does not have the same military tradition, but it also demonstrated a lack of confidence in the criminal law in the wake of 9/11. As discussed above, it relied on immigration law as anti-terrorism law with respect to alleged members of the Ressam cell<sup>201</sup> and others alleged to be associated with al Qaeda. Instead of military detention, Canada issued five immigration law security certificates between 2001 and 2003 that allowed it to detain five non-citizens suspected of involvement with al Qaeda.<sup>202</sup> This enabled the Canadian government to use secret evidence/intelligence and indeterminate detention in a manner that the criminal law would not allow.<sup>203</sup> The first criminal charge of an alleged al Qaeda terrorist was not laid in Canada until March 2004, and, in that case, immigration law was not an alternative because the accused was a Canadian citizen. The scale and militarization of administrative detention at Guantanamo was unique, but the flight from the criminal law was not.

In both Canada and the United States, the use of less restrained alternatives to the criminal law resulted in extensive and frequently successful litigation on behalf of detainees. Through three Supreme Court victories,<sup>204</sup> the Guantanamo detainees gained access to habeas corpus relief and more regularized military trials that would not use secret evidence. Somewhat similarly, security certificate detainees in Canada won important Supreme

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201. See Roach, *Canada's Response to Terrorism*, *supra* note 79, at 511.

202. See *id.*

203. *Id.*

204. *Boumediene v. Bush*, 553 U.S. 723 (2008); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Rasul v. Bush*, 542 U.S. 466 (2004). These cases may seem at odds with the extra-legalism thesis to the extent that they rejected President Bush's initial determination to avoid all judicial review of detention and trial at Guantanamo. At the same time, however, these cases proceeded in a cautious and minimal manner avoiding constitutional issues until they could not be avoided.

Court victories that produced a system of security-cleared special advocates who could, as in the UK, examine and challenge secret evidence.<sup>205</sup> The Supreme Court also required CSIS to retain more raw intelligence so that both the secret evidence and the unused intelligence could be challenged.<sup>206</sup> The actual gains from these legal victories are a matter of controversy in both countries. Habeas corpus review has not been particularly effective for the Guantanamo detainees. There have been other substitution effects such as detention at other sites not subject to habeas review. The transfers of Guantanamo detainees to other countries have also been controversial with concerns raised about possible transfer to torture.<sup>207</sup>

A similar story on a much smaller scale could be told about Canadian security certificates. The special advocates have won some victories in challenging secret evidence with one security certificate being quashed by the courts and another abandoned when the government refused to allow the disclosure of more information.<sup>208</sup> The three remaining detainees have all been released on a form of house arrest, but there are also concerns that they might be deported to countries where they might be tortured.<sup>209</sup> As with Guantanamo, there have also been substitution effects with the use of less visible forms of immigration proceedings than security certificates to remove or deny entry to suspected terrorists. There was also a safe third country agreement with the United States, which has led to decreased numbers of refugees being accepted in Canada.

Torture has tainted these less-restrained alternatives to the criminal law in both countries. In the United States, torture occurred through executive interpretations of the relevant legal restrictions as symbolized through the torture memos.<sup>210</sup> Congress did not enter the field until the 2005 enactment of the Detainee Treatment Act<sup>211</sup> in response to the Abu Ghraib scandal. The

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205. *Charkaoui v. Canada*, [2007] 1 S.C.R. 350 (Can.).

206. *Charkaoui v. Canada*, [2008] 2 S.C.R. 326 (Can.).

207. Manfred Nowak, Moritz Birk & Tiphonie Crittin, *The Obama Administration and Obligations Under the Convention Against Torture*, 20 *TRANSNAT'L L. & CONTEMP. PROBS.* 33, 64 (2011) (discussing cases of Guantanamo detainees returned to Algeria against their will).

208. See Roach, *Canada's Response to Terrorism*, *supra* note 79, at 528.

209. *Suresh v. Canada*, [2002] 1 S.C.R. 3 para. 78 (Can.).

210. ANTHONY LEWIS, *INTRODUCTION TO THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB* xiii–xvi (Karen J. Greenberg & Joshua L. Dratel eds., 2005).

211. Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2680, §

legislature intervened, but the executive continued to authorize waterboarding by the CIA.<sup>212</sup> In Canada, the flirtation with torture came from a much more surprising source: the judiciary. In a case decided in early 2002, the Supreme Court of Canada held that while deportation to face a substantial risk of torture would violate international law and require heightened procedural review, it would not rule out the possibility that in undefined “exceptional circumstances” courts might find deportation to face torture justified under the Charter.<sup>213</sup> Although the exception has not subsequently been applied,<sup>214</sup> it demonstrates that the United States was not alone in revisiting the absolute prohibition against torture. It is probably not accidental that the two countries that were closest to the 9/11 attacks were the ones that each, in their own different ways, loosened the absolute prohibition on torture. Because the Canadian exception is contained in a Supreme Court of Canada decision and not in a withdrawn executive interpretation of the law, however, the Canadian government has “a loaded weapon”<sup>215</sup> that it threatens to use in the remaining security certificate cases. Canadian security certificates and detention at Guantanamo both

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1003 (codified as amended at 42 U.S.C. § 2000dd (2006)). In Canada, 2008 legislation likewise condemned torture by providing that evidence obtained through torture or cruel and degrading treatment should not be used as secret evidence in immigration security certificates. Immigration and Refugee Protection Act, S.C. 2001, c. 27 s. 83 (1.1) *amended by* S.C. 2008, c. 3 s. 4 (Can.).

212. Stuart Taylor, Jr. & Benjamin Wittes, *Looking Forward, Not Backward: Refining U.S. Interrogation Law*, in LEGISLATING THE WAR ON TERROR: AN AGENDA FOR REFORM 289, 306–08 (Benjamin Wittes ed., 2009).

213. *Suresh v. Canada*, [2002] 1 S.C.R. 3, para. 78 (Can.).

214. The *Suresh* exception, however, allowed the government to continue to detain non-citizens on security certificates who could not be deported to countries such as Syria on the fiction that they were being detained with a view to deportation. See Kent Roach, *Charkaoui and Bill C-3: Some Implications for Anti-Terrorism Policy and Dialogue between Courts and Legislatures*, 42 SUP. CT. REV. 281, 287 (2008). Parliament subsequently renounced the use of evidence obtained by torture or degrading treatment in security certificates, though not the possibility of deporting non-citizens to face the possibility of torture. See Immigration and Refugee Protection Act, S.C. 2001, c. 27 s. 83(1.1) (Can.). The Court in *Suresh* also held that courts should deferentially review governmental decisions whether a person faces a substantial risk of torture if deported and, in at least one case, the Committee Against Torture found that Canada violated the Convention against Torture in a case where courts deferred to governmental determinations that a suspected Sikh terrorist would not be tortured if returned to India. COMMITTEE AGAINST TORTURE, *BACHAN SINGH SOGI V. CANADA DECISION*, para. 10.10 (2007), available at [http://www.worldcourts.com/cat/eng/decisions/2007.11.16\\_Bachan\\_Singh\\_Sogi\\_v\\_Canada.htm](http://www.worldcourts.com/cat/eng/decisions/2007.11.16_Bachan_Singh_Sogi_v_Canada.htm).

215. *Korematsu v. United States*, 323 U.S. 214, 246 (1944).

continue despite all the legal and political controversy they have caused.

*B. Canadian Litigation with Respect to Omar Khadr*

President Bush's original military order with respect to Guantanamo provided that the detainees could not seek remedies not only in any U.S. court, but also in "any court of any foreign nation" or in "any international tribunal."<sup>216</sup> The experience with prolonged litigation in Canada on behalf of Omar Khadr demonstrates that it was not possible for the United States to restrain foreign litigation over Guantanamo. One response to American extra-legalism<sup>217</sup> was litigation in foreign courts by people like Omar Khadr and Australian and British Guantanamo detainees who indirectly attempted to challenge their detentions in their "home" courts.<sup>218</sup> The Omar Khadr litigation, however, also underlines the limited powers that foreign courts will have over American military detention.

In 2005, a Canadian judge issued a temporary injunction that prevented Canadian intelligence officials from continuing to go to Guantanamo to question Khadr. The judge stressed that he was not reviewing the conduct of American officials,<sup>219</sup> but that continued Canadian intelligence gathering at Guantanamo risked causing irreparable harm to Omar Khadr, especially because the information obtained might be used against him in military proceedings at Guantanamo.<sup>220</sup> Although there was a public interest in gaining intelligence about terrorism, the "balance of convenience" favored granting the injunction because the possible harms to Khadr outweighed the diminishing intelligence and law enforcement benefits of continuing to interrogate him after three years in captivity.<sup>221</sup> Canadian intelligence officials complied with

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216. Military Order of Nov. 13, 2001, 66 Fed. Reg. 57,833, 57,835–36 (Nov. 16, 2001).

217. For an example of litigation brought by Guantanamo detainees in the United States not being litigated on the merits see *Rasul v. Myers*, 563 F.3d 527 (D.C. Cir. 2009), *cert. denied*, 130 S. Ct. 1013 (2009) (holding that *Bivens* action does not extend to detention at Guantanamo and that even if it did, qualified immunity would apply).

218. *Hicks v. Ruddock*, (2007) 156 FCR 574 (Austl.); *Abassi v. Sec'y of State for Foreign & Commonwealth Affairs*, [2002] EWCA (Civ) 1598 (Eng.).

219. *Khadr v. Canada*, [2005] F.C. 1076, para. 12 (Can.).

220. *Id.* at paras. 23–24.

221. *Id.* at para. 44.

this injunction, but as will be seen, their 2003 and 2004 visits to Guantanamo became the subject of much continued litigation.

The Supreme Court of Canada twice held that Canadian interrogations of Omar Khadr at Guantanamo in 2003 and 2004 violated both the Charter and international law.<sup>222</sup> The relevant Charter right in both cases was section 7 of the Charter which gives everyone and not just Canadian citizens the right not to be deprived of life, liberty, and the security of person except in accordance with the principles of fundamental justice. In general, claims under section 7 do not depend on Canadian citizenship.<sup>223</sup> In both cases, the court had to find a violation of international law in order to apply the Charter extra-territorially.<sup>224</sup> This approach to extra-territorial application of the Charter raised the possibility of the Canadian court potentially embarrassing the United States by concluding that conditions at Guantanamo violated international law. A 2002 decision of the Court of Appeal for England and Wales had denounced Guantanamo as a “legal black-hole.”<sup>225</sup> The Supreme Court of Canada took a less aggressive and more diplomatic approach in both its *Khadr* cases. In its 2008 decision, after briefly reviewing the U.S. Supreme Court’s decisions in *Rasul v. Bush*<sup>226</sup> and *Hamdan v. Rumsfeld*,<sup>227</sup> the court held that it was not

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222. *Canada v. Khadr*, [2010] 1 S.C.R. 44, paras. 16, 26 (Can.); *Canada v. Khadr*, [2008] 2 S.C.R. 125, para. 24 (Can.).

223. There are, however, some ambiguous references to Omar Khadr’s Canadian citizenship in *Canada v. Khadr*, [2008] 2 S.C.R. 125 at paras. 32, 35 (Can.) and the Federal Court of Appeal has refused to apply the Charter extra-territorially in two cases on the basis that the applicants were not Canadian citizens. See *Amnesty Int’l v. Canada* (Minister of Def.), [2008] F.C.A. 401 (refusing to apply Charter to benefit Afghan detainees who were not Canadian citizens); *Slahi v. Canada* [2009] F.C.A. 259, para. 7 (Can.) (refusing to apply Charter to benefit non-Canadian citizens interrogated at Guantanamo by Canadian officials). For criticisms of these decisions as contrary to the language of section 7 of the Charter and the idea that the Charter should be applied to extra-territorial violations of Canada’s international rights obligations see Roach, *The Supreme Court at the Bar of Politics: The Afghan Detainee and Omar Khadr Cases*, *supra* note 39, at 128–30, 139.

224. *R. v. Hape*, [2007] 2 S.C.R. 292 (Can.).

225. *Abbasi v. Sec’y of State for Foreign & Commonwealth Affairs*, [2002] EWCA (Civ) 1598, [64] (Eng.); see also *Al Rawi v. Sec’y of State for Foreign & Commonwealth Affairs*, [2006] EWHC (Admin) 972, [92] (Eng.). For a more recent decision where the English courts demonstrated that they were prepared to issue habeas corpus with respect to a person transferred by British forces to American officials for detention in Afghanistan, see *Rahmatullah v. Sec’y of State for Foreign & Commonwealth Affairs*, [2011] EWCA (Civ) 1540 (Eng.).

226. 542 U.S. 466 (2004).

227. 548 U.S. 557 (2006).

necessary to pronounce on the legality of Guantanamo because “[w]ith the benefit of a full factual record, the United States Supreme Court held that the detainees had illegally been denied access to habeas corpus and that the procedures under which they were to be prosecuted violated the *Geneva Conventions*.”<sup>228</sup>

The Supreme Court of Canada in both its 2008 and 2010 decisions focused on the 2003 and 2004 interrogations and did not attempt to opine on the dynamic and complex nature of the Guantanamo legal regime. Having found that the Canadian interrogation violated both the Charter and international law in the 2008 case, the court ordered as a remedy that Canada disclose to Khadr the information that it had obtained and had shared with American officials.<sup>229</sup> Consistent with Canada’s concerns about secrecy and its status as a net importer of intelligence,<sup>230</sup> however, the Supreme Court of Canada did not order immediate or full disclosure, but rather remanded the case to a federal court judge to rule on how much of the classified information could be disclosed to Khadr.<sup>231</sup> These proceedings were subsequently carried out with the presiding judge concluding that while disclosure of some of the information

may cause some harm to Canada-US relations, that effect will be minimized by the fact that the use of such interrogation techniques by the US military at Guantánamo is now a matter of public record and debate. In any event, I am satisfied that the public interest in disclosure of this information outweighs the public interest in non-disclosure.<sup>232</sup>

A synopsis of an interview conducted in February 2003 was disclosed. It included statements by Omar Khadr claiming he was tortured at Bagram when first captured, and depicted him pleading with Canadian officials to “promise you’ll protect me from Americans.”<sup>233</sup> The disclosures also revealed that Canadian officials

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228. *Canada v. Khadr*, [2008] 2 S.C.R. 125, para. 21 (Can.).

229. *Id.* at para. 34.

230. *Ruby v. Canada* (Solicitor Gen.), [2002] 4 S.C.R. 3, para. 44 (Can.).

231. *Canada v. Khadr*, [2008] 2 S.C.R. 125, para. 37 (Can.).

232. *Khadr v. Canada*, [2008] F.C. 807, para. 89 (Can.). Other parts of the judgment balanced the public interests for and against disclosure by, for example, allowing Khadr to obtain videotapes made of the Canadian interrogations but with the faces of the intelligence officers and other sensitive material edited out. *Id.* at para. 82.

233. Air Force Office of Special Investigations, *Report of Investigative Activity*, 1 (Feb. 24, 2003), <http://graphics8.nytimes.com/packages/pdf/world>



were aware that Omar Khadr had been placed on a so-called “frequent flyer program” of sleep deprivation in which for three weeks he was not permitted to remain more than three hours in any single location before the 2004 interviews.<sup>234</sup>

In subsequent litigation, Omar Khadr claimed that Canada’s decision not to request his repatriation from Guantanamo violated the Charter. After reviewing both the Canadian interviews at Guantanamo and Khadr’s claims to protection, not only as a Canadian citizen, but also as a person who was fifteen years of age when captured, a trial judge ordered that the only appropriate remedy was to require Canada to request his repatriation.<sup>235</sup> The judge stressed that there was no evidence that a repatriation request would cause harm to Canadian-American relations. He also concluded that any doubts about whether Khadr could be prosecuted in Canada only “reinforces the case for repatriation.”<sup>236</sup> The Supreme Court of Canada upheld most of this decision and stressed that the questioning of Khadr when he was sixteen years of age with no access either to counsel or courts, “offends the most basic Canadian standards about the treatment of detained youth suspects.”<sup>237</sup> The court relied on its 2008 decision to hold that the interrogations also violated international law. It focused on conditions at Guantanamo in 2003, while noting that “the regime under which Khadr is currently detained has changed significantly in recent years.”<sup>238</sup>

Although it held that the 2003 and 2004 interviews violated both international law and the Charter, the Supreme Court of Canada reversed the trial judge’s order that required Canada to request Khadr’s repatriation from the United States on the grounds that the remedy interfered with the government’s prerogatives over diplomacy.<sup>239</sup> The court stressed that the situation was dynamic, and it was hesitant to interfere with Canadian-American relations by requiring the Canadian government to request Omar Khadr’s repatriation. Although consistent with other decisions that have

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/20080711Khadr.pdf.

