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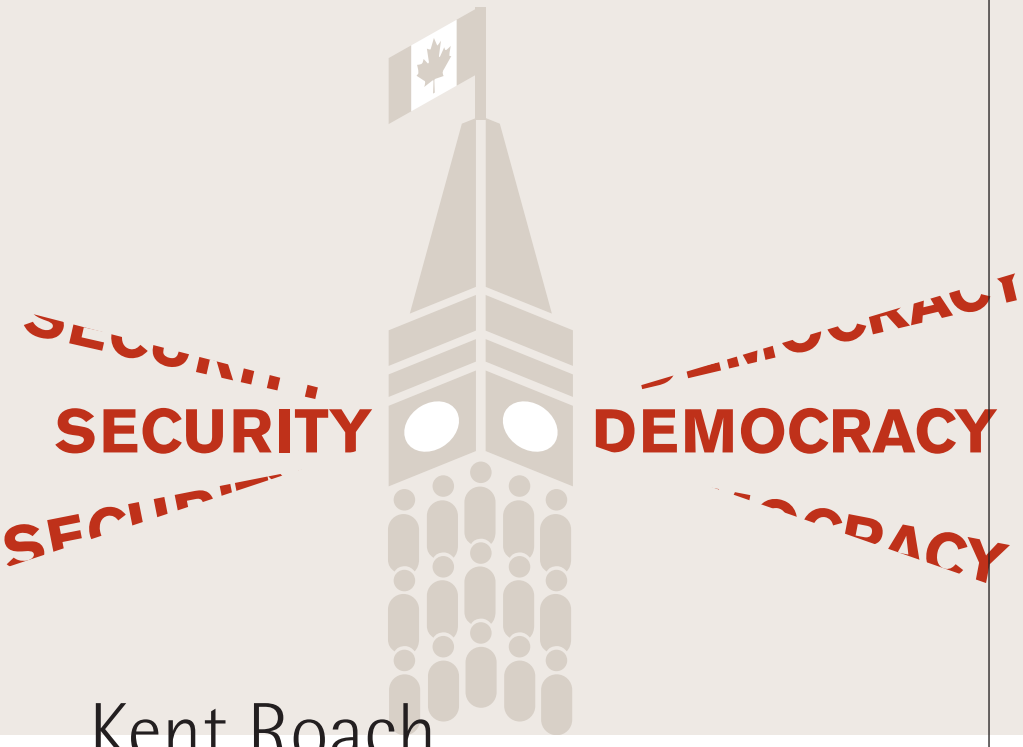
Security and Democracy

Better Late than Never?

The Canadian Parliamentary Review of the *Anti-terrorism Act*



Kent Roach

IRPP

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Security and Democracy / Sécurité et démocracy

Research Directors/ Directeurs de recherche

Mel Cappe and/et Wesley Wark

This IRPP research program explores the complex challenges confronting Canada with regard to the post-9/11 security environment and its impact on domestic and international policies. The research addresses issues that are in many ways new to the country and to the formulation of Canadian national security policy, above all the threat posed by global, transnational terrorism. The program examines the interrelationships between new security demands and democratic norms, focusing in particular on the building blocks of a sound democratic model for national security, namely, effective intelligence; capable law enforcement; appropriate, stable laws; good governance; accountability; citizen engagement and public knowledge; emergency response capability; wise economic policy; and public-private sector partnerships.

Ce programme de recherche s'intéresse aux défis de sécurité d'une grande complexité que le Canada doit relever depuis le 11 septembre, de même qu'à leur incidence sur nos politiques nationales et internationales. Il traitera d'enjeux souvent inédits pour notre pays en matière de sécurité nationale, notamment le terrorisme mondial et transnational. Le programme vise à analyser l'interrelation entre les nouvelles exigences de sécurité et les normes démocratiques, de manière à définir les éléments de base suivants : un modèle de sécurité nationale pleinement démocratique, notamment en matière de renseignement ; l'efficacité du maintien de l'ordre ; la stabilité et la légitimité des lois ; la gouvernance éclairée ; la responsabilisation ; l'engagement citoyen et l'information du public ; l'intervention d'urgence ; une politique économique avisée ; et les partenariats entre les secteurs public et privé.

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Kent Roach is a professor of law at the University of Toronto, where he holds the Prichard-Wilson Chair in Law and Public Policy. He has also been elected a Fellow of the Royal Society of Canada. He has written eight books, including *September 11: Consequences for Canada* (McGill Queens Press). He is the co-editor of *Global Anti-Terrorism Law and Policy* (Cambridge University Press) and of *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill* (University of Toronto Press). His work on comparative anti-terrorism law has been published in Australia, Europe, Hong Kong, Singapore, South Africa and the United States, as well as in Canada. He assisted the Arar and Air India inquiries and appeared before a working group drafting anti-terrorism laws in Indonesia.

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Introduction

This paper assesses the policy-making process behind the Canadian Parliament's mandated review of the *Anti-terrorism Act* (*ATA*) and the expiry of preventive arrests and investigative hearings in the *ATA*. As such, it provides a preliminary glimpse into the complexities of national security policy-making. Policy-makers in this area must grapple with difficult issues that involve liberty, security, equality, privacy and Canada's international relationships. In addition, they must also respond to a seemingly overwhelming array of policy drivers including United Nations edicts, varying assessments of the threat environment, predictions about the restraints that will be imposed by courts under the Canadian Charter of Rights and Freedoms, recommendations by public inquiries, rights watchdogs and parliamentary committees, the experience of other countries and input from interest groups. The policy environment is dynamic and the issues are multifaceted. There are no easy answers. At the same time, there is a danger that the issues will be simplified, sensationalized and politicized in a partisan manner.

In recognition that it was quickly drafted legislation enacted on a permanent basis, Canada's 2001 *ATA* required parliamentary committees to conduct a comprehensive three-year review of its provisions and operation, as stipulated in s. 145 of the Act.[1] This three-year review was to start at the end of 2004 and be completed by the end of 2005. Parliamentary reviews of innovative legislation have the potential to provide sober second thought. They can lead to amendments to reflect the experience under the law and changed circumstances. At the same time, past reviews of security legislation by parliamentary committees, for example the five-year review of the *Canadian Security Intelligence Service (CSIS) Act*, have faced problems gaining access to secret information, a lack of time to complete their work and government unwillingness to implement their recommendations (Commons 1990; Farson 1995). Unfortunately, Parliament's review of the anti-terrorism legislation was delayed and the reviews were not completed until March

2007. This delay meant that Parliament decided not to renew preventive arrests and investigative hearings, two controversial new powers in the *ATA* that were subject to a five-year renewable sunset, at the end of February 2007 without the benefit of the full review of the *ATA*.