234. Memorandum from R. Scott Heatherington, Dir., Foreign Intelligence Div., to MJW, *Umar Khadr: a meeting with*, 2 (Apr. 20, 2004), <http://graphics8.nytimes.com/packages/pdf/world/20080711Khadr.pdf>.

235. *Khadr v. Canada*, [2009] F.C. 405, paras. 76–89 (Can.).

236. *Id.* at para. 87.

237. *Canada v. Khadr*, [2010] 1 S.C.R. 44, para. 25 (Can.).

238. *Id.* at para. 17.

239. *Id.* at paras. 27–47.

stopped short of requiring governments to make diplomatic representations on behalf of citizens,<sup>240</sup> the court's approach discounted the trial judge's focus on Khadr's youth and his conclusion that there was no alternative remedy, except for a repatriation request. The court's deference on the remedial question was in conflict with its prior rejection of non-justiciable political questions.<sup>241</sup> It also created the risk that the Canadian government might, as initially appeared to be the case,<sup>242</sup> do nothing in response to the court's declaration that Omar Khadr had still not received an effective remedy for the violation of his Charter rights in 2003 and 2004.

The Canadian government continued to refuse to request Omar Khadr's repatriation. In 2008, government backbenchers had dissented from a Parliamentary committee report that called on the government to request Khadr's repatriation on the basis that "Mr. Khadr could become a litmus test on Canada's commitment to impeding global terrorism and the results of our actions today could result in consequences that are not in the long-term interests of the country."<sup>243</sup> The Canadian government saw its refusal to request Omar Khadr's repatriation as a demonstration of its willingness to be tough on terrorism. It did, however, after some initial hesitation, respond to the Supreme Court of Canada's 2010 decision with a diplomatic note that requested that the United States not use evidence obtained by Canadian officials.

Even though Canada's request that the evidence not be used stopped well short of a repatriation request, the United States issued a non-responsive diplomatic note in reply, which simply stated that the military commission would decide under the Military Commission Act what evidence would be admissible.<sup>244</sup> It appears that some use was made of the videotaped interrogation conducted by Canadian security officials in Khadr's pre-trial

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240. *Abbasi v. Sec'y of State*, [2002] EWCA (Civ) 1598; *Kaunda v. President of South Africa*, 2004 (1) SA 1 (CC) at 4, para. 5 (S. Afr.).

241. *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441 (Can.).

242. *Khadr v. Canada*, [2010] F.C. 715, paras. 36-39 (Can.); *see also* Roach, *The Supreme Court at the Bar of Politics: The Afghan Detainee and Omar Khadr Cases*, *supra* note 39, at 147 n.135.

243. KEVIN SORENSON, M.P., REPORT OF THE STANDING COMM. ON FOREIGN AFFAIRS AND INT'L DEV., 39TH PARLIAMENT, 2D SESSION (June 2008), *available at* <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=3572352&Language=E&Mode=1&Parl=39&Ses=2>.

244. The diplomatic note is contained in *Khadr v. Canada*, [2010] F.C. 715, annex. B (Can.).

military commission proceedings.<sup>245</sup> In subsequent Canadian litigation, a lower court concluded that Khadr had still not received an effective remedy. The judge indicated that he could, if necessary, order the government to request Khadr's repatriation if that was the only effective remedy.<sup>246</sup> The Canadian government successfully sought a stay of that judgment pending appeal. The appeal court judge who issued the stay expressed doubts whether a court could order the government to request Khadr's repatriation in light of the Supreme Court of Canada's 2010 decision overturning that remedy as not respectful enough of the government's prerogative with respect to diplomacy.<sup>247</sup> If accepted, this restriction on remedies would represent a partial acceptance of an American style political question doctrine that would preclude judicial remedies that require the government to make diplomatic representations.<sup>248</sup> This appeal has now been declared moot given Khadr's subsequent plea agreement in the military commission.<sup>249</sup>

At one level, the failure of Khadr's litigation to secure his release reveals how Canada has capitulated to the United States' insistence, even under President Obama, on using military commissions and not closing Guantanamo. The Canadian government only asked for Khadr's return when asked to do so by the United States as part of a plea agreement that saved the Obama administration the embarrassment of placing Omar Khadr on trial for acts he committed as a fifteen-year-old.<sup>250</sup> The Canadian government was likely motivated by the immense unpopularity of the Khadr clan, a self-professed "al Qaeda family" and a desire not

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245. *Id.* at paras. 85–87.

246. *Id.*

247. *Canada (Prime Minister) v. Khadr*, [2010] F.C. 199, paras. 31–32 (Can.).

248. See generally Roach, *The Supreme Court at the Bar of Politics: The Afghan Detainee and Omar Khadr Cases*, *supra* note 39, at 142ff. For other criticisms of the Supreme Court of Canada's deference on the remedial question see David Rangaviz, *Dangerous Deference: The Supreme Court of Canada in Canada v. Khadr*, 46 HARV. C.R.-C.L. L. REV. 253 (2011).

249. *Khadr v. Canada*, [2011] F.C.A. 92 (Can.).

250. On October 23, 2010, the United States proposed, in a diplomatic note, that Khadr could serve the remainder of his sentence in Canada and that he would be eligible for parole under Canadian law after having served one third of his sentence. Canada replied in a diplomatic note of the same day that it wished "to convey that, as requested by the United States, the Government of Canada is inclined to favourably consider Mr. Khadr's application" to serve the remainder of his sentence in Canada. See Memorandum for Michael L. Bruhn, Executive Sec'y Dept. of Def., from United States Dept. of Defense 6 (Oct. 24, 2010), available at <http://www.cbc.ca/news/pdf/khadr-papers.pdf>.

to spend its limited political capital with Washington on security matters over Omar Khadr.

*C. American Proceedings with Respect to Omar Khadr*

Omar Khadr brought multiple legal challenges to his detention and trial at Guantanamo, both in federal court and in military proceedings. Unlike in Canada, however, his claims were generally rejected. Moreover, the nature of judicial reasoning both in federal court and by military judges fits into a pattern of extra-legalism in which legal doctrine is used to defer to military and Congressional authority and to resist merits-based review and tangible remedies.

*1. Federal Court Proceedings*

Omar Khadr's various attempts to obtain habeas corpus relief in American federal court all failed. In 2004, attempts on his behalf to obtain emergency relief relating to his mental competence were rejected with Judge Bates ruling that Khadr had failed to submit evidence calling into question his mental competence, that habeas corpus did not include remedies relating to mental competency, and that mental competence would only be relevant if he were facing a criminal trial.<sup>251</sup>

In 2005, requests for a preliminary injunction preventing the use of torture or degrading treatment against Khadr or his transfer to another country, such as Afghanistan where he had been threatened with sexual assault, were also denied. Judge Bates stressed that preliminary injunctions should be used sparingly and reacted very negatively to a request that Khadr not be interrogated. He stated:

Petitioners do not cite any law for the extraordinary notion that a court may forbid the interrogation of individuals captured in the course of ongoing military hostilities. Even supposing that the Court has the constitutional authority to intrude so dramatically on the prerogative of the Executive in the performance of the war power, petitioners do not offer a plausible legal or evidentiary basis for the exercise of that authority in this case.

. . . [P]etitioners have no answer to the declaration of a

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251. *O.K. v. Bush*, 344 F. Supp. 2d 44, 54–60 (D.C. Cir. 2004).

high-level military intelligence official detailing the critical role that the interrogation of Guantanamo detainees has played in the war on terror and the danger that an injunction against further questioning of detainees could pose to our nation's security. Petitioners' request for an injunction against interrogation has no likelihood of success on the merits and would present a grave risk to the public interest, and therefore will be denied.<sup>252</sup>

This ruling is a striking contrast with a decision of a Canadian court in the same year that issued a similar interlocutory injunction preventing Canadian officials from continuing to interrogate Omar Khadr at Guantanamo.<sup>253</sup>

Judge Bates refused to enjoin torture on the basis that even accepting "the most serious of petitioner's allegations—short-shackling in stress positions for extended periods, use of petitioner as a 'human mop,' abusive physical treatment by guards, and threats of sexual abuse," there was no evidence that such allegations dating to October 2003 would "suddenly materialize again in the near future."<sup>254</sup> This 2005 decision demonstrates how narrow standing and restrictive pleading combined with judicial deference to executive and military action<sup>255</sup> contributed to a process of extra-legalism in which American courts refused to intervene on Omar Khadr's behalf, even to the extent of issuing a relatively non-intrusive order that he not be tortured or subject to degrading treatment.

In 2008, Judge Bates again denied Omar Khadr habeas corpus relief. Judge Bates decided that he should abstain from granting relief while military commission proceedings were pending. He relied on doctrines of comity and deference to ongoing military proceedings as endorsed by the U.S. Supreme Court in *Schlesinger v.*

252. *O.K. v. Bush*, 377 F. Supp. 2d 102, 111 (D.C. Cir. 2005).

253. *Khadr v. Canada*, [2005] F.C. 1076 (Can.).

254. *O.K.*, 377 F. Supp. 2d at 113.

255. The judge stressed that "[t]his Court is not equipped or authorized to assume the broader roles of a congressional oversight committee or a superintendent of the operations of a military base." *Id.* at 114. He also refused to enjoin Khadr's transfer to a third country, relying on "the well-settled canon of statutory interpretation providing that a court should not construe a statute to interfere with the province of the Executive over military affairs in the absence of a clear manifestation of Congressional intent to do so." *Id.* at 117 (citing *Dep't of Navy v. Egan*, 484 U.S. 518, 527 (1988) ("Unless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs.")).

*Councilman*.<sup>256</sup> He also restrictively interpreted *Boumediene v. Bush*<sup>257</sup> as only granting Guantanamo detainees the ability to use habeas corpus to challenge the legality of their detention and not their conditions of confinement. On this narrow basis, he held that *Boumediene* had not invalidated previous statutory restrictions on the use of habeas corpus to challenge conditions of confinement at Guantanamo.<sup>258</sup> Again, there is a striking contrast with more generous Canadian jurisprudence, which has long recognized that habeas corpus could be used to challenge conditions of detention.<sup>259</sup> Judge Bates's approach to this issue illustrates how narrow rulings promoted by a case-by-case constitutional minimalism<sup>260</sup> supported extra-legalism. A narrow parsing of legal authority maximized executive and military authority and allowed Omar Khadr to continue to be detained with adults.

In 2010, Judge Bates allowed Khadr to amend his habeas petition, but again denied it on grounds that the federal courts should defer to ongoing military commission proceedings. Judge Bates stated, "[T]he Constitution does not require that every protection available in criminal trials must apply in military commission proceedings for Guantánamo detainees."<sup>261</sup> He stressed that Khadr could eventually appeal his military commission proceedings to the federal courts, and, as such, that the court would "assume that the military court system created by the Military Commissions Act of 2009 will vindicate Khadr's rights."<sup>262</sup> This

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256. *Khadr v. Bush*, 587 F. Supp. 2d 225, 230–34 (D.D.C. 2008) (citing *Schlesinger v. Councilman*, 420 U.S. 738, 740 (1975) ("Although the District Court may have had subject-matter jurisdiction, we think that the balance of factors governing exercise of equitable jurisdiction by federal courts normally weighs against intervention, by injunction or otherwise, in pending court-martial proceedings.")).

257. 553 U.S. 723 (2008).

258. *Khadr*, 587 F. Supp. 2d at 235–37.

259. *Cardinal v. Dir. of Kent Inst.*, [1985] 2 S.C.R. 643 (Can.).

260. CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* ix–xiii (1999). The approach of constitutional minimalism can be contrasted with the more robust approach to judicial review advocated by President Aharon Barak of the Israel Supreme Court in *Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 97–162 (2002).

261. *Khadr v. Obama*, 727 F. Supp. 2d 61, 67 (D.D.C. 2010).

262. *Id.* at 68. The Court of Appeals had previously refused to hear an interlocutory appeal, concluding that, as in other cases, appeals could be heard after verdict. *Khadr v. United States*, 529 F.3d 1112, 1119 (D.C. Cir. 2008). Chief Judge Sentelle concluded, "Khadr has pointed solely to the interest that the public has in ensuring that all criminal proceedings are just. That interest does not

approach used the promise of future and delayed legalism as a reason not to examine whether Khadr's rights would be violated by trial by military commission. As will be seen, Khadr enjoyed little success in multiple rounds of litigation before military courts. Instead of waiting for the remote prospect of possible appellate relief, he gave up and eventually pled guilty before his military commission. The American process held out promises of legality and justice but did not provide Omar Khadr any tangible relief.

## 2. *Military Proceedings*

The public files made available by the Department of National Defense on the Omar Khadr case are voluminous,<sup>263</sup> and, in that sense, they contradict the idea that Guantanamo was ever a lawless black-hole. As Jack Goldsmith has argued, many of the infamous tactics used after 9/11, including the torture memos, were the result of a legalistic approach to counter-terrorism.<sup>264</sup> The heavily lawyered approach, however, often verged on extra-legalism in the sense that it represented a form of rule by law in which legalistic claims were made in support of actions that were unfair and would be viewed by many as contrary to the rule of law. The first entry in Khadr's public case file is revealing; it is President Bush's memo of February 7, 2002, noting that he accepted the Department of Justice's opinion that the Geneva Conventions would not apply to either al Qaeda or Taliban detainees, and that the actions of terrorists had ushered in "a new paradigm" that "requires new thinking in the law of war."<sup>265</sup>

Although there were many changes to Guantanamo during Omar Khadr's detention, Khadr's case continued to represent a "new paradigm" that fell outside the traditional laws of war and crime. This new paradigm, as represented by the Military

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warrant our interruption of this criminal proceeding just because it is a military commission." *Id.* at 1118–19.

263. See *Public Files of Omar Ahmed Khadr*, MILITARY COMMISSIONS, <http://www.mc.mil/CASES/MilitaryCommissions.aspx> (click "Omar Ahmed Khadr Completed"; follow hyperlink and click "Category" to choose which file to access) (last visited Apr. 17, 2012).

264. JACK GOLDSMITH, *THE TERROR PRESIDENCY* 141–76 (2007).

265. Presidential Memorandum Regarding Detainees (Feb. 7, 2002), available at <http://www.mc.mil/CASES/MilitaryCommissions.aspx> (follow "Omar Ahmed Khadr" hyperlink; under "Category" tab, select "Docket"; at the bottom of the page, follow ". . ." hyperlink; at the bottom of the page, follow "16" hyperlink; follow "Presidential Memo—Subject: Humane Treatment of al Qaeda and Taliban Detainees" hyperlink) (last visited Apr. 17, 2012).

Commission Act, combines crimes such as murder, conspiracy, and material support of terrorism, which have traditionally been the preserve of criminal law, with other crimes that have been better recognized under the laws of war. The result is a process that remains controversial because it allows the state to allege crimes while depriving the accused of some of the benefits of the criminal trial process, most notably trial before a civilian jury. Conversely, it allows the state to use trial by military commission, while depriving the accused of some combatant privileges that would normally be available under the laws of war.