After a brief description of the *ATA,* enacted in December 2001, and subsequent court cases that have applied the *ATA*, this paper will explore the debate over the expiry of investigative hearings and preventive arrests that occurred in February 2007. Particular attention will be paid to the lack of influence that an interim report released by the Commons committee (Commons 2006) had on what was a highly partisan and fractious debate. It will then describe the processes used by both Commons and Senate committees to complete their delayed three-year review of the *ATA*. This paper then identifies and discusses 12 major issues that arise from the final reports of the Senate and Commons committees. My purpose is to assess the recommendations made by the committees rather than to advocate particular ways to resolve these important issues. I will also identify some intriguing and important differences between the approaches taken by the Senate and the Commons committee and provide a report card of sorts on the work of the committees. The government's response in June 2007 to the three-year review conducted by the Commons committee will also be assessed. The conclusion of this study will explore whether Parliament is up to the task of building on the work of the committees in a rational and intelligent way and completing the long-delayed three-year review of the *ATA* through amendments.

The recent debate over investigative hearings and preventive arrests, regardless of one's views about the outcome, does not justify optimism. It may be that good work by committees in the sensitive area of anti-terrorism law and policy may be better received in courts and unelected upper chambers than in the elected Commons. This, at least, has been the experience in the United Kingdom (Hiebert 2005). Such a conclusion would not, however, bode well for the ability of Parliament or the Canadian public to deliberate about the many difficult security issues that we face.

The *Anti-terrorism Act*

The Bill C-36 debate

Bill C-36, containing the *Anti-terrorism Act*, was introduced in Parliament on October 15, 2001. It weighed in at over 170 pages of legislative text that, for the most part, had been quickly drafted in the large and tragic shadow of 9/11. Although it was not enacted with the same rapidity as the *USA Patriot Act* – a speed that prevented many American legislators from even reading the text of that law – the debates about the *ATA* were rushed. The federal government took the position that Security Council Resolution 1373, which required all nations to enact laws against terrorism and the financing of terrorism and to report to a new United Nations Counter-Terrorism Committee by the end of 2001, required that Bill C-36 become law by December 18, 2001.[2]

Perhaps because the government felt secure with its majority position in Parliament and was committed to legislating in response to 9/11, there was a robust debate about Bill C-36 in committees in the Commons and the Senate. The many critics of the legislation obtained some significant changes in committee, including the attachment of a five-year sunset to new powers of preventive arrest and investigative hearings and some narrowing of the legislation's broad definition of terrorist activities. The public debate was also energetic. Books were written about the Bill and the media produced extensive analyses of its potential effects on civil liberties (Daniels, Macklem and Roach 2001; Daubney et al. 2002; Kelly 2005, 246-7; Roach 2003: chap. 3). Groups representing Aboriginal people, unions, charities, refugees and lawyers, as well as watchdog review agencies such as the privacy and access to information commissioners and the Canadian Human Rights Commission, all voiced their concerns about the Bill, as originally drafted, to committees in the Commons and the Senate. These committees made some important recommendations, many of which were later adopted by the government. They addressed issues such as the definition of terrorist activities, and recommended that an exemption from the definition for strikes and protests not be limited to lawful protests and strikes. The result has been described as "the most balanced example of legislative activism to date" (Kelly 2005, 246) and one that demonstrated the ability of Parliament to take rights considerations into account. The committees certainly made important contributions to Bill C-36, but party discipline and closure was imposed to end the parliamentary debate, leading some MPs such as Joe Clark to criticize the process as "a travesty of democracy" (Roach 2003, 67). As will be seen, the courts have found some parts of Bill C-36 to be flawed under the Charter.

The complex, omnibus nature of the *ATA* made it difficult for interested persons and parliamentarians to assess all parts of the Act. Much of the Bill C-36 debate revolved around the definition of terrorist activities, the introduction of investigative hearings and preventive arrests, and the effects of the law on charities. The implications of the more technical parts of the Act relating to signals intelligence, terrorist financing and government secrecy received less attention (Wark 2001). The important role that immigration law, and in particular security certificates, would play was also largely ignored (Macklin 2001), as were issues related to the review of national security activities.

The definition of terrorist activities

United Nations Security Council Resolution 1373, enacted immediately after 9/11, called on all states under the mandatory provisions of chapter VII of the United Nations Charter to ensure that terrorism was treated as a serious crime, but it did not attempt to define terrorism. That difficult and controversial task was left to each domestic government.

The most discussed part of the *ATA* added a new section on terrorism to the Criminal Code. It defined terrorist activities in the Criminal Code for the first time and enacted a broad range of new offences relating to the financing and facilitation of terrorism and participation in a terrorist group. The focus on financial support for terrorism reflected the substance of Security Council Resolution 1373 and the UN's focus at the time. Subsequent developments, including the report of the 9/11 Commission, have raised questions about the effectiveness of the focus on the financing of terrorism in preventing actual, often low-cost, acts of terrorism.

As first introduced, the *ATA* would have defined terrorist activities to include serious disruptions of essential public or private services, so long as they were politically or religiously motivated or designed to intimidate a segment of the public with regard to its security or to compel a government or any person to act. The only exemption from this sweeping prohibition when Bill C-36 was introduced was for "*lawful* advocacy, protest, dissent or stoppage of work" [emphasis added]. This broad definition of terrorism inspired widespread concern among civil society groups that the Act would brand many illegal protests and strikes as terrorism (Roach 2003, chap. 3). This concern led to amendments before the Bill became law that dropped the requirement that exempt protests must be lawful, and provided that the expression of religious, political or ideological thought or opinions would not normally be considered terrorism.