Guantanamo involved both a process of reviewing military detention through the combatant status review tribunals and trials before military commissions. The combatant status review tribunals were inspired by Justice O'Connor's opinion in *Hamdi v. Rumsfeld*,<sup>266</sup> indicating that due process in the context of military detention did not require all the protections of the criminal trial process.<sup>267</sup> This approach, at least as it could be applied to American citizens, was criticized by Justice Scalia (in a dissent joined by Justice Stevens) as an "unheard-of system in which the citizen rather the Government bears the burden of proof, testimony is by hearsay rather than live witnesses, and the presiding officer may well be a 'neutral' military officer rather than judge and jury."<sup>268</sup> The combatant status review tribunals allowed the use of secret evidence. Omar Khadr refused to participate in such a process, and his status as an enemy combatant was upheld on the basis of classified or secret evidence in September 2004.<sup>269</sup>

The Military Commissions Act of 2006 did not authorize the use of secret evidence, but it did include a number of crimes that were not traditionally recognized in the law of war. Khadr was charged with murder and attempted murder in violation of the law of war, even though his actions in throwing a grenade during a battle arguably were within the laws of war, since they did not

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266. 542 U.S. 507 (2004).

267. *See id.* at 533.

268. *Id.* at 575 (Scalia, J., dissenting). For criticism of Justice O'Connor's opinion, see Kent Roach & Gary Trotter, *Miscarriages of Justice in the War Against Terror*, 109 PENN ST. L. REV. 967, 1014-32 (2005).

269. Omar Khadr Combatant Status Review Tribunal Determination (Sept. 10, 2004), available at <http://www.mc.mil/CASES/MilitaryCommissions.aspx> (click "Omar Ahmed Khadr" hyperlink; under "Category" tab, select "Docket"; at the bottom of the page, click ". . ." hyperlink; at the bottom of the page, click "16" hyperlink; follow "Combatant Status Review Tribunal Determination" hyperlink) (last visited Apr. 17, 2012).



constitute killing by treachery or perfidy or killing with weapons prohibited by the laws of war.<sup>270</sup> Khadr was also charged with conspiracy, even though four Supreme Court Justices in *Hamdan* concluded that conspiracy was not part of the laws of war.<sup>271</sup> He was also charged with material support of terrorism, a charge clearly available under American criminal law, where Khadr could be tried by a federal court exercising extra-territorial jurisdiction, but not one recognized under the laws of war. Finally, he was charged with spying, which is an offense in the law of war, but one that does not apply to someone like Khadr, who was not behind enemy lines.<sup>272</sup>

Khadr's lawyers before the military commission brought a large number of challenges to these charges. They argued that the commission did not have jurisdiction over crimes such as murder and conspiracy. They also argued that the military commission did not have jurisdiction because Khadr was a child soldier. In a number of generally terse decisions, these motions were all rejected. In one ruling, Military Judge Brownback asserted that Congress had a reasonable basis for acting and that it simply recognized crimes that existed in 2002 when Khadr was alleged to have committed them.<sup>273</sup> He also denied the child soldier motion on the basis that there was no age limit placed on the definition of unlawful enemy combatants in the Military Commissions Act. He reasoned that these provisions would prevail even if treaties prohibited trials of a person for acts committed when he was fifteen years of age. Even though treaties technically have the status of law in the United States, consistent with extra-legalism, they are

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270. See David Glazier, *A Court Without Jurisdiction: A Critical Assessment of the Military Commission Charges Against Omar Khadr*, SSRN, 11 (Sept. 1, 2010), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1669946](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1669946) (explaining ways an enemy-combatant may also be prosecuted for war crimes).

271. *Hamdan v. Rumsfeld*, 548 U.S. 557, 598–612 (2006). Justice Kennedy held that it was unnecessary to decide this question. *Id.* at 655 (Kennedy, J., concurring).

272. Glazier, *supra* note 270, at 28.

273. *United States v. Khadr*, Ruling on Def. Mot. to Dismiss Charge Three for Lack of Subject Matter Jurisdiction 4, (Apr. 21, 2008), available at <http://www.mc.mil/CASES/MilitaryCommissions.aspx> (follow "Omar Ahmed Khadr" hyperlink; under "Category" tab, select "Docket"; at the bottom of the page, follow ". . ." hyperlink; at the bottom of the page, follow "12" hyperlink; follow "Military Judge's Order Denying Defense Motion to Dismiss Charge Three for Lack of Subject Matter Jurisdiction (D-010)" hyperlink) (last visited Apr. 17, 2012).

generally not directly enforceable.<sup>274</sup> In another decision, the military court judge similarly held that even if the Optional Protocol to the Convention on the Involvement of Children in Armed Conflict prohibited the use of statements, the Military Commissions Act would take precedence with respect to the admissibility of statements taken from Khadr.<sup>275</sup> One feature of American extra-legalism is a narrow positivism in which literal interpretations of domestic statutes generally trump claims based on international law or appeals to justice or equity.

Khadr was denied several rights that would have been available to him if tried in criminal courts as a juvenile. The military court judge held that provisions for trials of juveniles in federal court would not apply because military commissions fell outside of the definition of federal courts.<sup>276</sup> Khadr also did not have speedy trial rights because of his lack of connection to the United States and because he did not face a criminal prosecution under the Sixth Amendment.<sup>277</sup> In August 2010, Military Judge Parrish ruled on a critical suppression motion in a nine-page judgment. He decided that while there was evidence of an interrogator telling Khadr a fictional story about an Afghan prisoner being raped in an American prison, the threat did not amount to torture. He also found that the threat was not related to Khadr's subsequent incriminating statements.<sup>278</sup> The judgment found that Khadr's

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274. Oona A. Hathaway, Sabria McElroy & Sara Aronchick Solow, *International Law at Home: Enforcing Treaties in U.S. Courts*, 37 *YALE J. INT'L L.* 51 (2012).

275. *United States v. Khadr*, Ruling on Def. Mot. to Suppress Evidence of Statements (Violation of Child Soldier Protocol), (Aug. 15, 2008), available at <http://www.mc.mil/CASES/MilitaryCommissions.aspx> (follow "Omar Ahmed Khadr" hyperlink; under "Category" tab, select "Docket"; at the bottom of the page, follow "9" hyperlink; follow "Military Judge's Order Denying Defense Motion to Suppress Evidence of Statements (Violation of Child Soldier Protocol) (D-062)" hyperlink) (last visited Apr. 17, 2012).

276. *See United States v. Khadr*, Ruling on Def. Mot. for Dismissal Due to Lack of Jurisdiction Under the MCA in Regard to Juvenile Crimes of a Child Soldier (Apr. 30, 2008), available at <http://www.defense.gov/news/d20080430Motion.pdf>.

277. *United States v. Khadr*, Ruling of Def. Mot. To Dismiss (for Violation of the Sixth Amendment Right to a Speedy Trial), (Sept. 15, 2008), available at <http://www.mc.mil/CASES/MilitaryCommissions.aspx> (follow "Omar Ahmed Khadr" hyperlink; under "Category" tab, select "Docket"; at the bottom of the page, follow "8" hyperlink; follow "Military Judge's Order Denying Defense Motion to Dismiss for Violation of the Sixth Amendment Right to a Speedy Trial (D-068)" hyperlink) (last visited Mar. 10, 2012).

278. *United States v. Khadr*, Ruling on Suppression Motions D-097 and D-111, at 9, (Aug. 17, 2010) available at <http://www.mc.mil/CASES/MilitaryCommissions.aspx> (follow "Omar Ahmed Khadr" hyperlink; under "Category" tab, select

statements were voluntary, not the product of mistreatment, and that the incriminating videotape was not “‘fruit of the poisonous tree’ as there is no ‘poisonous tree.’”<sup>279</sup> The rhetoric of a due process exclusionary rule widely but perhaps erroneously perceived as stacked in favor of the accused was used as a means to dismiss relief. Omar Khadr was denied many of the benefits of a criminal trial while at the same time subject to military prosecution for acts that have traditionally not been recognized as war crimes. Law was used, but systemically to the advantage of the state and to the disadvantage of Omar Khadr.

Shortly after the August 2010 ruling refusing to exclude incriminating statements, as well as the October 2010 exchange of diplomatic notes between Canada and the United States that contemplated that Khadr could serve much of his sentence in prison in Canada,<sup>280</sup> Khadr pled guilty to the charges of murder, attempted murder, conspiracy, material support of terrorism, and spying. Consistent with extra-legalism, in which law is used to preclude legal claims, his plea agreement includes an agreement that he will not bring claims relating to his capture, detention, or trial “in any forum in any Nation.”<sup>281</sup> In this way, Khadr’s plea agreement echoed President Bush’s initial military order that attempted to preclude any judicial review of the detentions whether in American or foreign courts.<sup>282</sup>

According to the terms of his plea agreement, Omar Khadr received an eight-year sentence. The result for Khadr was far better than the forty-year sentence that the “jury” of military officers would have imposed on Khadr after hearing testimony from

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“Docket”; at the bottom of the page, follow “2” hyperlink; follow “Military Judge’s Order Denying Defense Motions to Suppress the Accused Statements (D-097) and Video Tape (D-111)” hyperlink) (last visited Apr. 17, 2012).

279. *Id.*

280. United States v. Khadr, U.S. and Canadian Diplomatic Notes Dated 10/23/2010 (Oct. 24, 2010), *available at* <http://www.mc.mil/CASES/MilitaryCommissions.aspx> (follow “Omar Ahmed Khadr” hyperlink; under “Category” tab, select “Docket”; follow “U.S. and Canadian Diplomatic Notes Dated 10/23/2010” hyperlink) (last visited Apr. 17, 2012).

281. United States v. Khadr, Khadr Military Commission Approved Offer for Pre-trial Agreement (Oct. 13, 2010), *available at* <http://www.mc.mil/CASES/MilitaryCommissions.aspx> (follow “Omar Ahmed Khadr” hyperlink; under “Category” tab, select “Docket”; at the bottom of the page, follow “2” hyperlink; follow “Khadr Military Commission Approved Pretrial Agreement” hyperlink) (last visited Apr. 17, 2012).

282. Exec. Order No. 13235, National Emergency Construction Authority, 66 Fed. Reg. 58,343 (Nov. 20, 2001).

Tabitha Speer, the widow of Sergeant Speer, who Khadr admitted to killing with a grenade.<sup>283</sup> Mrs. Speer testified that “[e]veryone wants to talk about how he’s the victim, he’s the child. I don’t see that. The victims, the children, are my children” who were eleven and eight-years old at the time of the sentencing.<sup>284</sup> Her moving victim impact statement was consistent with populist and victim rights strains in the American criminal process.<sup>285</sup> The Speer family also obtained a default judgment for \$94.5 million against the Khadr family in the U.S. District Court for the District of Utah, with Judge Cassell holding that Khadr’s actions were not “acts of war” for the purposes of civil suit even though they were treated as war crimes for purposes of Omar Khadr’s military detention and trial.<sup>286</sup> Consistent with the new paradigm represented by the Military Commissions Act, Khadr and his family were deprived of the benefits that would accrue both to soldiers and civilians.

Concerns linger about the legitimacy of the guilty plea, both in relation to the military commission’s purported jurisdiction over the offenses and the pre-trial ruling that Khadr’s incriminatory statements were not tainted by threats that he would be raped in an American prison.<sup>287</sup> As discussed above, Khadr’s attempts to challenge the jurisdiction of the military commission in federal court were thwarted by multiple rulings by Judge Bates, who held that he should defer to the ongoing military proceedings and would assume that Khadr’s rights would be vindicated either in the military commission or on appeal to the civilian courts. Former Guantanamo detainee David Hicks has argued that Khadr, like himself, only pled guilty in order to leave Guantanamo and because he was convinced that no military commission would render an

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283. *Omar Khadr Sentenced to Symbolic 40 Years*, CBC NEWS (Oct. 31, 2010), <http://www.cbc.ca/news/world/story/2010/10/31/guantanamo-khadr-sentencing.html>.

284. Jennifer Turner, *The Victims*, ACLU (Oct. 29, 2010), <http://www.aclu.org/blog/human-rights-national-security/victims>.

285. See, e.g., *Payne v. Tennessee*, 501 U.S. 808 (1991) (allowing victim impact statements in capital sentencing proceedings); DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* (2002); DAVID GARLAND, *PECULIAR INSTITUTION: AMERICA’S DEATH PENALTY IN AN AGE OF ABOLITION* (2011); Kenji Yoshino, *The City and the Poet*, 114 YALE L.J. 1835 (2005).

286. *Morris v. Khadr*, 415 F. Supp. 2d 1323, 1333–34 (“The court refuses to be al Qaeda’s advocate and force plaintiffs to prove that, in fact, al Qaeda’s members are not ‘military forces of any origin’ that would be entitled to immunity under [§ 2336(a)].”).

287. Suppression Motion Ruling by Military Court Judge Colonel Parish D-094, D-111, (17 Aug. 2010), available at <http://www.defense.gov/news/D94-D111.pdf>.

acquittal.<sup>288</sup>

What will happen to Omar Khadr? He remains in Guantanamo as of mid-March 2012, and arguments have surfaced in Canada that the Canadian government should reject his transfer to Canada on the basis that he constitutes a threat to national security.<sup>289</sup> The plea agreement recognizes that, if transferred to Canada, Omar Khadr will be eligible for release under controls by the Canadian parole board after having served a third of his eight-year sentence. Once his eight-year sentence expires, Omar Khadr will not be subject to controls. However, under a provision added to the Canadian Criminal Code after 9/11,<sup>290</sup> he could potentially be subject to restrictions through a peace bond if a judge concludes that there is a reasonable fear that he will commit a terrorism offense. American legislative restrictions on transfer of Guantanamo detainees to foreign countries specifically do not apply to plea agreements like Khadr's that were reached before the passage of the National Defense Authorization Act for 2012.<sup>291</sup>

It is an interesting, but probably academic question whether these strict certification requirements would be satisfied by the release of Omar Khadr in Canada. They would require Canada to agree to take actions that would satisfy the U.S. Secretary of Defense that Omar Khadr would not engage in any terrorist activity and to share information with the United States about Khadr and

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288. David Hicks, *Pressure to Plead Guilty*, 29(4) Human Rights Defender, 14 (2010), available at <http://www.amnesty.ca/files/David%20Hicks%20Opinion%20re%20Omar%20Khadr%20Pressure%20to%20Plead%20Guilty%20Nov%202010.pdf>.

289. Under section 10 of the International Transfers of Offenders Act, S.C. 2004, c. 21 (Can.), the Canadian Minister of Public Safety has discretion whether to accept Canadian citizens to serve prison sentences in Canada. The Minister can consider factors including whether the offender's return would constitute a threat to the security of Canada, whether the offender after transfer will commit a terrorism offense, and whether the foreign confinement threatens an offender's security or human rights. The diplomatic notes exchanged by Canada with the United States surrounding Khadr's agreement, however, provides in part that "[t]he Government of Canada therefore wishes to convey that, as requested by the United States, the government is inclined to favourably consider Mr. Khadr's application to be transferred to Canada to serve the remainder of his sentence . . . ." Memorandum for Michael L. Bruhn Executive Secretary Dep't of Defense, (2010), available at <http://www.cbc.ca/news/pdf/khadr-papers.pdf>.

290. Criminal Code of Canada, R.S.C. 1985, c. C-46, s. 810.01, amended by S.C. 2001, c. 41 s. 22 (Can.).

291. National Defense Authorization Act for Fiscal Year 2012, s.1028 (2)(b) (Can.).

his associates that could affect the security of the United States.<sup>292</sup> As will be seen in the next section, however, Omar Khadr's older brother, Abdullah Khadr, who has confirmed his admiration for the 9/11 terrorists, has been free in Canada since August 2010, and is not subject to any restrictions or charges. There is also a possibility that once Omar Khadr is returned to Canada, he might, despite the terms of his plea agreement, attempt directly or indirectly to challenge his treatment or guilty plea at Guantanamo given that Canadian courts have already indirectly reviewed his detention at Guantanamo. Canadian litigation over Omar Khadr and, as will be seen below, over Abdullah Khadr, indicates how American counter-terrorism can be subject to indirect challenge in the courts of other countries.