Lawyers for the first person charged under the *ATA*, Mohamed Momin Khawaja, however, successfully challenged this definition of terrorist activities. The judge held that while the definitions of terrorism offences were not unconstitutionally vague or over-broad and had constitutionally sufficient fault requirements, the requirement of proof of religious and political motive was an unjustified violation of freedom of expression, religion and association and an invitation to religious profiling of suspected terrorists. The judge struck down the political or religious motive requirement and severed it from the rest of the definition.[3] This decision had the effect of expanding the definition of terrorist activities, especially because the law applied to attempts to compel not only governments but any person to act. But the ruling also responded to real concerns in society about targeting people as potential terrorists because of their religious beliefs (Roach 2007a). The Supreme Court recently refused to hear an appeal of this decision. Nevertheless, the decision remains controversial. Some argue that it is nonsensical to define terrorism without regard to religious and political motives (Plaxton 2007), while others point to many examples of definitions of terrorism that do not use motive as a basis for distinguishing it from ordinary crime (Roach 2007a). Regardless of one's views about the decision, however, it suggests that Parliament should consider revisiting its definition of terrorist activities, which was hurriedly crafted in the immediate aftermath of 9/11. The independent reviewer of British anti-terrorism laws recently completed just this task and stated that, with some exceptions, the British definition of terrorism — which, it should be noted, forms the basis for the Canadian definition — was sound (Carlile 2007). That the Canadian Parliament would find itself confronting the definition of terrorism yet again should not be surprising given the great difficulties that the international community has experienced in reaching an agreement about the proper definition of terrorism. The question remains, however, whether the Canadian Parliament is up to the difficult task of defining terrorism in a principled and workable manner.

Investigative hearings and preventive arrests

Another important feature of the *ATA* was its expansion of police powers. One provision provided for preventive arrest when there are reasonable grounds to believe that a terrorist activity will be carried out and

reasonable suspicion that detention or the imposition of conditions on a specific person is necessary to prevent its carrying-out. The period of preventive arrest under Canadian law was limited to a maximum of 72 hours and could see a judge release a person before this time. The maximum 72-hour period was shorter than the 7 days then provided under British law, a period that has subsequently been extended to 28 days, with calls for even longer periods.

At the same time, the effects of a Canadian preventive arrest could last much longer than three days. A judge can require the suspect to enter into a recognizance or peace bond for up to a year, with a breach of the bond being punishable by up to two years' imprisonment and a refusal to agree to a peace bond punishable by a year's imprisonment. Governments were required to prepare reports on the use of preventive arrests, but the reports that have been issued reveal no use of this provision.

A second new investigative power was a power to compel a person to answer questions relating to terrorist activities in either the past or the future.[4] The subject could not refuse to answer on the grounds of self-incrimination, but the statements and evidence derived from them could not be used in subsequent proceedings against the person so compelled. There was judicial supervision of the questions and a right to counsel.

The first and only attempt to use investigative hearings was during the Air India trial. The application for the hearing was held in secret without notice to the media or to the accused in the trial. The person compelled to testify challenged the constitutionality of the procedure. In *Application under s. 83.28*,[5] the Supreme Court upheld the constitutionality of this novel procedure in a 6-to-3 decision. Justices Iacobucci and Arbour held for the majority that the procedure did not violate s. 7 of the Charter, given that compelled evidence or evidence derived from that evidence could not be used against the person except in perjury prosecutions. Two judges dissented on the basis that investigative hearings violated the institutional independence of the judiciary by requiring judges to preside over police investigations. They, along with a third judge, also dissented on the basis that the use of an investigative hearing in the middle of the Air India trial constituted an abuse of process because it was an attempt by the prosecution to gain an unfair advantage.

In the companion case of *Re Vancouver Sun*,[6] a majority of the Court held that the presumption in favour of open courts applied to the conduct of investigative hearings. Two judges dissented on the basis that such a presumption would make the hearing ineffective as an investigative tool and could harm the rights of third parties and intimidate witnesses. This dissent raises but does not resolve the connection between investigative hearings and the ability of Canadian officials to protect witnesses and recruit informers.

Enhanced investigative powers

The *ATA* made it easier for police officers to obtain warrants for electronic surveillance in terrorism investigations. It also provided the first recognition of Canada's signals intelligence agency, the Communications Security Establishment (CSE). The CSE gathers foreign intelligence from global communications networks, helps protect important information infrastructures in Canada and provides technical and operational assistance to federal law enforcement and security agencies. The *ATA* empowered the CSE to intercept private communications on a ministerial as opposed to a judicial authorization. Although this was not clearly spelled out in the legislation, the CSE amendment allows for interception of communications, even if one side of the conversation was in Canada. Similar use of intercept powers by the National Security Agency in the United States, until recently not specifically authorized by legislation, have caused considerable controversy. In one of its few recognitions of the importance of reviewing national security activities, the *ATA* also recognized the role of the arm's-length commissioner of the CSE, generally a retired judge, who has a mandate to ensure that the CSE's activities are in compliance with the law.

Enhanced secrecy

The *ATA* also updated the *Official Secrets Act* and renamed it the *Security of Information Act*. The amendments expanded the previous act to include communications with terrorist groups as well as foreign powers, if the communications are prejudicial to broadly defined interests of the state. One section that was not amended was the offence targeting leaks or possession of secret information, despite many criticisms and calls for its reforms. In 2006, the section was declared to be unconstitutional and struck down in the Juliet O'Neill case. The judge gave the old law a failing grade in all possible respects. She found that the old offence was unconstitutionally vague and over-broad, did not require fault and was a disproportionate limitation on

freedom of expression.[7] As will be seen, the Commons and Senate committees failed to deal adequately with the implications of this ruling.

The *ATA* also amended the secrecy provisions of the *Canada Evidence Act* to require justice system participants to notify the Attorney General of Canada if they planned to disclose or call evidence about a broadly defined range of secrets. The law requires that disputes about the disclosure of such information, even when they arise in criminal trials, be litigated before a specially designated judge of the Federal Court. Provisions requiring that all parts of such Federal Court hearings be conducted in private have recently been declared to be an unjustified violation of freedom of expression by the Federal Court.[8] This suggests that claims made by the Minister of Justice in 2001 that the *ATA* was consistent with the Charter have not always been borne out by subsequent experience with Charter litigation.

At the same time, however, other parts of the *Canada Evidence Act* amendments have survived Charter challenge. The Federal Court recently held that the government's ability to make arguments to the judges about secret information without the other side's being present did not violate the Charter.[9] The Court suggested that in appropriate cases a security-cleared friend of the court could be appointed to challenge the government's case for secrecy and non-disclosure.

Even if a judge orders that the public interest in disclosure outweighs the interest in non-disclosure, the Attorney General can, under the 2001 amendments, prevent disclosure by issuing a certificate. The certificate lasts 15 years but can be renewed. In response to criticisms after Bill C-36 was introduced, it can be subject to a light form of judicial review that only requires the judge to affirm that the information covered by the certificate relates to national security or national defence or was received from a foreign entity.