*D. Canadian Rejection of the Attempt to Extradite Abdullah Khadr to the United States*

Although Canada and the United States eventually reached agreements in the Omar Khadr case that encouraged him to plead guilty and contemplate his return to Canada, there has been much more conflict between Canada and the United States over the treatment of Omar's older brother Abdullah. Abdullah Khadr was captured by the Inter-Services Intelligence Directorate (ISI) in Pakistan in October 2004 after the United States posted a \$500,000 bounty for his capture.<sup>293</sup> The fact that the United States paid such a bounty was a secret until it was revealed by a Canadian judge in state secrets proceedings related to an American extradition request to Canada.<sup>294</sup> The judge stressed that, while the United States had not agreed to the release of information about the bounty, "[i]t is now more than three years since the information was received by Canadian officials, the general practice is in the public domain, no human source would appear to be at risk and the circumstances in Pakistan have changed since these events took place."<sup>295</sup>

Abdullah Khadr alleged he was tortured by Pakistani officials, but a Canadian extradition judge found these allegations of torture were not established because of inconsistencies in Khadr's story.<sup>296</sup>

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292. *Id.* s.1028(2)(b)(1), (d)-(f).

293. *United States v. Khadr*, 2011 ONCA 358, para. 7 (Can.).

294. *Khadr v. Canada*, 2008 F.C. 549, para. 107 (Can.).

295. *Id.* at para. 111.

296. *United States v. Khadr*, 2010, ONSC 4338, para. 61 (Can.).

Khadr also did not complain of abuse during the consular visits he eventually received from Canadian officials, though he was also not asked by consular officials if he had been abused.<sup>297</sup> The extradition judge found that Khadr was physically abused by Pakistani officials but not by an unnamed American intelligence agency when they extensively interviewed him in Pakistan.<sup>298</sup>

Abdullah Khadr was held for fourteen months in a secret detention center in Pakistan without access to counsel or courts. He was denied consular access to Canadian officials until January 2005.<sup>299</sup> The Canadian extradition judge found that Pakistan and the United States acted “in concert” to deny access in order to facilitate interrogation by U.S. intelligence.<sup>300</sup> Thereafter, however, Khadr received consular visits and Canadian officials consistently and eventually successfully lobbied Pakistani officials for his return to Canada. In this way, the officials responded to some of the lessons from the Arar affair. The Arar inquiry criticized the Canadian government for sending “mixed signals” about whether it wanted Maher Arar returned to Canada.<sup>301</sup> Although Canadian officials acted properly in requesting Khadr’s return to Canada, it is ironic that such action assisted Abdullah Khadr, who had publicly admitted his support for al Qaeda, and not Maher Arar.

In June 2005, the Pakistani authorities were prepared to release Khadr, concluding that they had gained all the intelligence from him that was possible. As in the Arar case, however, American officials were alarmed at the prospect that Khadr might return to Canada. In June 2005, a Canadian CSIS officer “received a phone call from his American intelligence counterpart telling him the U.S. agency disagreed with and was concerned about plans to repatriate Khadr to Canada. The United States believed Khadr still posed a threat and that releasing him at this point was not a wise course of action.”<sup>302</sup> As in the Arar case, Canada was the last place that U.S. officials wanted Khadr sent because of the porous border it shares with the United States. U.S. officials supported plans to transfer Khadr to the Pakistani court system, but the ISI vetoed this idea for fear that it might result in disclosure of their agents,

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297. *Id.* at paras. 46, 55.

298. *Id.* at paras. 105–06.

299. *Id.* at paras. 57.

300. *Id.* at paras. 116, 120.

301. COMMISSION OF INQUIRY ANALYSIS AND RECOMMENDATIONS, *supra* note 4, at 206–19.

302. *United States v. Khadr*, 2010 ONSC 4338, para. 69 (Can.).

sources, and methods.<sup>303</sup> Thereafter, U.S. officials devoted their efforts to preparing a criminal case against Khadr in the United States. They requested that Pakistan render or extradite Khadr directly to the United States, despite the objections of Canadian officials.<sup>304</sup> Even if Khadr had been irregularly rendered to the United States at that time, the process used to bring him to the United States and his mistreatment in Pakistan would not have been relevant under the *Ker/Frisbie*<sup>305</sup> doctrine with respect to any terrorism trial in the United States. As will be seen, the mistreatment of Khadr in Pakistan was much more relevant to Canadian courts in deciding whether to extradite him to the United States.

Why did U.S. officials not want Abdullah Khadr returned to Canada? They likely would have known that Khadr would not be charged and detained if returned to Canada, given that an RCMP officer, who went to Pakistan in April 2005 to interview Khadr, refused to conduct an interview for law enforcement purposes, when Pakistani officials would not allow Khadr to contact his Canadian lawyer or allow the RCMP to videotape the interview.<sup>306</sup> As discussed above, Canada does not have a tradition of pretextual charges as a means of detaining those suspected of other crimes. The admissibility of any statements that Khadr made in Pakistan could also be challenged under the Charter, given that his conditions of confinement violated international law because of the lack of access to courts and counsel.<sup>307</sup> In any event, Canadian courts would reject involuntary statements in part because of concerns that they might be false confessions.<sup>308</sup> Canada's concerns about due process made it difficult to prosecute Abdullah Khadr in Canada. In 2005, American officials would have been troubled by Canada's inability to gain convictions in terrorism prosecutions. In

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303. *Id.* at para. 65.

304. *Id.* at para. 75.

305. See *United States v. Alvarez-Machain*, 504 U.S. 655 (1992); *Frisbie v. Collins*, 342 U.S. 519 (1952); *Ker v. Illinois*, 119 U.S. 436 (1886).

306. *United States v. Khadr*, 2010 ONSC 4338, at paras. 62–63 (Can.).

307. See *R. v. Hape* [2007] 2 S.C.R. 292, para. 91 (Can.) (stating that “*ex post facto* scrutiny of the investigation by a Canadian court in a Canadian trial . . . might result in the exclusion of evidence gathered in breach of the *Charter*” outside of Canada) (italics in the original); *Khadr v. Canada* [2010] 1 S.C.R. 44 (Can.).

308. See *R. v. Oickle* [2000] 2 S.C.R. 3, para. 68 (Can.) (“[B]ecause of the criminal justice system’s overriding concern not to convict the innocent, a confession will not be admissible if it is made under circumstances that raise a reasonable doubt as to voluntariness.”).



that year, two men accused of the 1985 Air India bombings were acquitted after a long and difficult trial,<sup>309</sup> and no convictions had yet been registered under the 2001 Anti-Terrorism Act.<sup>310</sup> After the RCMP refused to interview Khadr for law enforcement purposes, the United States sent the FBI to Pakistan to interview him for law enforcement purposes. The United States also attempted without success to persuade the Pakistanis to allow him to be brought to the United States for trial.<sup>311</sup> Although the secrecy of both events prevents a definitive conclusion, it is likely that the unwillingness of Canadian officials to charge and detain both Maher Arar in 2002 and Abdullah Khadr in 2005 prompted American officials to seek alternatives to returning a Canadian citizen to Canada.

In July 2005, FBI agents interviewed Khadr in Pakistan for law-enforcement purposes. American officials in August 2005 subsequently attempted, without success, to have Khadr “sent directly to the United States.”<sup>312</sup> In November 2005, “a senior United States official” asked Canada to consent to further delay in Khadr’s release and return to Canada so that the U.S. officials could “‘get their act together’ with respect to extradition plans.”<sup>313</sup> The Canadian officials, perhaps mindful of the controversies caused by delays in agreeing to Maher Arar’s return,<sup>314</sup> refused. Khadr was released to Canadian consular officials and flown back to Canada at the end of November 2005. Unlike Mohammed Mansour Jabarah, Abdullah Khadr was not transferred to American custody by Canadian officials, with no legal process, and in violation of his Charter rights, including his right as a Canadian citizen to remain in Canada.<sup>315</sup> The Canadian officials in the Abdullah Khadr case respected his consular rights and were successful in convincing Pakistan to return Khadr to Canada and not the United States. At the same time, however, Canadian officials were not prepared to charge Khadr. Unlike the FBI, Canadian officials concluded that they could not gather evidence

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309. *R. v. Malik*, 2005 BCSC 350, para. 1345 (Can.).

310. *See R. v. Khawaja*, 2010 ONCA 862, para. 189 (Can.) (noting that the sentencing of Khawaja in 2006 was “the first sentencing under Canada’s Part II.1 Terrorism provisions”).

311. *United States v. Khadr*, 2010 ONSC 4338, paras. 73–75 (Can.).

312. *Id.* at para. 75.

313. *Id.* at para. 76.

314. *See* COMMISSION OF INQUIRY ANALYSIS AND RECOMMENDATIONS, *supra* note 4, at 206–29.

315. *See* SEC. INTELLIGENCE REVIEW COMM., *supra* note 126, at 1160 (providing a review of the case of Mohammed Mansour Jabarah).

for law enforcement purposes from Abdullah Khadr while he was detained in Pakistan.<sup>316</sup>

The FBI maintained their interest in Khadr after he returned to Canada and was not prepared to cede any criminal investigation to Canadian officials. They sent the same two agents who had interviewed Khadr in Pakistan to interview him in Toronto with representatives of the RCMP present.<sup>317</sup> A Canadian extradition judge would have excluded the results of the Toronto FBI interview because he found that they were derived from the interviews in Pakistan. In those interviews, Khadr admitted to supplying al Qaeda with machine gun rounds, grenades, rockets, and explosive material to be used against American and coalition forces.<sup>318</sup> The Canadian extradition judge found that the statements obtained from the Pakistan interview should be excluded in extradition proceedings as manifestly unreliable because they were conducted in a “hostile and oppressive environment” in which Khadr was denied access to counsel and the courts.<sup>319</sup> The contrast between this ruling and the military commission ruling refusing to exclude statements taken from Omar Khadr when, as a younger person, he was also detained without access to counsel and courts is striking.<sup>320</sup> American courts also are unwilling to exclude evidence in extradition proceedings that may have been obtained through torture or mistreatment under general rules of non-inquiry.<sup>321</sup> Canadian extradition courts now require higher standards of adjudicative fairness than American military commissions or American extradition courts.

Another contrast between the Omar and Abdullah Khadr cases is the different remedial posture taken by the Canadian courts. As discussed above, the Supreme Court of Canada reversed a mandatory order that Canada request Omar Khadr’s return from

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316. See *Canada (Att’y Gen.) v. Khadr*, 2010 ONSC 4338, para. 62 (Can. Ont. Sup. Ct. J.).

317. *Id.* at paras. 86–94.

318. *United States v. Khadr*, [2008] 234 C.C.C. 3d 129, para. 8 (Can.).

319. *Id.* at para. 161.

320. See *Defense Motion to Suppress Evidence of Statements (in Violation of Child Soldier Protocol)*, *United States v. Khadr*, (May 29, 2008), available at <http://www.defense.gov/news/khadr%20-%20d%20-%20062%20child%20soldier%20protocol.pdf>.

321. *Atuar v. United States*, 156 Fed. App’x 555, 563 (4th Cir. 2005) (refusing to exclude evidence in extradition proceedings claimed to be derived from torture in Turkey). See generally Mathew Murchison, *Extradition’s Paradox: Duty, Discretion and Rights in the World of Non-Inquiry*, 43 STAN. J. INT’L. L. 295 (2007).

the United States on the basis that it did not give adequate weight to governmental prerogatives in conducting Canadian-American diplomacy.<sup>322</sup> In the Abdullah Khadr case, the extradition judge found that a stay of proceedings of the extradition case was warranted given American conduct in this case. Justice Speyer concluded:

Although Khadr may have possessed information of intelligence value, he is still entitled to the safeguards and benefit of the law, and not to arbitrary and illegal detention in a secret detention centre where he was subjected to physical abuse. The United States was the driving force behind Khadr's fourteen month detention in Pakistan, paying a \$500,000 bounty for his apprehension. The United States intelligence agency acted in concert with the ISI to delay consular access by DFAIT to Khadr for three months, contrary to the provisions of the *Vienna Convention*. The United States, contrary to Canada's wishes, pressured the ISI to delay Khadr's repatriation because of its dissatisfaction with Khadr being released without charge, even though there was no admissible evidence upon which to base charges at that time. In my view, given this gross misconduct, there cannot be a clearer case that warrants a stay.<sup>323</sup>

In reaching this conclusion, the extradition judge relied on a 2001 Supreme Court of Canada judgment that stayed extradition proceedings after an American prosecutor had threatened a fugitive with a maximum sentence and hinted at the possibility of rape in an American prison if the fugitive contested extradition to the United States.<sup>324</sup> The contrast between the Canadian approach, which held that the extradition was tainted by mistreatment, and the approach taken by the military judge in the Omar Khadr case, who concluded that a threat of rape in American prison did not taint any of Omar Khadr's subsequent statements, is also striking.<sup>325</sup>

It is also significant that the Canadian courts did not base their decisions to stay Abdullah Khadr's extradition to the United States on the basis that he is a Canadian citizen. The courts applied

322. *Canada v. Khadr*, [2010] 1 S.C.R. 44, para. 2 (Can.).

323. *See Canada (Att'y Gen.) v. Khadr*, 2010 ONSC 4338, para. 150 (Can.) (italics in original).

324. *See id.* at para. 127 (citing *United States v. Cobb*, 2001 SCC 19, para. 9 (Can.)).

325. *See Ruling on Suppression Motion, United States v. Khadr*, (Aug. 17, 2010), available at <http://www.defense.gov/news/D94-D111.pdf>.

standards of fairness taken from section 7 of the Canadian Charter, which applies to all persons and not just Canadian citizens. The increasing due process orientation of Canadian extradition proceedings could potentially frustrate American-Canadian cooperation on extradition matters. For example, the Canadian courts will likely not allow anyone to be extradited from Canada to the United States without assurances that the United States will not apply the death penalty.<sup>326</sup> In addition, an Iraqi national held in Canada is currently resisting extradition to the United States on terrorism charges related in suicide bombings in Iraq in part on the basis that as a foreign national in the United States he will be liable to military detention and trial in the United States under the National Defense Appropriation Act.<sup>327</sup>

The decision to stay extradition proceedings against Abdullah Khadr led to his release after four-and-a-half years of pre-extradition custody.<sup>328</sup> Canadian judges had denied Khadr bail first in 2006 and later in 2009 because of concerns that he might flee the jurisdiction given his and his family's history.<sup>329</sup> The judges also found that granting Khadr bail would adversely affect public confidence in the justice system.<sup>330</sup> The judge who denied bail in 2006 noted that Abdullah Khadr attended al Qaeda training camps at the bin Laden compound. The judge also noted that Abdullah

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326. *United States v. Burns*, [2001] 1 S.C.R. 283 (Can.).

327. The case involves an attempt to extradite Sayfidin Tahir-Sharif, also known as Faruq Khalil Muhammad 'Isa, on charges related to a suicide bombing in Iraq that killed five American soldiers. *Hearing Delayed for Canadian Facing Terrorism Charges*, GLOBE & MAIL, Jan. 30, 2012. For details of the indictment see Press Release, *Alleged Terrorist Indicted in New York for the Murder of Five American Soldiers*, FBI (Dec. 9, 2011), <http://www.fbi.gov/newyork/press-releases/2011/alleged-terrorist-indicted-in-new-york-for-the-murder-of-five-american-soldiers>. Presidential waivers of military custody under s.1022 of the National Defence Appropriations Act can be granted in cases where a foreign country indicates that it will not extradite or transfer terrorist suspects to the United States if that option is available.

328. See *Abdullah Khadr Released After Court Ruling*, CBC NEWS, Aug. 4, 2010, <http://www.cbc.ca/news/canada/story/2010/08/04/abdullah-khadr-extradition.html>.

329. See *United States v. Khadr*, [2006] 262 D.L.R. (4th) 652, paras. 44–65 (Can. Ont. Sup. Ct. J.); *United States v. Khadr*, [2008] 234 C.C.C. (3d) 129, para. 16 (Can. On. Sup. Ct. J.).

330. Bail can be denied in Canada because of concerns that (1) the accused will not appear for trial or (2) that the accused will commit an offense if released and (3) that the denial of bail will undermine public confidence in the administration of justice. See *Criminal Code of Canada*, R.S.C. 1985, c. C-46, s. 515(10) (Can.).

Khadr had told an interviewer in February 2004 that “he dreams himself [sic] of becoming a martyr for Islam, expressed his admiration for the terrorists who crashed into the World Trade Buildings on September 11, 2001 and referred to Osama Bin Laden as a ‘saint.’”<sup>331</sup> During the same 2004 interview both Abdullah Khadr’s mother and sister expressed approval of the 9/11 attacks and the prospects of family members dying as martyrs for Islam.<sup>332</sup>

The Crown appealed the stay of proceedings to the Ontario Court of Appeal. The appeal was dismissed and the stay was upheld in a unanimous judgment by the three-judge panel. Justice Sharpe relied in part on British authority that had stayed proceedings in a case of an irregular extradition,<sup>333</sup> a result quite different than that reached by the U.S. Supreme Court under the *Ker/Frisbie* doctrine.<sup>334</sup> The Canadian courts were not as prepared as the American courts would be to wash their hands of mistreatment in bringing a person before the court. The Ontario Court of Appeal held that the alternative remedies of excluding the statements taken by the FBI in Pakistan and Toronto would fail to disassociate the court from the “‘gross misconduct’ that could not be remedied by anything short of a stay of proceedings.”<sup>335</sup> The court of appeal stressed that “the rule of law must prevail even in the face of the dreadful threat of terrorism” and even when it “serves in the short term to benefit those who oppose and seek to destroy” such values.<sup>336</sup> The judgment eloquently reaffirms the importance of protecting rights and judicial integrity even in a case involving

331. *United States v. Khadr*, [2006] 262 D.L.R. 4th 652, para. 48 (Can. Ont. Sup. Ct. J.). Another judge at a subsequent bail review held that the latter comment contained in the U.S. record of the case may have been taken out of context because “[t]he statement concerns Mr. Khadr’s observations, as a younger person, when his family lived in bin Laden’s compound. They seem to capture Mr. Khadr’s impressions of the way bin Laden interacted with others, and not his political and terrorist activities.” *United States v. Khadr*, [2008] 234 C.C.C. 3d 129, para. 16 (Can. Ont. Sup. Ct. J.).

332. *United States v. Khadr*, [2008] 234 C.C.C. 3d 129, para. 20 (Can. Ont. Sup. Ct. J.).

333. *United States v. Khadr*, 2011 ONCA 358, para. 48 (Can.) (citing *R. v. Horseferry Road Magistrates Court, Ex Parte Bennett*, [1994] 1 A.C. 42, 65–66 (H.L.) where Lord Bridge in particular expressed a preference for Justice Stevens’ dissenting opinion in *United States v. Alvarez-Machain*, 504 U.S. 655 (1992)).

334. See *Frisbie v. Collins*, 342 U.S. 519 (1952) (followed in the terrorist cases of *United States v. Yunis*, 924 F.2d 1086 (D.C. Cir. 1991) and *United States v. Yousef*, 927 F. Supp. 673 (S.D.N.Y. 1996)); *Ker v. Illinois*, 119 U.S. 436 (1886); see also *United States v. Alvarez-Machain*, 504 U.S. 655 (1992).

335. *United States v. Khadr*, 2011 ONCA 358, para. 66 (Can.).

336. *Id.* at para. 76.

terrorism.

The Ontario Court of Appeal determined that it was not necessary “to balance the protection and vindication of the court’s integrity with the societal interest in responding positively to the extradition request,” because the clearest possible case for a stay of proceedings had been established.<sup>337</sup> This approach demonstrates the considerable weight that Canadian courts give to due process under the Charter and their willingness to impose these concepts even in situations that involve international cooperation against terrorism. Pre-Charter judicial deference to the state was a thing of the past even though it was not until 1985 that the Supreme Court of Canada finally recognized that courts could stay proceedings as a response to pre-trial abuses by the state.<sup>338</sup> The Ontario Court of Appeal did add, however, that if balancing the competing interests was warranted, the Canadian government’s “emotive argument that because of what the extradition judge did, an admitted terrorist collaborator is allowed to walk free is unfounded,” because Khadr could be prosecuted in Canada under the 2001 Anti-Terrorism Act for acts of terrorism that were committed outside of Canada.<sup>339</sup>

Abdullah Khadr could be charged with making property available, knowing that it would be used to benefit a terrorist group, under section 83.03(b) of the Criminal Code of Canada<sup>340</sup> and with participating in a terrorist group under section 83.18 of the Criminal Code<sup>341</sup> for his alleged acts of supplying terrorist groups in Pakistan with firearms and explosives. He could also be charged with the commission of weapons or explosive offenses for the benefit of a terrorist group under section 83.2 of the Code.<sup>342</sup> All of these offenses can be prosecuted if committed outside Canada by a Canadian citizen by virtue of section 7(3.74) of the

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337. *Id.* at para. 69.

338. *R. v. Jewitt*, [1985] 2 S.C.R. 128 (Can.).

339. *United States v. Khadr*, 2011 ONCA 358, para. 77 (Can.).

340. R.S.C. 1985, c. C-34, s.83.03 *amended by* S.C. 2001, c. 41. The “financing offence” requires proof of knowledge that the property will be used by or benefit a terrorist group and is subject to a maximum of ten years imprisonment.

341. *Id.* s.83.18. The “participation offence” requires both knowledge of a terrorist group and the purpose of enhancing its ability to carry out a terrorist activity and is subject to a maximum of ten years imprisonment. *Id.*

342. *Id.* s.83.2. This offense carries a maximum of life imprisonment and requires proof of the fault for the underlying offense and that the offense was committed for the benefit of or at the direction or in association with a “terrorist offence.”

Criminal Code.<sup>343</sup> Although a six-month sentence in Canada was upheld for a person who pled guilty to giving between \$2,000 and \$3,000 to the Tamil Tigers,<sup>344</sup> Abdullah Khadr would, if convicted, face much greater sentences under a series of Ontario Court of Appeal decisions which raised the sentences for those convicted in the first successful prosecutions of new terrorism offenses created in the wake of 9/11.<sup>345</sup>

Abdullah Khadr has, however, not been charged in Canada since his release in August 2010. The extradition judge ruled that the FBI interviews of Khadr in both Pakistan and Toronto, which obtained incriminating statements from him, are inadmissible because the former was obtained in oppressive circumstances and the latter was derived from the first.<sup>346</sup> This demonstrates that the “fruit of the poisonous tree” exclusionary doctrine disparaged by the military court judge in the Omar Khadr case<sup>347</sup> is alive and well in Canada and applies in extradition proceedings.<sup>348</sup> The extradition judge did, however, find that Khadr’s initial interview with the RCMP upon his return to Toronto was admissible<sup>349</sup> even though the RCMP officer who conducted the interview had interviewed Khadr in Pakistan, albeit not for law enforcement purposes. It is not clear from the reported judgments, however, whether Khadr made any incriminating statements in the admissible Toronto interview. In any event, he has not been charged with any offense more than eighteen months after being

343. *Id.* s.7(3.74).

344. *R. v. Thambaiturai*, 2011 BCCA 137, paras. 2, 8 (Can. Ont. C.A.).

345. *R. v. Khawaja*, 2010 ONCA 862, para. 5 (Can.); *R. v. Gaya*, 2010 ONCA 860, para. 6 (Can.); *R. v. Khalid*, 2010 ONCA 861, para. 8 (Can.); *R. v. Amara*, 2010 ONCA 858, paras. 16–17 (Can.).

346. *Canada (Atty’ Gen.) v. Khadr*, 2010 ONSC 4338, paras. 161, 171–75 (Can.).

347. *United States v. Khadr*, Ruling on Suppression Motions D-097 and D-111, at 9, (Aug. 17, 2010) available at <http://www.mc.mil/CASES/MilitaryCommissions.aspx> (follow “Omar Ahmed Khadr” hyperlink; under “Category” tab, select “Docket”; at the bottom of the page, follow “2” hyperlink; follow “Military Judge’s Order Denying Defense Motions to Suppress the Accused Statements (D-097) and Video Tape (D-111)” hyperlink) (last visited Apr. 17, 2012).

348. Canada’s domestic exclusionary rule is constitutionally entrenched in s.24(2) of the Charter and the Supreme Court has recognized that extradition judges have discretion to exclude evidence gathered in an abusive manner by foreign authorities in order to protect the fairness of extradition proceedings. *United States v. Schulman*, [2001] 1 S.C.R. 616, para. 56 (Can.). For recent restrictions on the American exclusionary rule see *Davis v. United States*, 131 S. Ct. 2419 (2011); *Herring v. United States*, 555 U.S. 135 (2009).

349. *United States v. Schulman*, [2001] 1 S.C.R. 616, para. 170 (Can.).

released by the extradition judge. As will be seen in the next section, even if Abdullah Khadr is eventually charged, his prosecution in Canada would face a number of challenges.

*E. The Distinct Challenges of Canadian Terrorism Prosecutions*

The most pressing concern about terrorism prosecutions in Canada is not the adequacy of offenses and penalties, but the process of prosecutions. Until 1982, Canada maintained a system where the Attorney General of Canada could make absolute and non-reviewable claims to the courts that would prevent judicial inspection or disclosure of information on the basis that disclosure would harm national security, national defense, or international relations.<sup>350</sup> This approach lagged behind developments elsewhere in the common-law world and reflected Canadian anxieties about being a net importer of intelligence. Indeed, as discussed in the second part of this article, Canada overreacted by holding a secret public inquiry that held suspected spies incommunicado and without access to counsel immediately after World War II, in part because of fears that Canada may have allowed nuclear secrets, most notably American and British secrets, to fall into the hands of the Russians.<sup>351</sup> Canadian concerns about secrecy were reaffirmed with the 1984 creation of the CSIS as a domestic and civilian security intelligence agency. This agency was born during the Cold War and, until 2008, it interpreted its intelligence mandate as justifying the destruction of raw intelligence in order to maximize secrecy.<sup>352</sup> CSIS's destruction of wiretaps it obtained in relation to the Air India bombing was found to violate the Charter rights of the accused,<sup>353</sup> and its destruction of wiretaps in the Ahmed Ressam case frustrated American officials, though it did not prevent Ressam's subsequent conviction in the United States.<sup>354</sup> The combined forces of CSIS' Cold War mentality about the primary importance of secrecy, its lack of concern about the evidentiary

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350. See *Commission des droits de la personne v. Canada* (Att'y Gen.), [1982] 1 S.C.R. 215 (Can.).

351. See *supra* Part II.

352. *Charkaoui v. Minister of Citizenship and Immigration*, [2008] 2 S.C.R. 326, para. 2 (Can.).

353. *R. v. Malik*, 2004 BCSC 554, para. 22 (Can.).

354. KERRY PITHER, *DARK DAYS: THE STORY OF FOUR CANADIANS TORTURED IN THE NAME OF FIGHTING TERROR* 33–34 (2008). In accordance with its standard policies, CSIS destroyed 400 hours of electronic surveillance on Ressam after making summaries. *Id.* at 33.



implications of intelligence, and Canada's traditional anxieties about disclosing the secrets of its allies meant that secrecy claims have been an imposing obstacle to Canadian terrorism prosecutions.

Absolute and unreviewable claims of secrecy by the executive were no longer tenable in Canada after the enactment of the Charter as a constitutional bill of rights in 1982. In that year, Canada moved cautiously to allow judicial review of secrecy claims. It did not follow the model of the 1980 American Classified Information Procedures Act (CIPA)<sup>355</sup> or British public interest immunity models in giving trial judges access to secret information for the purposes of determining whether it had to be disclosed to the accused. Instead, this power was only given to specially designated judges of the Federal Court of Canada. Unlike in the United States, the federal courts in Canada have only limited jurisdiction that does not extend to criminal prosecutions.<sup>356</sup>

Canada continues to use a two-court system for terrorism prosecutions involving public interest immunity or CIPA-like claims. This two-court approach meant that when access to secret intelligence held by CSIS was sought by the accused in a case involving Armenian terrorism in the 1980s, the accused could only seek disclosure from the specially designated federal court judge and not from the trial judge.<sup>357</sup> The trial judge did not have access to the secret undisclosed material, and the Federal Court judge, who decided that the information should not be disclosed to the accused, did not have the option of revisiting or revising initial non-disclosure orders as the criminal trial unfolded. In the end, the Federal Court judge in the Armenian case followed pre-1982 precedents and ordered that the intelligence should not be disclosed to the accused without even inspecting it.<sup>358</sup> The trial judge then upheld criminal convictions even though he was clearly uncomfortable with the fact that he had not been able to inspect the intelligence in order to determine whether it should be disclosed to the accused.<sup>359</sup>

The enactment of new terrorism offenses and the increased emphasis on collecting intelligence about possible terrorist threats

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355. Pub. L. No. 96-456, 94 Stat. 2025 (1980).

356. Federal Courts Act, R.S.C. 1985, c. F-7.

357. *Kevork v. R.*, [1984] 2 F.C. 753, 753 (Can. T.D.).

358. *Id.*

359. *R. v. Kevork*, [1986] 27 C.C.C.(3d) 523, 546 (Ont. H.C.J.).

means that secrecy issues surrounding the relationship between intelligence and evidence became even more prominent after 9/11. The post-9/11 ATA amended section 38 of the Canada Evidence Act to follow the CIPA model of encouraging pre-trial resolution of secrecy matters and encouraging judges to devise creative solutions to the dilemma of disclosing intelligence through the use of substitutions, redactions, and adverse inferences.<sup>360</sup> At the same time, the post 9/11 reforms maintained the two-court approach that only allowed specially designated federal court judges, and not trial judges, to see the secret material and to decide whether it should be disclosed to the accused. It also preserved the ability to appeal a section 38 decision to the Federal Court of Appeal, potentially in the middle of a criminal trial.<sup>361</sup>

The two-court approach creates both inefficiency and potential unfairness in terrorism prosecutions. The 2010 report of the Air India inquiry recommended that criminal trial judges be given the power, as they would have in the United States, the United Kingdom, and Australia, to make and revise non-disclosure orders to protect national security information. It also recommended that the ability to appeal a non-disclosure order before the completion of a criminal trial be abolished.<sup>362</sup> The report raised concerns that

an accused might use the two-court approach—dealing with the trial in one court and with section 38 issues in the Federal Court—to sabotage a terrorism trial by trying to call evidence that leads to s.38 litigation in Federal Court. Once an accused seeks information and the Attorney General of Canada refuses to disclose it, litigation in the Federal Court is inevitable, with appeals likely to the Federal Court of Appeal and the Supreme Court of Canada. This litigation will delay and disrupt the main trial and might result in its collapse. Particularly in a jury trial, it is probable that a mistrial will be declared if there is a serious delay.<sup>363</sup>

Despite this strongly worded critique, the Canadian government has not accepted the Air India inquiry's recommendation that trial judges be given CIPA-like powers in

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360. Canada Evidence Act, R.S.C. 1985, c. C-5, s. 38.06.

361. *Id.* s.38.09.