The *Canada Evidence Act* also recognized that a failure to disclose relevant information to the accused because of a concern about preserving secrets could make a fair trial impossible. It explicitly recognized the right of trial courts to order whatever remedy was required to protect the accused's right to a fair trial in light of a non- or partial disclosure order from the Federal Court. This represented a concession to the Charter and the reality that at least one terrorism prosecution had been stayed because of a lack of full disclosure.[10] The new *Canada Evidence Act* provisions may have been successfully Charter-proofed by providing for such remedies for non-disclosure (Roach 2001a). Nevertheless, questions remain about whether the provisions are workable in requiring two courts, the Federal Court and the criminal trial court, to resolve the difficult balance between the state's interest in secrecy and the accused's interest in disclosure in terrorism prosecutions.

The Khawaja prosecution, Canada's first terrorism prosecution under the *ATA*, has become bogged down in pretrial litigation. There has been not only Charter litigation over the *ATA*'s definition of terrorist activities,[11] but an unsuccessful Charter challenge to the new provisions of the *Canada Evidence Act*[12] and an application by the Crown requesting that about 1,500 pages of the almost 99,000 pages of material that it holds about the case not be disclosed to the accused.[13] The Attorney General of Canada has appealed a decision to disclose and summarize some of this secret information to the accused. The accused in turn has appealed the decision to uphold the law under the Charter and not to disclose the remaining information. We are no closer to starting a trial against Mr. Khawaja even though he was first charged and denied bail in 2004. In contrast, the British were able to complete the trial of Mr. Khawaja's alleged co-conspirators in London at the end of April 2007, despite the fact that the British trial took a year to complete and the jury deliberated for almost a month before convicting five of the seven men who were charged.

All countries must grapple with reconciling the competing needs to keep secrets and to disclose relevant information to ensure that the accused is treated fairly. Canada, however, has a particularly difficult time resolving such tensions because of its concerns about being a net importer of intelligence. The judge hearing the Crown's application for non-disclosure in *Khawaja* accepted that Canada must rely on foreign intelligence, but nevertheless held that the government had gone too far in making some of its claims of secrecy.[14] Another factor that complicates the Canadian approach to secrecy is our awkward use of two courts, the Federal Court and the criminal trial court, to resolve claims of national security confidentiality. In Britain, the United States and Australia, the trial judge alone is able to determine what secret material must be disclosed to the accused and what must not.

Summary: the *ATA* in context

The *ATA* was important and sweeping legislation. At the same time, it was only part of an intensification of national security activities. The *Public Safety Act* was

introduced shortly after the *ATA* was enacted and it contained many provisions providing for increased information sharing within and between governments as well as measures relating to aviation security, the control of toxins and dangerous materials, and emergency measures. Unlike the *ATA*, it was not subject to a three-year review. In addition to these legislative responses to 9/11, there was increased spending on security matters, a Smart Border agreement with the United States, including an eventual safe-third-country agreement restricting refugee applications from each country, and the deployment of Canadian Forces in Afghanistan,[15] but not Iraq. In 2004, Canada released its first national security policy, designed to deal not only with the threat of terrorism but also other risks to human security such as natural disasters and pandemics including SARS (Roach 2003, chap. 7; Wark 2006; Whitaker 2005). The Solicitor General's Department was reorganized as the new and expanded Department of Public Safety and Emergency Preparedness, and new agencies were created with responsibility for aviation safety and border protection.

Although the comprehensive review of the *ATA* was itself a daunting task, it was still far from a comprehensive review of all the post-9/11 changes to Canadian security policy. Indeed, it might be impossible for any one committee of Parliament to conduct a truly comprehensive review of the many post-9/11 changes to Canada's national security policy, precisely because they have affected so many aspects of governance. As will be seen, the complexity of the review of just the *ATA* and related legislation was almost overwhelming for the Commons and Senate committees that conducted it.

The House of Commons Committee Interim Report on Preventive Arrests and Investigative Hearings

The dissolution of Parliament in November 2005 and the subsequent 2006 election made it impossible for the Commons committee to complete its comprehensive report as scheduled by the end of 2005. In late October 2006, an interim report was issued. All members of the Commons subcommittee[16] unanimously agreed that investigative hearings should be extended until December 31, 2011, but subject to the recommendation that such hearings only be conducted when there was reason to believe that there was imminent peril that a terrorist offence would be committed. This recommendation followed an argument made by the Canadian Civil Liberties Association in its written brief to the committee. The committee's unanimous proposal would have prevented the use of investigative hearings to investigate past acts of terrorism such as the 1985 bombing of Air India Flight 182. The committee's rationale for this approach was sparse. It concluded:

> The Canadian Civil Liberties Association (CCLA) in its brief has expressed concern about the dual nature of investigative hearings. The CCLA accepted the necessity in some circumstances to compel testimony in an adjudicative hearing such as a criminal trial where the issues are clearly circumscribed. It stated that a distinction might be made between misdeeds already committed and perils imminently expected—the power to compel testimony should be limited to the latter situation.
>
> The Subcommittee agrees with the position taken by the CCLA on this issue. There are already a number of investigative powers and techniques available to law enforcement agencies pursuing the perpetrators of criminal activity, which includes terrorism offences. Traditionally, Canadian criminal law has not accepted that testimony be compelled for investigative purposes, in contrast with adjudicative processes.
>
> The Subcommittee believes that investigative hearings should only be available in relation to situations where testimony has to be compelled to prevent activities where there is imminent peril of serious damage being caused as a consequence of their being successfully carried out in whole or in part. This recommendation can be implemented by amending section 83.28(4) of the Criminal Code so as to delete paragraph (a) from it. (Commons 2006, 6-7)

The CCLA had originally proposed this approach in 2001 as a "compromise" (Borovoy 2006, 97), presumably on the basis that the social interest in preventing terrorism was greater than that in prosecuting terrorism. The issue was not even discussed when the CCLA appeared before the committee. The rationale for the CCLA's approach and that recommended by the Commons committee in its interim report is essentially that investigative hearings like preventive arrests, should be limited to emergency situations where extraordinary action is necessary to prevent acts of terrorism.

Neither Parliament nor the Supreme Court, however, drew any distinction between past and future acts of terrorism. Investigative hearings as included in the 2001 legislation specifically applied to both future and past acts of terrorism. In 2004, a majority of the

Supreme Court held that, as procedural legislation, investigative hearings could be applied to past acts of terrorism without violating the rule against retroactive offences. Justices Iacobucci and Arbour concluded that "[w]hile the prevention of future acts of terrorism was undoubtedly a primary legislative purpose in the enactment of the provision, as discussed earlier, it does not follow that Parliament intended for procedural bifurcation respecting past acts of terrorism *vis-à-vis* anticipated or future acts. The provision itself provides for judicial investigative hearings to be held both before and after the commission of a terrorism offence ...."[17] The dissenting judges concluded that using an investigative hearing against a Crown witness during an ongoing trial was an abuse of the prosecution's powers, but did not indicate that investigative hearings should not be available with respect to past acts of terrorism. The fact that Parliament and the Supreme Court had no problem with the use of investigative hearings for past acts of terrorism does not necessarily mean that the position taken by the CCLA and the Commons review committee was wrong. It does, however, suggest that the Commons committee should have provided a more elaborate and sustained justification for its conclusions.

The committee was divided about the renewal of preventive arrests. The majority recommended that they should be extended subject to minor housekeeping amendments, but Joe Comartin of the NDP and Serge Ménard of the Bloc Québecois dissented. They stressed that the provisions could be used to label a person as a terrorist on the basis of reasonable suspicion. They referred to both the Maher Arar case and the October 1970 detentions as examples of the dangers of harming the innocent, but they distinguished preventive arrests from peace bond provisions in the Criminal Code. Ordinary peace bond provisions were expanded in 2001 by the *ATA* and, unlike the preventive arrests, were not subject to either reporting or sunset requirements. They allow year-long conditions to be imposed on a person, on pain of the criminal sanction, on the basis of a reasonable fear that the person will commit a terrorism offence.[18] Peace bonds and preventive arrests both allow preventive restraints, or what the British call control orders, to be placed on terrorist suspects. The main difference between the two procedures is that preventive arrests allow for arrest without warrant in emergency situations when detention is necessary to prevent a terrorist activity, whereas under a peace bond a person can only be arrested with a warrant. In addition, preventive arrests, but not peace bonds, give the judge discretion to allow a person to be detained and perhaps questioned for a maximum of 72 hours after arrest. Peace bonds to respond to reasonable fears of terrorism remain in force, despite the expiry of preventive arrests. Indeed, they were used when charges were recently stayed against two youths arrested and charged with various terrorism offences in Toronto.

The committee's interim report was not an impressive or particularly well-thought-out document. It did not examine why Canadian officials had not used investigative hearings or preventive arrests, or why they believed such powers had to be retained. It did not examine comparative experience with similar powers. It did not articulate the rationale for why investigative hearings should only be used to investigate imminent as opposed to past acts of terrorism. It did not explore the Supreme Court's jurisprudence on investigative hearings, including the implications of the Court's decision that investigative hearings could be used to investigate past acts of terrorism and that they should be subject to the presumption that the hearing would be held in public. The interim report did not examine the case for reforming preventive arrests by placing restrictions on how a person is treated during the period of detention, as was recommended at the time that the *ATA* was drafted (Trotter 2001), and as has been included in Australia's comparable legislation (Roach 2007c). In any event, the Commons committee need not have bothered issuing its interim report. As will be seen, its interim recommendations played a negligible role in what was to become a highly partisan and emotive debate over renewal.

The Parliamentary Debate over the Renewal of Preventive Arrests and Investigative Hearings

Even before 9/11, Parliament has traditionally not been an effective forum to discuss complex and sensitive security issues. Professor Franks found that "most of the discussion of security matters in the House has been stimulated by scandal-hunting and suggestions of impropriety" (1979, 15). In his judgment, "the record shows that parliamentary discussion is spotty and partial, with some issues being flogged to death, while others have been ignored. Debate, questions and committee consideration have usually concentrated on a few, and often unimportant

aspects of the problem" (65). As will be seen, the parliamentary debate on the sunset provisions did not improve Parliament's less than stellar record on security issues.

On February 9, 2007, the government introduced a motion to extend investigative hearings and preventive arrests for a three-year period.[19] The government argued that the renewal was necessary to prevent terrorism, and stressed that the Supreme Court had held in 2004 that investigative hearings were consistent with the Charter. The Conservatives, like the Liberals before them, relied on the argument that security legislation had been "Charter-proofed." Although such arguments reflect the important role of the Charter in policy formation (Kelly 2005), they focus on the minimum standards of the Charter and avoid the question of whether the policy in question is wise or effective (Roach 2001a).

The parliamentary secretary for the Minister of Justice argued that the House most simply vote on whether to renew investigative hearings as they stood in the original *ATA*. He was aware that the Commons committee had proposed additional recommendations in its interim report, including the controversial proposal that investigative hearings only be available to investigate imminent and not past acts of terrorism, but he argued that such reforms would have to wait until the committees had completed their delayed comprehensive reviews. He stressed that the renewal motion was limited to whether the provisions would sunset or not.[20] There was support for this up or down position in the text of the expiry provisions in the *ATA*,[21] but the *ATA* had also contemplated that the three-year review by the parliamentary committees would be completed a year before preventive arrests and investigative hearings would be subject to the sunset provisions. The timing originally contemplated in the *ATA* would have allowed the government to amend the Act in response to the review before the sunset. The government's approach in insisting that the provisions be renewed or allowed to lapse without amendment probably also represented a strategic decision by a minority government to maximize the likelihood of quickly obtaining an extension from a divided Commons. As will be seen, however, the government's minimalist approach backfired, as the opposition parties argued that they should not renew investigative hearings and preventive hearings while waiting for further reforms to the *ATA* that might never come.

The Minister of Public Safety spoke at length about the need for the provisions, stressing that investigative hearings had been upheld by the Supreme Court and preventive arrests entailed a minor invasion of rights that could save lives.[22] The Liberals indicated that, in the absence of legislation implementing the Commons committee's interim recommendations or an overall review of the *ATA*, they would allow the provisions to sunset.[23] Representatives of the NDP and the Bloc also indicated that they would oppose the renewal motion.[24] The Conservative chair of the committee supported the proposed renewal, arguing that during the three-year period the government could consider the committee's recommendations that investigative hearings only be used with respect to imminent and not past terrorist attacks, as well as the delayed full three-year committee reviews.[25] The argument suggested that more time was required to digest all the reports. However, time was running out, as every sitting day of Parliament brought the five-year sunset for investigative hearings and preventive arrests closer.

In the days that followed, the Conservatives cited the support for investigative hearings by victims of terrorism and by former Liberal cabinet ministers to criticize the Liberals' refusal to renew the provisions.[26] On February 21, 2007, the Prime Minister, in response to a question about judicial appointments, brought up a newspaper story that alleged that the RCMP was intending to use investigative hearings in its continuing Air India investigation, and that the father-in-law of a Liberal member of Parliament had been named as a possible target of an investigative hearing.[27] The issue dominated question period and the media in the ensuing days, with the Conservatives alleging that the Liberals' position would threaten the Air India investigation and the Liberals alleging that the Prime Minister had impugned the integrity of a member of Parliament and the Liberal Party's decision-making process. The Leader of the Opposition demanded an apology from the Prime Minister for his remarks, and the Prime Minister demanded an apology from the Liberals for not renewing the provision.[28] Neither apology was made, and each party raised questions of privilege against the other.[29] What quickly got lost in the debate was any discussion of the merits of investigative hearings and preventive arrests or the interim report of the Commons committee.