362. COMMISSION OF INQUIRY REPORT, VOL. 3, *supra* note 71, at 167.

363. *Id.* at 154–55.

criminal trials.<sup>364</sup> Reform is even less likely given that in 2011 the Supreme Court of Canada ruled that the two-court system does not violate the Charter rights of the accused or the inherent powers of provincial superior courts that conduct terrorism trials.<sup>365</sup>

Is Canada's two-court system workable in terrorism prosecutions? A mistrial was declared in one prosecution using Canada's two-court system in 2003 because a trial judge was not willing to keep a jury waiting while a non-disclosure order was appealed to the Federal Court of Appeal.<sup>366</sup> A new trial and conviction was, however, eventually obtained in this non-terrorist case which involved a hostage-taking of a Canadian soldier during the Bosnia conflict.<sup>367</sup> The two-court system was also used in Canada's first terrorism prosecution under the Anti-Terrorism Act enacted in 2001. The prosecution eventually ended in a conviction, but the trial process lasted four years and involved multiple rounds of litigation in the Federal Court.<sup>368</sup> The accused agreed to a bench trial so there were no problems caused by a jury being kept waiting by satellite litigation in a separate court.

The two-court system was avoided in the Air India trial, which resulted in two acquittals in 2005, but only because defense counsel agreed to undertakings that would allow them to inspect

364. RESPONSE TO THE COMMISSION OF INQUIRY, *supra* note 72.

365. R. v. Ahmad, [2011] 1 S.C.R. 110 (Can.). For a critical examination of this decision see Kent Roach, 'Constitutional Chicken': National Security Confidentiality and Terrorism Prosecutions after R. v. Ahmad, 54 SUP. CT. L. REV. (2d) 357 (2011).

366. R. v. Ribic, 2008 ONCA 790, para. 4 (Can.).

367. *Id.*

368. One round of litigation in Federal Court upheld the constitutionality of the two-court scheme with the Federal Court of Appeal concluding that the ability of trial judges to stay proceedings protected the constitutionality of the scheme. Canada (Att'y Gen.) v. Khawaja, [2007] FCA 388 (Can.). Two rounds of Federal Court litigation were necessary over the government's desire to prevent the disclosure of less than two percent of 99,000 pages of disclosure in the case including material subject to FBI restrictions or caveats on disclosure. Canada (Att'y Gen.) v. Khawaja, [2007] F.C. 463, para. 10 (Can.). The Federal Court judge approved an FBI substitution of unclassified material in one instance, but also insisted that Canada request the FBI to amend the caveat to allow a plea agreement made with a key witness in the *Khawaja* case to be disclosed. Canada (Att'y Gen.) v. Khawaja, [2007] F.C. 490, para. 55-57, *rev'd in part* [2007] F.C. 342 (Can.). The Federal Court judge also attempted to provide a fuller description of the non-disclosed material to assist the trial judge, but the Federal Court of Appeal held that he erred by including some sensitive material. Canada (Att'y Gen.) v. Khawaja, [2007] F.C. 342 (Can.). Another round of Federal Court litigation was heard later in the process and caused the trial judge to articulate concerns about the fate of the trial, but also resulted in a non-disclosure order. Canada (Att'y Gen.) v. Khawaja, [2008] F.C. 560 (Can.).

undisclosed intelligence to determine its possible relevance to the trial without discussing what they found with their clients.<sup>369</sup> Such undertakings are widely used under CIPA, but can no longer be used in Canada in light of its supreme court's pronouncements that they are an unethical incursion on the relationship between the accused and defense counsel.<sup>370</sup> The two-court system was also avoided in the Toronto terrorism prosecutions, but only because the trial judge ruled that his inability to make non-disclosure decisions violated the Charter rights of the accused and the constitutionally guaranteed powers of superior courts.<sup>371</sup> This meant that non-disclosure orders in that complex case were, as they would be in the United States, made by the trial judge.

The Supreme Court of Canada, however, reversed the trial judge's ruling about the unconstitutionality of the two-court approach,<sup>372</sup> albeit after convictions had been recorded in many of the cases.<sup>373</sup> The Supreme Court of Canada stressed that the two-court system should be administered in a flexible manner and that the Federal Court judge or the Attorney General of Canada could allow the trial judge to have access to, or a detailed description of, any material that the Federal Court ordered should not be disclosed because of harms to national security, national defense, or international relations. Even if trial judges are now allowed to see the non-disclosed information, they will still be powerless to amend or revise non-disclosure orders during the trial should increased disclosure become necessary to preserve the accused's right to a fair trial.

The Supreme Court of Canada concluded that the two-court system did not violate the accused's right to a fair trial because section 38.14 of the Canada Evidence Act gives trial judges the power to stay proceedings if they conclude, as a result of the Federal Court's non-disclosure order, that such a remedy is required to protect the accused's right to a fair trial. The court stressed that trial judges should not hesitate to stay trials and that it was not necessary to apply the demanding "clearest of cases"

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369. COMMISSION OF INQUIRY REPORT, VOL. 3, *supra* note 71, at 270–73.

370. *R. v. Basi*, [2009] 3 S.C.R. 389, paras. 45–46 (Can.); *R. v. Ahmad*, [2011] 1 S.C.R. 110, para. 49 (Can.).

371. *R. v. Ahmad*, [2009] 257 C.C.C. (3d) 135 (Can. Ont. C.A.), *rev'd*, [2011] 1 S.C.R. 110 (Can.).

372. *Id.*

373. *See R. v. Gaya*, 2010 ONCA 860 (Can.); *R. v. Khalid*, 2010 ONCA 861 (Can.); *R. v. Amara*, 2010 ONCA 858 (Can.).

standard used to justify the stay in the Abdullah Khadr extradition case.<sup>374</sup> This approach encourages trial judges to order a drastic remedy of a stay of proceedings that will permanently end the prosecution when a less drastic remedy, such as a revised non-disclosure order, might also protect the accused's rights. Under the two court system, the trial judge will not have the power to revise the Federal Court's non-disclosure order. In turn, the Federal Court's pre-trial non-disclosure judgment will have been finalized to allow for what are in essence pre-trial or interlocutory appeals, thus rendering the Federal Court judge unable to revise the non-disclosure order should evolving circumstances at the trial require such an amendment.<sup>375</sup> In contrast, courts under CIPA or British public interest immunity proceedings have the power to revise an initial non-disclosure order if necessary to ensure trial fairness without necessarily resorting to the drastic remedy of a stay.<sup>376</sup> The threat of a stay of proceedings will now hang over all Canadian terrorism prosecutions that involve the non-disclosure of domestic or foreign intelligence. Any future prosecution of Abdullah Khadr in Canada would likely involve attempts to prevent American, Canadian, and Pakistani intelligence from being disclosed, and arguments by the accused that access to such intelligence is essential to a fair trial and to the litigation of alleged misconduct.<sup>377</sup> Indeed, the difficulties of such litigation may help explain why no prosecution of Abdullah Khadr has been commenced since he was released by the extradition judge in August 2010.

Canada's two-court system and the priority that it has traditionally assigned to secrecy claims helps to explain why on a per capita basis Canada has had far fewer terrorism prosecutions than the United States since 9/11 despite the presence of similar

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374. The Supreme Court of Canada stated that even in cases where a trial judge does not have enough information about the non-disclosed information, "[t]he trial judge must presume that the non-disclosure order has adversely affected the fairness of the trial" and that it was not necessary to apply the restrictive "clearest of cases." *R. v. Ahmad*, [2011] 1 S.C.R. 110, para. 35, 51–52 (Can.).

375. Kent Roach, *The Unique Challenges of Terrorism Prosecutions: Towards a Workable Relation between Intelligence and Evidence*, SSRN, 241–42 (May 1, 2010), <http://ssrn.com/abstract=1629227>.

376. *Rowe and Davis v. The United Kingdom*, 28901/95 Eur. Ct. H.R. 91, para. 65 (2000), available at <http://www.bailii.org/eu/cases/ECHR/2000/91.html>.

377. Roach, *Constitutional Chicken*, *supra* note 365, at 371.

threats of home grown and al Qaeda-inspired terrorism.<sup>378</sup> In cases that have been reported in Canada since 2001, there have been: the conviction and life imprisonment of Momin Khawaja, in a British-based terrorist plot;<sup>379</sup> convictions and guilty pleas of seven of eighteen persons in a Toronto-based terrorist plot;<sup>380</sup> the conviction and life sentence of a Quebec man in a German- and Austrian- based terrorist plot;<sup>381</sup> a guilty plea and six-month sentence of a man in British Columbia for terrorism financing in supplying \$2,000 to \$3,000 to the Tamil Tigers;<sup>382</sup> probation and time served sentence for conviction of a hoax about terrorist activity;<sup>383</sup> and acquittals of two men (and one guilty plea and subsequent perjury conviction) in connection with the 1985 Air India bombing.<sup>384</sup> In the United States, the exact number of terrorism prosecutions is a matter of some controversy, in part because of classification issues. Nevertheless, reports from different sources conservatively suggest well in excess of 200 terrorism convictions since 9/11.<sup>385</sup> The figure in the United

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378. Exact comparisons of threat levels are difficult from open sources, but the successful Toronto terrorism prosecutions which involved a controlled buy of substances held out to be explosives suggests that the threat of home-grown terrorism in Canada is not illusory. In 2012, the Canadian government articulated a counter-terrorism plan that stated, "violent Islamist extremism is the leading threat to Canada's national security. Several Islamist extremist groups have identified Canada as a legitimate target or have directly threatened our interests. In addition, violent 'homegrown' Sunni Islamist extremists are posing a threat of violence." GOV'T OF CANADA, BUILDING RESILIENCE AGAINST TERRORISM: CANADA'S COUNTER-TERRORISM STRATEGY 4 (2011), available at [http://www.publicsafety.gc.ca/prg/ns/\\_fl/2012-cts-eng.pdf](http://www.publicsafety.gc.ca/prg/ns/_fl/2012-cts-eng.pdf). There are at least two terrorism prosecutions pending in Canada: one involving a Toronto man alleged to have plotted to join a Somali terrorist group; and another involving four accused alleged to be involved in a transnational plot with explosives. See Megan O'Toole, *Terrorist Suspect Mohammed Hersi to Head Directly to Trial*, NAT'L POST (Dec. 14, 2011), <http://news.nationalpost.com/2011/12/14/terror-suspect-mohamed-hersi-to-head-directly-to-trial>; *Text of Charges Against Terror Suspects*, THE STAR (Aug. 26, 2010), <http://www.thestar.com/news/canada/article/852935>.

379. *R. v. Khawaja*, 2010 ONCA 862 (Can.).

380. *R. v. Gaya*, 2010 ONCA 860 (Can.); *R. v. Amara*, 2010 ONCA 858 (Can.); *R. v. Khalid*, 2010 ONCA 861 (Can.).

381. *R. v. Namouh*, 2010 QCCQ 943 (Can. Que.).

382. *R. v. Thambathurai*, 2011 BCCA 137 (Can.).

383. *R. v. Lapoleon*, 2008 BCPC 80 (Can.).

384. *R. v. Malik*, 2005 BCSC 350 (Can.).

385. The New York University Law and Security Center reports 230 convictions and an average 15.3 year sentence in terrorism and national security crimes since 9/11. NYU SCHOOL OF LAW, TERRORIST TRIAL REPORT CARD UPDATE 1 (Apr. 2011), available at [http://www.lawandsecurity.org/Portals/0/Documents/Federal%20Terrorism%20Crimes%20Prosecuted%20Since%209-11%20%20\(Updated](http://www.lawandsecurity.org/Portals/0/Documents/Federal%20Terrorism%20Crimes%20Prosecuted%20Since%209-11%20%20(Updated)

Kingdom has also been placed at over 200 convictions.<sup>386</sup> Recent media reports suggest that U.S. prisons are holding 269 people with connections to international terrorism, while Canada at present imprisons five such persons.<sup>387</sup> Even accounting for Canada's smaller population, the number of terrorism prosecutions and convictions in Canada remains disproportionately small.<sup>388</sup>

In a qualitative sense, the 2005 acquittal of two men of the Air India bombings in Canada looms large. The trial took 217 trial days, involved 1.5 million pages of disclosure, and cost \$57 million.<sup>389</sup> The length of this trial was related to historical difficulties associated with that investigation, including CSIS' destruction of relevant raw intelligence that could have potentially resulted in a stay of proceedings had the trial judge not acquitted the accused on the merits. Nevertheless, the Air India Commission, in its 2010 report, cautioned that many of the same challenges faced by the Air India prosecution, including the two-court system and problems with voluminous disclosure and long jury trials, persisted.<sup>390</sup> Canada has responded with legislation providing for the appointment of a case management judge and

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%20April%202011).pdf. Human Rights First reports 400 individuals have been convicted on terrorism related charges. *Trying Terrorist Suspects in Federal Court*, HUMAN RIGHTS FIRST, available at <http://www.humanrightsfirst.org/wp-content/uploads/pdf/USLS-Fact-Sheet-Courts.pdf> (last visited Apr. 18, 2012). The U.S. Department of Justice reported in 2010 that over 300 individuals are imprisoned in the United States on terrorism charges. Tracy Russo, *The Criminal Justice System as a Counter-Terrorism Tool Fact Sheet*, U. S. DEP'T OF JUSTICE (Jan. 26, 2010), available at <http://blogs.usdoj.gov/blog/archives/541>.

386. *Operation of Police Powers Under the Terrorism Act 2000 and Subsequent Legislation: Arrests, Outcomes and Stops and Searches Great Britain 2010/11*, HOME OFFICE (Oct. 13, 2011), <http://www.homeoffice.gov.uk/publications/science-research-statistics/research-statistics/counter-terrorism-statistics/hosb1511/>.

387. Colin Freeze, *Who's Who in the SHU*, THE GLOBE & MAIL, (Aug. 31, 2011), <http://www.theglobeandmail.com/news/national/in-pictures-whos-who-in-the-shu/article2149340/>; Scott Shane, *Beyond Guantanamo A Web of Prisons for Terrorist Inmates*, N.Y. TIMES, Dec. 10, 2011, at A1.

388. This is not to suggest that all the American or British terrorism prosecutions are not problematic. For arguments about the need for American courts to be more robust in their application of entrapment doctrines to terrorist stings see Kent Roach, *Entrapment and Equality in Terrorism Prosecutions*, 80 MISS. L. J. 1455 (2011). For arguments that British terrorism laws are overbroad, see Jacqueline Hodgson and Victor Tadros, *How to Make a Terrorist Out of Nothing*, 77 MOD. L. REV 984 (2009).

389. See COMMISSION OF INQUIRY REPORT, VOL. 3, *supra* note 71, at 267–79.

390. *Id.*

the use of more alternative jurors.<sup>391</sup> At the same time, the two-court system remains in place and may hinder Canada's efficient conduct of terrorism prosecutions.

The ability to conduct terrorism prosecutions is not only a law and order issue. Canadian reluctance to use the criminal process against suspected terrorists in both the Maher Arar and Abdullah Khadr cases led the United States to seek to have Canadian citizens rendered to and/or tried in Syria, Pakistan, or the United States respectively. Although Canadian officials may have been justified in refusing to charge either man because they did not have sufficient evidence to support a conviction, American officials were not satisfied with such a response. In the Maher Arar case, they were able to render him to Syria, and in the Abdullah Khadr case, they unsuccessfully tried to have him rendered from Pakistan to the United States for prosecution and to have him extradited from Canada to the United States for prosecution.

#### *F. Summary*

The Khadr family, like Maher Arar, has had an important and perhaps disproportionate impact on Canadian-American security relations in the post-9/11 era. The Khadr family as a self-professed 'al Qaeda family' understandably raises fears in the United States about terrorist threats from Canada even if the inaccurate labeling of Maher Arar and his wife as associated with al Qaeda serves as a cautionary tale. Perhaps because of these concerns, the Canadian government did not request Omar Khadr's repatriation from Guantanamo until it did so as part of an agreement with the U.S. government. The Canadian government opposed U.S. attempts to render Abdullah Khadr from Pakistan to the United States, but it supported subsequent attempts to extradite him from Canada to the United States on terrorism charges that have now ended with a judicial stay of proceedings.