The special Senate committee's comprehensive report was released on February 22, 2007, too late to have any real effect on a debate that had already been overtaken by bitter partisan wrangling in the House. The Senate committee noted that, given that

there had been no reports of the use of either investigative hearings or preventive arrests, "it is difficult for the Committee to make a definitive judgment as to the need for them" (Senate 2007, 70). Nevertheless, it recommended a three-year extension of the provisions as well as enhanced and more timely reporting on why they were used or not used.

The very next day, the focus of attention shifted again as the Supreme Court released its long-awaited decision in the *Charkaoui* case.[30] The case involved a successful Charter challenge by three men detained under security certificates issued not under the *ATA* but under immigration law. The Supreme Court unanimously concluded that the present procedure, which allowed the government to present secret intelligence to the judge without detainees' or their lawyers' being present to know and challenge the government's case, unnecessarily violated detainees' Charter rights. The parties traded allegations of blame for not reforming the immigration law security certificate process sooner.[31] Unfortunately, the larger and more complex issues underlying the treatment of secret information were not discussed, even though they had been thoroughly and comprehensively discussed in the Senate report released the previous day. The media also reflected the obsession with the *Charkaoui* case, as it featured multi-page spreads on the case and reactions to it while almost totally ignoring the Senate's report. The only reference to the comprehensive review process in the Commons that day was its unanimous approval of a fourth extension for the Commons committee to complete its review of the *ATA*.[32]

Much of the next few days in the House was taken up with debate about the renewals of investigative hearings and preventive arrests. The NDP and the Bloc affirmed their opposition to renewal, stressing civil liberties concerns, as reflected in the Arar case, even though Mr. Arar had not been subject to either of the procedures. The Liberals argued that they had never been "soft on terror" and that the government had not responded to either the recommendations of the interim report or the Senate committee's report of the need for "comprehensive revision" of the entire anti-terrorism law.[33] Former Liberal justice minister Irwin Cotler stressed the need for a comprehensive review, and bemoaned what he saw as a politicization and reduction of a debate on which reasonable people can disagree "into one of bumper sticker slogans and smears." He concluded that his only choice was a "principled abstention" from the debate.[34] Some Liberal members broke party ranks and argued that investigative hearings and preventive arrests should be renewed, because they were consistent with the Charter and had not been abused, and that Parliament should defer to those with "top secret" information who thought they should be renewed.[35] Some Conservatives argued that the three-year renewal was necessary to give Parliament time to absorb the results of the comprehensive review just finished by the Senate committee and still pending from the Commons committee.[36]

Time for debate about the sunsetting provisions, however, ran out. On February 27, 2007, the government's motion to renew the provisions for three years was defeated by a vote of 159 to 124.[37] The sunset issue was decided before Parliament was in a position to know all of the results of the comprehensive three-year review. The tendency of the Commons debate to focus on partisan issues, as well as the delays in the three-year review, had combined to allow the powers of preventive arrests and investigative hearings to expire without a sustained debate about either the merits or the dangers of those provisions. The media in large part mimicked the partisan tenor of the debate in the Commons, except for its fixation with the drama of the court's decision in *Charkaoui*. Whereas both the Commons and the media had reflected on a number of substantive issues during the Bill C-36 debate, such as the proper definition of terrorism and the dangers of investigative hearings and preventive arrests, the debate about the expiry of those provisions was largely devoid of substance. It was a strange turn of events, but one that reflected the perils of reviewing or renewing complex legislation in a minority government setting.

The Process Adopted by the House of Commons and Senate Committees

Although it is often correctly observed that Canadian parliamentary committees do not have the resources available to legislative committees in the United States and the United Kingdom (Franks 1979; Hiebert 2002), the process used by both the Commons and Senate committees was fairly impressive. Both committees heard from a broad range of witnesses from government, independent review agencies, civil society and academe, and they eventually issued extensive and in the main well-reasoned reports.

The Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness established a seven-member subcommittee in December 2004, which

heard from 82 witnesses in 22 meetings lasting for a total of 47 hours. The subcommittee was chaired by Liberal member of Parliament Paul Zed. The subcommittee also considered 44 briefs before Parliament was dissolved in November 2005. Some witnesses from the United Kingdom, including Lord Carlile, the independent reviewer of British anti-terrorism laws, were heard by way of video link. A new subcommittee of seven members with four hold-over members, but a new chair, Conservative member of Parliament Gord Brown, was established in May 2006. It heard from 5 witnesses, received six briefs and held 22 meetings over 36 hours. This time commitment included the preparation of its interim and final reports. Of the 87 witnesses heard by the Commons committee, the majority were either government officials or ministers, followed by individuals representing interest groups, review agencies such as the Privacy Commissioner and finally individuals, mostly academics but including some individual victims of terrorism.[38] Assistance to the committee was provided by two officials from the Library of Parliament.

The Senate committee was a special Senate committee of nine members whose composition was of course not affected by elections. It was originally chaired by Liberal Senator Joyce Fairbairn, but the chair was eventually taken over by Liberal Senator David Smith. A majority of the members of the Senate committee were also part of the special Senate committee that considered Bill C-36 in 2001, including Senators Andreychuk, Fairbairn, Fraser, Jaffer and Joyal. The Senate committee thus came to the task with extensive knowledge of the *ATA*. The Senate committee heard from 140 witnesses over 22 sitting days. A number of witnesses testified from the United Kingdom, Norway and Singapore by video link. Fourteen interest groups appeared before both committees,[39] as did many of the same ministers and government and review agency officials. As with the Commons committee, the most frequent appearances before the committee were by government officials or ministers, followed by representatives of interest groups, officials from review agencies and individuals, usually academics.[40] The Senate committee also conducted study visits to London and Washington to learn about British and American responses to terrorism, and heard from a United Nations official in Vienna.[41] Although it is easy to criticize parliamentarians for study trips, they can play a valuable role in the security field, where much knowledge of standard operating procedures and new challenges is not reduced to writing. Assistance to the committee was provided by three officials from the Library of Parliament.

The two committees decided not to limit themselves to the strict terms of s. 145 of the *ATA*, which required them to conduct a review of the provisions and operation of the Act. Both committees reviewed the operation of other security legislation, most notably security certificates issued under immigration law, as well as questions of review of national security activities. The decisions of the committees in this respect recognized the public controversy over security certificates. They also recognized the interest in the creation of a parliamentary committee to review national security matters and the review recommendations of the Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar. At the same time, the committees did not attempt to conduct a comprehensive review of the many facets of Canada's evolving security policy and they did not review the *Public Safety Act*.

The Commons committee made 60 recommendations and issued a 137-page report. It also featured a dissenting report issued by Serge Ménard of the Bloc Québecois and Joe Comartin of the NDP. The Senate committee made 40 recommendations and issued a unanimous 139-page report. These reports will not be examined in detail here; rather, their recommendations will be analyzed and compared in the following discussion of the major issues emerging from the review.

There are, however, some themes that run throughout and distinguish the two reports. Perhaps representing its nature as an unelected institution that is supposed to be responsive to the concerns of minorities, the Senate committee devoted more attention and concern to the effects of anti-terrorism efforts on Muslim communities than the Commons committee. For example, the Senate committee approved of the deletion of the religious and political motive requirement, addressed the role of the Cross-Cultural Roundtable on Security, raised the issue of discriminatory profiling, and recommended an enhanced review of the national security activities of the RCMP and other officials, as well as the abolition of the possibility that non-citizens suspected of involvement in terrorism could be deported to countries where they might be tortured. In contrast, the Commons committee disapproved of the deletion of the religious and political motive requirements, recommended a new offence that would apply to the glorification of terrorism and dealt with review of

national security activities only as it affected Parliament and not various police, immigration, foreign affairs or customs officials. It also did not address the issue of deporting non-citizens to torture. My finding that the Senate committee was much more responsive to the concerns of Muslim communities is consistent with findings that the unelected House of Lords in the United Kingdom has demonstrated more interest in the *Human Rights Act, 1998* than the elected Commons (Hiebert 2005, 22; Nicol 2004, 472-3).

That said, it would be wrong to suggest that the Commons committee was not concerned with all rights claims. It was particularly sensitive to the concerns of lawyers with respect to terrorist financing, and it recommended that due diligence defences be made available for charities and those charged with the financing of terrorism. Indeed, the Commons committee was more concerned about possible overbreadth and unfairness in these areas than were the Senate committee or the government. The Commons committee was also sensitive to privacy concerns. It recommended that the review body for Canada's signals intelligence agency be empowered to review its activities for compliance with the Charter and the *Privacy Act*, a recommendation that was not made by the Senate committee.

The difference between the Senate and Commons committees may not concern rights in general, but the rights of unpopular groups. In this respect, it would not be surprising if unelected parliamentarians in the Senate were more concerned with the rights of unpopular individuals and groups than were their elected colleagues, and their elected colleagues were more concerned with the rights of more powerful and popular groups such as lawyers and charities. Indeed, such insights inform most defences of the anti-majoritarian role of judges (Ely 1980; Roach 2001b). They also suggest that unpopular minorities and individuals may consistently lose if, as some argue, courts defer to legislative interpretations of rights on the basis that elected institutions should be able to resolve so-called reasonable disagreements about rights (Huscroft 2007; Waldron 1999). Such deference to majoritarian interpretations of rights could promote the alienation of minorities, who could come to believe that their rights are consistently undervalued or ignored (Ramraj 2006). More specifically, it could feed into allegations that there are double standards with respect to the rights of Muslim minorities. Although civil liberties are usually and properly a normative end in themselves, there is also an instrumental case that respect for civil liberties and equality rights can help combat a world view that seeks to portray the war against terrorism as a war against Islam.

Twelve Issues Considered in the Review

In what follows, I will identify 12 major issues that emerge from a close reading of the Commons and Senate committee reports. I will not attempt to advocate any particular resolution of these issues but rather compare, contrast and assess the approach of each committee and identify other factors that should inform the decision-making process. As will be seen, the issues are complex and often interrelated. The policy drivers in each area come from multiple directions, including international instruments, comparative experience, the courts and civil society concerns.

Political and religious motives and the definition of terrorist activities

The Senate committee called for the deletion of the political, religious and ideological motive requirements not only with respect to the definition of terrorist activities in the Criminal Code (Senate 2007, 13), but also with respect to the definition of CSIS's mandate to investigate threats to the security of Canada (Senate 2007, 20) and the definition of a purpose prejudicial to the interest of the state under the *Security of Information Act* (Senate 2007, 99). The committee's approach demonstrates Parliament's ability to look beyond the specific issue that commanded attention from the court in *Khawaja*. Parliament retains the ability to engage in more comprehensive reforms than the courts.

In this vein, it is important to note that, at least in relation to the *CSIS Act*, the Senate committee recognized that simply striking down the political and religious motive requirement could create problems of overbreadth by targeting virtually all serious violence against persons or property as terrorism. The Senate committee recommended that the *CSIS Act* be amended to include only violence designed to influence governments to act or to intimidate the public (Senate 2007, 19). There is a danger, apparently not considered by the judge in *Khawaja*, that simply removing the political or religious motive requirement will expand the definition of terrorism to encompass all intentional violence (Roach 2007a).

Strangely, the Senate committee did not address this danger with respect to the Criminal Code definition of terrorist activities as amended by the decision in *Khawaja*, even while it recognized the same problem with respect to the *CSIS Act*.

In contrast to the Senate, the Commons committee accepted the government's argument that the political or religious motive requirement is required to distinguish terrorism from ordinary crime. The Commons committee noted that the "irony" of the *Khawaja* judgment was that the Crown now had one less factor to establish concerning the accused's crime. As will be seen, however, the Commons committee itself was not averse to making recommendations that would expand the ambit of terrorism offences. The Commons committee was quite dismissive of the court's decision in *Khawaja*, but it did note that the issue "is still before the courts and that future judgments may have a bearing on the issue" (Commons 2007, 9). The Supreme Court has refused to hear an appeal from this case and, like it or not, the *Khawaja* ruling on political and religious motive will stand, at least until the prosecution is completed.

The Commons committee also recommended expanding the definition of terrorist activities and the ambit of terrorism offences in several ways. It suggested that references to governments be expanded to include municipal, regional and territorial governments (Commons 2007, 14). It also recommended that the reference to compelling persons be changed to compelling entities, to ensure that attempts to compel unincorporated groups and associations to act be included in the definition of terrorism (Commons 2007, 14). Finally it proposed that Parliament's broad definition of terrorist activities, which at present is incorporated into many offences relating to the facilitation, financing and instruction of terrorist activities, itself be made into a separate terrorism offence (Commons 2007, 15). If adopted, this expansion of terrorism offences could reopen arguments rejected by the trial judge in *Khawaja* that the definition of terrorist activities and the ambit of terrorism offences are unconstitutionally vague and over-broad.