The U.S. approach to Omar Khadr's case demonstrates a willingness in both the Bush and Obama administrations to pursue new legal paradigms that combine the advantages for the state of both criminal and war crimes prosecutions, while depriving the accused of advantages such as combatant immunity under the laws of war and the right to an impartial jury under criminal law. The Guantanamo proceedings emerge not as a legal black hole, but one

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391. Fair and Efficient Criminal Trials Act, S.C. 2011, c. 16 (Can.).



characterized by extra-legalism in which legalistic claims were made about the right of Congress under the Military Commissions Act to enact and retroactively apply new war crimes, and to deprive Khadr of many of the benefits of criminal trials for juveniles. Matters were no better in the Federal District Court for the District of Columbia where Omar Khadr's request for injunctive relief from mistreatment was dismissed in 2005 on the basis of restrictive pleading and standing rules. These rulings can be contrasted with the willingness of a Canadian court in 2005 to enjoin Canadian officials from continuing to interrogate Khadr at Guantanamo. In 2008 and 2010, multiple habeas petitions in the D.C. Circuit on Omar Khadr's behalf were denied on the basis that the federal courts should defer to ongoing military commission proceedings and presume that Omar Khadr could obtain eventual relief and justice through the military commission process. Both American military and federal court proceedings in the Omar Khadr case were characterized by extra-legalism or rule by law in which law was used by judges to defer to the executive or legislature and to avoid ruling on the justice of subjecting a young person to military detention and trial.

Canadian governments spanning both Liberal and Conservative administrations have been unwilling to spend political capital with the United States on behalf of Omar Khadr. The contrast with their efforts on behalf of Maher Arar is striking. In both cases, however, the Canadian executive had to be prodded into action by judicial, or in the case of the Arar inquiry, quasi-judicial action. The Canadian government successfully appealed a lower court order that would have required it to ask for Omar Khadr's return from Guantanamo, and then successfully sought a stay of another lower court judgment that might have required it to make a repatriation request after the United States did not agree to a Canadian request that Canadian interviews not be used in Khadr's military commission proceedings. Although the courts ultimately did not force the Canadian government to request Omar Khadr's repatriation, they reviewed Canadian participation in Guantanamo and found it to violate both the Charter and international law. Canadian conduct in the Abdullah Khadr case reflected some learning from both the Maher Arar and Mohamed Jabour matters as Canadian officials objected to attempts by the United States to have Abdullah Khadr irregularly rendered from Pakistan to the United States. Canadian officials were able to

ensure that Abdullah Khadr was returned to Canada and was subject to the safeguards that surround formal extradition proceedings, which eventually resulted in a stay of proceedings preventing his extradition to the United States on terrorism charges.

The Canadian judicial proceedings in both the Omar and Abdullah Khadr cases underline the powers of Canadian courts under the Charter and their commitment to protect the rights of Canadian citizens even in the face of significant evidence of their involvement with al Qaeda. They also serve as a reminder that U.S. actions at Guantanamo and in Pakistan may have legal repercussions in other states even if they remain somewhat insulated from judicial review within the United States. Perhaps reflecting the real politick of Omar Khadr's continued detention at Guantanamo, Canadian judicial scrutiny of Guantanamo was fairly gentle and stopped short of requiring Canada to ask the United States for Omar Khadr's repatriation. Canadian judges were, however, much more critical of American actions in Pakistan in delaying Abdullah Khadr's access to consular services and, subsequently, his release. The permanent stay of proceedings has deprived the United States of an opportunity to try Abdullah Khadr in the United States, and perhaps imprison him for a significant term while he remains free in Canada despite having confessed in Pakistan to supplying arms to al Qaeda. The Canadian courts did not hesitate to grant the strong remedy of a stay of proceedings in this case. In the future, they may be required to use the drastic remedy of a stay of proceedings in Canadian terrorism prosecutions under Canada's two-court approach to CIPA-like state secrecy issues. The approach of the Canadian courts in these matters can be contrasted with the much more passive approach of American courts which, under the *Ker/Frisbie* doctrine, would have accepted jurisdiction over Abdullah Khadr on terrorism charges without regard to his capture and treatment in Pakistan or any irregular rendition to the United States. Canadian courts may demand assurances that the United States not seek the death penalty or employ military detention and trials in future extradition cases, even though American requests for extradition may partially be a response to concerns about the capacity of Canadian courts to conduct its own terrorism prosecutions.

## VI. NEIGHBORS STILL: POST-9/11 AMERICAN-CANADIAN SECURITY AGREEMENTS

The Maher Arar and Omar and Abdullah Khadr case studies reveal significant differences in American and Canadian counter-terrorism and underline how Canadian public inquiries and courts have made decisions and reports that have served as significant irritants to American-Canadian security cooperation. The picture that emerges from these case studies are of two neighbors who are deeply uneasy about the other, with Canada being concerned about American neglect of human rights, and the United States being concerned about Canada's inability to prosecute suspected terrorists.

At the same time, the irritants in these cases would not have developed had it not been for judicial and quasi-judicial decisions in Canada. Since 9/11, the Canadian government, under both Liberal and Conservative administrations, has been determined to cooperate with the United States in security matters. As has been seen, some of the initial Canadian cooperation after 9/11 was quite problematic from a human rights perspective.<sup>392</sup> This cooperation may have been intended to compensate for the Ressam case and false reports that the 9/11 attackers had entered the United States through Canada. Canadian governments also made it a priority to keep the border as open as possible. As in the United States, it is important to take account of the role of the courts when evaluating Canadian counter-terrorism policy.

### A. *The 2001 Smart Border Agreement*

In December 2001, the two countries signed a smart border declaration that eventually included a safe third-country agreement that generally prohibited non-citizens in either country from seeking refugee status in the other country. This agreement reflected American concerns about the perceived laxness of Canada's immigration system, which relies on detention less than the American system. The safe third-country agreement was more controversial in Canada than in the United States. The agreement was successfully challenged under the Charter on the basis that the United States did not abide by restrictions on refoulement to

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392. See *supra* notes 121–30 and accompanying text.

torture<sup>393</sup> before being upheld by an appellate court as consistent with the Charter.<sup>394</sup> In the years since 9/11, the entry of refugee claimants into Canada has dramatically declined. In 2001, 44,360 refugee claimants entered Canada, including 3,159 from Pakistan; while in 2010, 23,110 with only 529 from Pakistan.<sup>395</sup> At the same time, the detention of refugee applicants in Canada has increased, albeit not to the same level as in the United States.<sup>396</sup> Canada's reception of refugees has declined significantly in the post-9/11 era.

The smart border agreement stopped short of proposals from the Canadian business community for full visa convergence. One factor that prevented more integrated perimeter security agreements was selective registration systems used after 9/11 in the United States that targeted those born in predominantly Muslim countries. A number of foreign-born and high-profile Canadians spoke out against these policies, with Liberal member of Parliament, Sarkis Assadourian, complaining that he was treated as a "second class citizen" of Canada because he was subjected to fingerprinting at the U.S. border because he was born in Syria.<sup>397</sup> Perhaps recognizing that Islam is the fastest growing religion in

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393. *Canadian Council for Refugees v. Canada*, [2007] F.C. 1262, paras. 257–62 (Can.) (noting the Arar case and raising concerns about U.S. practice). For commentary critical of this decision but also suggesting that demonstrated differences between generous Canadian and European approaches on the obligations not to deport to torture as opposed to more textualist American interpretations, see Patrick J. Glen, *Is the United States Really Not a Safe Third Country?: A Contextual Critique of the Federal Court of Canada's Decision in Canadian Council for Refugees, et al. v. Her Majesty the Queen*, 22 GEO. IMMIGR. L.J. 587 (2008) and Audrey Macklin, *Disappearing Refugees: Reflections on the Canada-U.S. Safe Third Country Agreement*, 36 COLUM. HUM. RTS. L. REV. 365 (2005) (discussing the third-country agreement).

394. *Canadian Council for Refugees v. Canada*, [2008] F.C. 229 (Can.).

395. The only other predominantly Muslim country listed in the top sources of refugee claimants is Nigeria with 732 entrants in 2001 and 875 entrants in 2010. See *Immigration Overview: Permanent and Temporary Residents*, CITIZENSHIP AND IMMIGRATION CANADA, (Aug. 30, 2010), <http://www.cic.gc.ca/english/resources/statistics/facts2010/temporary/25.asp>.

396. See CAN. BORDER SERVS AGENCY, CBSA DETENTIONS AND REMOVALS PROGRAMS - EVALUATION STUDY (2011), available at [http://www.cbsa-asfc.gc.ca/agency-agence/reports-rapports/ae-ve/2010/dr-rd-eng.html#ftn\\_ref\\_26](http://www.cbsa-asfc.gc.ca/agency-agence/reports-rapports/ae-ve/2010/dr-rd-eng.html#ftn_ref_26). Most of these detentions were for less than a week, but some are longer term and involve detention in provincial jails. DELPHINE NARACHE, U.N. HIGH COMMISSIONER FOR REFUGEES, THE HUMAN AND FINANCIAL COST OF DETENTION OF ASYLUM-SEEKERS IN CANADA, at 44 tbl.5, available at <http://www.socialsciences.uottawa.ca/edim/eng/documents/1.pdf>.

397. KENT ROACH, SEPTEMBER 11: CONSEQUENCES FOR CANADA 72 (2003).

Canada, a number of ministers of the Liberal party raised concerns about selective American registration policies. These policies were eventually abandoned by the United States as being counterproductive and underinclusive.<sup>398</sup> Nevertheless, Americans need to understand the importance of multiculturalism to Canadians.<sup>399</sup>

### B. *The 2011 Perimeter Security Agreement*

In February 2011, Prime Minister Harper and President Obama signed a joint declaration on a shared vision for perimeter security and economic competitiveness. It started by noting that bilateral trade between the two countries amounted to half a trillion dollars a year, and 300,000 people crossed the border every day. While recognizing the right of each country to act independently and in accordance with its laws, the declaration stressed increased information sharing as a means to further strategic interests in identifying and addressing threats early, and to provide for integrated cross-border law enforcement while also providing for joint privacy protection principles.<sup>400</sup> A more detailed action plan was released in December 2011. It provided a commitment to promote “increased informal sharing of law-enforcement intelligence . . . consistent with the respective domestic laws of each country.”<sup>401</sup>

The above proposal, with its blurring of the distinction between intelligence and evidence and its focus on informal cooperation, is troubling. Although Canadian privacy laws provide some restrictions on information sharing, there are broad exemptions for sharing of information for law enforcement, consistent use, pursuant to international agreements, and even

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398. David Martin, *Refining Immigration Law's Role in Counterterrorism*, in *LEGISLATING THE WAR AGAINST TERRORISM* 180, 203 (Benjamin Wittes ed., 2009).

399. For recognition that American post 9/11 targeting of Muslim countries hindered North American integration, see Kevin R. Johnson & Bernard Trujillo, *Immigration Reform, National Security after September 11, and the Future of North American Integration*, 91 *MINN. L. REV.* 1369, 1393–94 (2007).

400. *Beyond the Border: A Shared Vision for Perimeter Security and Economic Competitiveness*, CANADA'S ECONOMIC ACTION PLAN (Feb. 4, 2011), <http://actionplan.gc.ca/eng/feature.asp?mode=preview&pageId=352>.

401. PERIMETER SECURITY ACTION PLAN *supra* note 3. There are also provisions for the sharing of entry and exit information on foreign nationals and permanent residents at first, but by 2014 on all citizens. *Id.* at 10–11.

when necessary in the “public interest.”<sup>402</sup> Privacy laws themselves will not significantly restrain information sharing, and it is unclear whether joint principles for Canadian-American information and intelligence sharing will go beyond paying mere lip service to these laws. The Arar case raises the question of whether information sharing principles and practice will ensure the reliability, accuracy, necessity, and relevance of shared information. It also raises the issue of whether information shared between Canada and the United States will find its way to third countries, as occurred in the Arar and related cases.<sup>403</sup> The action plan suggests that these issues will be left for agreement on subsequent principles, but also that these concerns may be balanced with competing concerns about protecting informants, victims, and ongoing investigations.

Information sharing will likely increase under the 2011 perimeter security arrangements, but there are reasons to be uneasy about such practices. Wikileaks revealed continued Canadian disclosure of the names of suspected terrorists and their associates to the United States in 2008 and 2009. The names that Canada passed on to American authorities included not only those accused in the Toronto terrorism prosecutions, but also a person in the Toronto Muslim community who acted as an informer for the state in that prosecution.<sup>404</sup> These revelations have raised concerns

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402. Privacy Act, R.S.C. 1985, c. P-21 § 8(2)(a), (e), (f), (m) (Can.). See generally STANLEY COHEN, *PRIVACY, CRIME AND TERROR* 93–153 (2005) (discussing information sharing as it affects law enforcement under the Privacy Act).

403. The December 2011 action plan studiously ignores the Arar example when it declares: “Our countries have a long history of sharing information responsibly and respecting our separate constitutional and legal frameworks that protect privacy.” PERIMETER SECURITY ACTION PLAN, *supra* note 3, at 32. It commits the two countries to developing joint privacy principles for information sharing including issues of “data quality; necessity and minimization; access; record ratification; purpose specification and use limitation; onward transfer to third countries; retention; security safeguards; effective oversight; redress and transparency; and appropriate exceptions to these principles, such as exceptions intended to protect the privacy and identity of a victim and the identity of an informant, as well as against disclosure of information that could jeopardize a law enforcement investigation.” *Id.*

404. WikiLeak disclosures revealed that Canada passed on the names of the eighteen people charged in the Toronto terrorism plot to the United States for possible watch-listing in the visa viper program, but also the names of others associated with the case who were not charged, including the name of one person within the Toronto Muslim community who acted as an informer and testified for the state in the Toronto case. Dave Seglins, *CSIS Eyed Many Suspects in Terrorist Cases: Wikileaks*, CBC NEWS (May 18, 2011), <http://www.cbc.ca/news/canada/story/2011/05/17/wikileaks-csis-terrorism-suspects.html>; Wesley Wark, *No One Wants Another Maher Arar Case*, OTTAWA CITIZEN (May 21, 2011), <http://www2.canada>

in Canada about a repeat of the Arar case. These concerns are far from groundless given the refusal of the Canadian government to implement the Arar inquiry's 2006 recommendation for enhanced and integrated review of information sharing by Canadian security agencies and in particular the RCMP, which is only subject to a police complaints body with insufficient powers to audit and monitor top secret and informal information sharing practices.<sup>405</sup> Concerns about an exact repeat of the Arar case may be exaggerated given apparent changes in American rendition policies. Nevertheless, the perimeter security framework, like the earlier Monterrey Protocol, reserves the right of the United States to remove dual citizens in accordance with its own laws and interests.<sup>406</sup>

Canada and the United States will cooperate closely as neighbors with many common economic and security interests, but there are continued reasons for unease about human rights on the Canadian side and about security on the American side. American and Canadian governments alike may prioritize security over rights, but the real difference has been in the willingness of Canadian courts and quasi-judicial institutions, such as public inquiries, to highlight rights concerns on the Canadian side, as opposed to the willingness of American courts to defer to the legislature, the executive, and the military on security matters.

## VII. CONCLUSION

In the eyes of much of the world, Canada and the United States are so closely tied together that there is little to distinguish them. There are, however, significant differences in American and Canadian counter-terrorism that reflect each country's history and legal systems. This article has attempted to contribute to a better understanding of the different approaches and anxieties of the two

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.com/ottawacitizen/news/archives/story.html?id=2eb71e22-a361-4184-845b-16e9d214c11d&p=2. The Canadian media refused to publish the names of those not charged in Canada with terrorism illustrating its concerns about the potential unfairness of the information sharing that has not been disclosed to those affected or subject to adversarial challenge.

405. See COMMISSION OF INQUIRY INTO THE ACTIONS OF CANADIAN OFFICIALS IN RELATION TO MAHER ARAR, A NEW REVIEW MECHANISM FOR THE RCMP'S NATIONAL SECURITY ACTIVITIES (2006); ROACH, THE 9/11 EFFECT, *supra* note 19, at 416–20.

406. "We recognize the sovereign right of each country to act independently in its own interest and in accordance with its laws." PERIMETER SECURITY ACTION PLAN, *supra* note 3.

neighboring countries. It would be naïve to think that such insights would eliminate disagreements and irritants. Nevertheless, it may provide a firmer and more sensitive foundation to guide ongoing cooperation, including limits on cooperation, between the two countries.

The Maher Arar and Khadr family case studies tend to confirm cultural stereotypes of Canada as concerned about rights and trusting to the point of being gullible about security while the United States is prepared to bend or even break the law to protect security. As is often the case, there is some basis in reality for the stereotypes, but the reality is more complex. It is important in Canada to distinguish between the conduct of courts and quasi-judicial public inquiries, which have been very concerned with human rights, and the conduct of Canadian governments, under both Liberal and Conservative administrations, which have been much more concerned with security cooperation and keeping the border open. In the immediate aftermath of 9/11, Canadian officials cooperated with American security officials in ways that contributed to human rights violations, perhaps in an effort to compensate for the Ahmed Ressam case and past failures of Canadian counter-terrorism. The Canadian government under both Liberal and Conservative administrations refused to request that Omar Khadr be repatriated to Canada from Guantanamo despite concerns that the fifteen-year-old had been conscripted by his family as a child soldier. The government of Canada only agreed to contemplate Omar Khadr's repatriation in 2010 when the United States asked it to do so in order to facilitate a plea agreement before an American military commission. There is an important distinction between the actions of Canadian governments, which have focused on security and economic interests shared with the United States, and the actions of independent Canadian courts and public inquiries, which have been more concerned with human rights.

American courts have played a much less robust role in scrutinizing counter-terrorism actions by the executive than Canadian courts and quasi-judicial institutions such as public inquiries. The en banc Second Circuit dismissed Maher Arar's civil claim against American officials because of concerns about deferring both to Congress and the executive, and general concerns about state secrets, political questions, and narrow standing that could apply even in cases brought by American



citizens. Omar Khadr's legal claims were similarly dismissed by both military judges at Guantanamo and federal court judges in the D.C. Circuit in a manner that stressed deference to the military and Congress and avoided engaging with the merits of Khadr's claims that he had been mistreated and should not be subject to military detention and trial for acts done as a fifteen-year-old. The result was that the extensive American legal proceedings conducted on Omar Khadr's behalf avoided dealing with the merits of his claim that his military detention and trial were unjust. Abdullah Khadr would likely have been unable to raise his mistreatment when he was captured in Pakistan as a defense had American courts been able to assume jurisdiction over him on the material support of terrorism indictment issued against him. It has been suggested that the concept of extra-legalism or rule by law helps explain why American courts have been deferential to both legislatures and the executive in the Arar and Khadr cases.

A complicating factor is that Maher Arar and Omar Khadr are citizens in Canada, but aliens in the United States. At first glance, this may suggest that the contrast between the receptiveness of Canadian courts to their rights claims and the lack of comparable American receptivity is simply a matter of comparing apples and oranges. To be sure, Omar Khadr's detention at Guantanamo was made possible by his lack of American citizenship, but his claims to habeas corpus were based on concessions that the remedy should apply to him as it would to American citizens. Even more strikingly, the dismissal of Maher Arar's civil claim in American courts did not hinge on his citizenship but on more general concerns about judicial deference, narrow standing, and state secrets that have been applied in lawsuits brought by American citizens. In addition, the legal claims brought in Canada by Maher Arar and the two Khadr brothers revolved around rights under the Canadian Charter that are enjoyed equally by citizens and non-citizens. Canadian courts were concerned about the treatment of Omar Khadr and refused to extradite Abdullah Khadr to the United States not so much because they are Canadian citizens, but because of concerns about abuses of human rights, including those recognized under international human rights law. Thus citizenship does not emerge as a particularly strong explanation for the different treatment received by these people in Canada and the United States. The greater roles played by courts and quasi-judicial institutions in Canada than in the United States emerges as a more

robust explanation of the different treatment in these three case studies.

It is important for Americans to understand that Canadian responses to counter-terrorism are shaped by concerns of past abuses and by the restraints of a constitutional bill of rights that in the national security context places more restraints on state officials than the American Bill of Rights. Canada's declaration of martial law in October 1970 has had a lasting effect on Canadian security efforts. Resulting changes include the establishment of CSIS, a security intelligence agency without law enforcement powers that is subject to extensive watchdog review, and the 1982 enactment of the Charter as a constitutional bill of rights, including a 1985 decision by the Supreme Court of Canada rejecting the concept of non-justiciable political questions under the Charter. In both the Omar and Abdullah Khadr cases, the Charter required Canadian courts to apply human rights and fairness standards at the risk of impairing Canada's ongoing security cooperation with the United States. Canadian law on the extra-territorial application of the Charter now requires Canadian courts to determine whether Canadian activity violates not only the Charter, but also international human rights laws. In both 2008 and 2010, the Supreme Court of Canada concluded that Omar Khadr's detention at Guantanamo violated international human rights, though it limited its decision to 2003 and 2004 when Canadian intelligence agents interrogated Omar Khadr at Guantanamo. The Canadian courts refused to extradite Abdullah Khadr to the United States because of American abuses in detaining him in Pakistan in 2004 through 2005. The days when Canadian courts automatically deferred to state authority ended with the Charter. The stereotype of Canada as prioritizing rights over security has some support in these cases and also helps explain some of the conflicts between American and Canadian security efforts.

The Abdullah Khadr case has placed strains on Canadian-American security relations, but it needs to be understood in the context of the Maher Arar case, in which a high-profile public inquiry criticized Canadian officials for not adequately protecting Arar's interests as a Canadian citizen to be returned to Canada. In part because Maher Arar remains on American watch lists, Americans may have difficulty in understanding the social significance of his case in Canada. Arar was exonerated by a high profile public inquiry run by a respected judge. The inquiry led a

Conservative Canadian government to settle Arar's civil claim for \$10.5 million. The same government also protested his treatment to President Bush and unsuccessfully lobbied to have Arar removed from U.S. watch-lists. The Arar case has made a lasting impact in a Canadian society that prides itself on multiculturalism and in which one-in-five Canadian citizens are foreign born. It also may explain why Canadian officials refused to consent to U.S. efforts to have Abdullah Khadr regularly or irregularly extradited from Pakistan to face terrorism charges in the United States despite the fact that Canada seems unwilling or unable to prosecute Abdullah Khadr domestically. At the same time, the Arar case has not prevented Canadian governments from refusing to implement the Arar inquiry's recommendation for enhanced review of information sharing by Canadian security agencies or to agreeing to increased and informal information sharing with the United States as part of the 2011 perimeter security action plan. Again, it is important to distinguish between the security interests of the Canadian governments and rights concerns that are forced upon them by the decisions of courts and quasi-judicial public inquiries.

American concerns about Canada as a security threat are not frivolous. The Ressay case and the existence of the Khadr family as a self-professed "al Qaeda family" understandably make Americans nervous about security threats from Canada. Canada's historical track record on terrorism investigations and prosecutions, particularly in relation to the Air India bombings, does not inspire confidence. Fortunately, there have been some post 9/11 improvements, including convictions in the Khawaja and Toronto terrorism cases, but Canada stills lags well behind the United States in conducting terrorism prosecutions. Canada needs to demonstrate that it has the capacity and will to prosecute its own terrorists. Both the Maher Arar and Abdullah Khadr cases suggest that Canadian reluctance to use criminal prosecutions (whether justified or not) may lead the United States to seek other less restrained alternatives with respect to suspected Canadian terrorists, including regular or irregular extradition to the United States or other countries. An important factor in Canada's approach in both cases is an unwillingness to use pretextual criminal charges which are much more readily accepted in the United States. Another factor in Canada's difficulties in conducting terrorism prosecutions is its anxiety as a net importer of intelligence about the possible disclosure of foreign intelligence.

Although this anxiety does not excuse Canada's rigid approach to the retention of intelligence as evidence, and its awkward two-court approach to adjudicating state secrets claims, it does help to explain it.

Constant exposure to American politics and culture can make Canadians overconfident in their ability to understand the United States, and this has frequently been the case since 9/11. There is a danger that Canadians will fail to appreciate the profound and lasting emotional impact of the 9/11 attacks and the subsequent wars in Afghanistan and Iraq on the American psyche. The Maher Arar and Khadr family case studies in this article need to be placed in the context of the immediate American response to 9/11. Although this does not excuse the abuses of human rights in each case, it does help explain them. Arar's rendition to Syria would not likely occur today not only because of the commitment to consultation in the Monterrey Protocol, but also because of apparent de-escalation of intelligence-based rendition programs. The continued detention and trial by military commission of Omar Khadr and the failed American attempt to render or extradite Abdullah Khadr for trial in the United States can be explained in part by the seriousness of the allegations against them. Although the United States engaged in forceful unilateralism in the Arar and both Khadr cases, it is likely that the accurate perceptions that Canada lacked the ability or will to detain or prosecute people rightly or wrongly suspected of terrorism played a significant role in all three cases.

The cultural stereotype of the American response as one based on military force and lawless cowboy approaches also needs to be supplemented by an appreciation of the real restraints that the Bill of Rights and the fragmented American political system place on domestic innovations to prevent terrorism. The Patriot Act was controversial in the United States, but it stopped short of authorizing preventive arrests and warrantless spying that were authorized in Canada's post-9/11 Anti-Terrorism Act. There may be a symbiotic relationship between the restraints of American domestic constitutionalism and its only partially successful attempts to escape those restraints outside of the United States through renditions, Guantanamo, CIA prisons, and targeted killings. Moreover, the American response to terrorism is not quite as lawless as the stereotype suggests. Canadians (and Europeans) often fail to appreciate that the American legal system gives the

executive a degree of freedom from judicial supervision that would not be accepted in other constitutional democracies. In this respect, the judicial refusal to allow Maher Arar to complete his civil action, though contested in the United States, represents an important strain in the American constitutional tradition that reserves some sensitive issues to the elected branches of government without judicial supervision. Similarly, American courts have accepted military detention and trials of those, such as Omar Khadr, who were captured in Afghanistan and have deferred to both the military and Congress when taking such passive positions. They also would not have reviewed improprieties and violations of the law in Abdullah Khadr's capture in Pakistan had they been able to assert jurisdiction to try him on material support of terrorism charges. What in Canada and many other parts of the world might appear to be American lawlessness may be supported by complex, though not always persuasive, claims of legality or non-reviewability from the American legal system.

Canadians often fail to appreciate that terrorism has been seen in the United States, both before and after 9/11, as an external threat calling for a military response. This tendency to engage the military in an external war against terrorism is also related to the difficulties of waging a legislative war on terrorism with the fragmented American political system that accepts the Bill of Rights as a fundamental restraint on domestic state activity. The American military tradition in counter-terrorism may provide impediments to international cooperation with the United States. For example, Canadian security agents were enjoined by Canadian courts from continuing to interrogate Omar Khadr at Guantanamo, and if new attempts are made to extradite Abdullah Khadr, or other terrorism suspects, from Canada to the United States, then the United States might have to agree not only not to seek the death penalty, but not to employ military detention and trial against such foreign al Qaeda suspects as recently authorized by the National Defense Appropriations Act. Distinctive American approaches to counter-terrorism that employ the military and use a war model may spark increased cycles of American unilateralism if they inhibit international counter-terrorism cooperation. If Canada resists cooperation despite its uniquely close ties and shared interests with the United States, the reaction from Europe is likely to be even stronger.

A comparative study of American and Canadian counter-

terrorism has relevance to the overall study of counter-terrorism laws and policies. Although there are some differences between the two countries, both countries have been comparatively reluctant to make radical innovations in their criminal justice systems in order to accommodate terrorist prosecutions. Although both the Patriot Act and Canada's Anti-Terrorism Act were domestically controversial, they were restrained compared to subsequent Australian and British responses. American use of immigration and military detention, and the Canadian use of immigration detention can be best understood in the context of limited reforms in the criminal justice systems, including common refusals to use secret evidence or status-based membership offenses. Both the United States and Canada are also more reluctant than European countries to regulate speech associated with terrorism. American misconduct and insistence on retaining options such as the death penalty, military detention, and military trial for foreign terrorist suspects may be a barrier to international counter-terrorism cooperation with possible negative consequences for American security itself. At the same time, co-operation may continue if the President waives military custody when it would impede the transfer or extradition of a terrorist suspect to the United States.

The American-Canadian post-9/11 story also underlines how courts now play a greater role in supervising security efforts than at any other time. Although much state activity, including targeted killing and renditions, in the United States has escaped effective judicial scrutiny, robust attempts have nevertheless been made to impose such scrutiny. President Bush's initial attempts to render detention at Guantanamo immune from judicial review failed, and Omar Khadr, like other Guantanamo detainees, was able to bring multiple, albeit unsuccessful, habeas corpus challenges to his detention. The Canadian courts have been more active than the American courts, and entertained indirect challenges to American conduct in both the Omar and Abdullah Khadr cases. The Abdullah Khadr case is especially noteworthy given that courts have traditionally been quite deferential in reviewing extradition requests. It is also possible that Omar Khadr's legal treatment at Guantanamo may yet be subject to collateral attack in Canadian courts. Conduct that is sheltered from judicial review in the United States may be indirectly reviewed by courts in other jurisdictions. In short, the globalized array of legal venues makes it difficult for

any regime to sustain legal black holes, and it may encourage indirect challenges to American practices that are tolerated under the unique approach of American extra-legalism.

A comparative examination of American-Canadian counter-terrorism also provides an important window into the sharing of intelligence that has been encouraged globally and domestically since 9/11. The Maher Arar saga reveals the dangers of shared intelligence that is, as the Canadian inquiry concluded, unreliable. The American government's continued watch-listing of Arar also reveals the danger of using secret intelligence to impose sanctions when the intelligence is not subject to independent review and adversarial challenge. If Maher Arar cannot effectively challenge his inclusion on American no-fly lists, the difficulties facing others who are listed but whose cases have received much less scrutiny must be even greater. Despite these dangers, intelligence sharing between Canada and the United States must, as Canada's Arar inquiry acknowledged, continue, and it will intensify under new perimeter security arrangements. The Arar story underlines the need for effective and integrated review and oversight of information sharing practices. In many ways, the ideal mechanism would be joint review by an independent body appointed by both countries. Such a body could apply joint principles for information sharing that have been promised as part of the December 2011 Perimeter Security Action Plan, but surprisingly and disturbingly have not yet been developed despite day-to-day information sharing between the two countries. If American and Canadian security officials are going to work seamlessly side by side, so too should their reviewers. Nevertheless, the continued disagreement over whether Maher Arar is a security risk underlines the challenges of such cooperation.

Despite their close ties and common security interests, there have been a number of high profile irritants in post-9/11 Canadian and American security cooperation. These disagreements have not primarily been between American and Canadian governments who share common security and economic interests, but between independent judicial and quasi-judicial bodies in Canada that have been concerned about infringement of the human rights of those rendered by the United States to Syria, detained on the behest of the United States in Pakistan, and held by the United States at Guantanamo. We only know about this unease because of the publicity of judicial and inquiry processes. Most security

arrangements are much less transparent. This study then suggests that independent courts have the potential to complicate but perhaps not to frustrate security arrangements between governments. Despite strong criticisms of American abuses by Canada's Arar inquiry and by Canadian courts in both the Omar and Abdullah Khadr cases, the Canadian and U.S. governments are moving forward with perimeter security arrangements that will intensify security cooperation, including information sharing. The two countries may be uneasy neighbors, but they remain neighbors nevertheless.



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