Neither committee raised concerns about whether existing terrorism offences are vague or over-broad or have insufficient fault requirements, perhaps reflecting the fact that such Charter challenges were rejected by the trial judge in *Khawaja*. It would have been helpful if the committees had explained why they agreed with these less well-known parts of the *Khawaja* decision. Both committees also ignored a hoaxing terrorism offence that was added to the list of terrorism offences in the *ATA* in 2004, in a generally ignored amendment included in the omnibus *Public Safety Act*. Although false threats of terrorism should constitute a crime, there are arguments that the new hoaxing offence has inadequate fault requirements, given the stigma and punishment resulting from its status as a new terrorism offence (Roach 2006a).

The Senate committee did not recommend expansion of the ambit of terrorism offences. Nevertheless, it did recommend that the broader Criminal Code definition of terrorist activity be substituted for the narrow definition of terrorism that is now used in immigration law. The Supreme Court read the narrower definition of terrorism into immigration law in 2002.[42] The Supreme Court's definition was inspired by international law, and focuses on the intentional killing and maiming of civilians in order to intimidate a population or compel governments or international organizations to act. Unlike the Criminal Code definition of terrorist activities included in the *ATA*, it does not include some forms of property damage and disruptions of essential services. Nor does it require proof of a political or religious motive. At the same time, it distinguishes terrorism from ordinary crime, by requiring proof of an intent to intimidate the public or compel governments or international organizations to act.

At the end of the day, the committees did not provide the government or Parliament with all the tools necessary to engage in a rethinking of the crucial definition of terrorist activities in the Criminal Code. They provided disparate assessments and divided views, and failed to see all the implications of their own recommendations. The research and analysis of the Canadian committees pale when compared to the 48-page report on the definition of terrorism produced by Lord Carlile, in the independent review of terrorism legislation in Britain. The British report included research on the definitions in many other countries and in international and regional conventions (Carlile 2007).

The conclusion that the Canadian reports were inadequate on definitional issues is sobering, given the weight of attention paid, both in the debates in the fall of 2001 and during the review process, to such issues. Indeed, the definitional issue is more pressing in Canada than in Britain, because a Canadian court has found parts of our definition of terrorist activities to be constitutionally deficient

(*Khawaja* 2006) and because the Canadian Supreme Court has ventured into the difficult territory of defining terrorism.[43] As much as some may want to move beyond definitional issues, they are the foundation of any anti-terrorism law. Problems with the definition of terrorist activities cannot be ignored, but they were not adequately addressed in either of the reports.

Discriminatory profiling and relations with Muslim communities

The Senate committee's support for the deletion of the political and religious motive requirement was related to its concerns about discriminatory profiling. It echoed the Arar Commission's recommendations that the RCMP, CSIS and other security agencies create policies against racial profiling and called for "sufficient monitoring, enforcing and training to ensure that racial profiling does not occur" (Senate 2007, 24), including an enhanced complaints procedure for the RCMP (Senate 2007, 26). It also called for a procedure that would enable individuals to appeal decisions to place them on Canada's "passenger protect" no-fly list (Senate 2007, 88).[44] In addition, it called for more independence and budget for the Cross-Cultural Roundtable on Security Issues. The committee, however, stopped short of recommending that a non-discrimination clause (Cotler 2001) or an anti-profiling provision (Choudhry and Roach 2003) be included in the *ATA,* even though it had argued in 2001 that an anti-discrimination clause should be added.

The Commons committee devoted a mere page of its report to the "concerns of minority communities," as opposed to the 11-page chapter in the Senate committee's report. The page in the Commons committee report stressed efforts made by the RCMP and CSIS with respect to diversity. It concluded that "while the Subcommittee makes no specific recommendation on how best to respond to the concerns about racial and religious profiling, much more has to be done in consultation with the affected ethno-cultural communities to address these concerns" (Commons 2007, 10). The committee did not address the danger that consultation in the absence of effective review and remedies for discriminatory treatment might be seen as meaningless. It also ignored the Arar Commission's recommendations with respect to the need for security agencies to develop policies against profiling and for enhanced review, in part to investigate allegations of profiling.

The issue of discriminatory profiling is tied to the adequacy of review and complaints mechanisms. The federal government does not have an ombudsman, and the Arar Commission recommended a significant expansion of the Security Intelligence Review Committee's (SIRC) mandate to provide independent review and complaints handling for a wide range of government officials involved in national security activities (Roach 2007d). Under these recommendations, SIRC would have the power to conduct self-initiated reviews as well as hear complaints, and it would be entitled to see secret information (Canada 2006a). Others have recommended an enhanced role for the Canadian Human Rights Commission in this area (Wark 2006).

The issue of profiling raises both instrumental and normative concerns. Allegations of profiling are allegations of racial or religious discrimination that should be taken seriously. In addition, allegations of profiling can poison relations between minority communities and the state. Untested assertions of profiling may feed into the disaffection of some members of minority groups and create false but dangerous impressions that the fight against terrorism is directed against Islam. The Commission for Public Complaints against the RCMP dismissed allegations of discriminatory profiling in connection with the 2003 Operation Thread seizure of students on fraudulent visas, even though officials initially depicted the case as a suspected al-Qaeda cell and selected only students from Pakistan for further investigation (Roach 2006b, 430). Concerns about profiling have plagued Canada's fledgling no-fly list, and they can adversely affect other national security activities. Even if one is confident that discriminatory profiling does not occur, there is a need to ensure that we have adequate definitions of discriminatory profiling and adequate review mechanisms to respond to profiling should it occur.

A glorification of terrorism offence

The Commons committee recommended the addition of a new offence of glorification of terrorism for the purposes of emulation. In one of its very few forays into comparative experience, it looked to the British *Terrorism Act, 2006* in this regard and concluded that "hate propaganda offences now contained in the Criminal Code are not adequate to address the glorification and encouraged emulation of terrorist activities" (Commons 2007, 12) The committee concluded that the existing terrorist activity offences were "inadequate to address the situation within which the glorification or incitement is expressed to the public, and no particular individuals are encouraged to emulate any specific actions. Such expressive behaviour is diffuse and

untargeted" (Commons 2007, 12). This analysis, however, ignores the fact that the definition of terrorist activities in the Code already includes threats to commit terrorism. The committee recommended that the new offence be subject to the various free speech and fair comment defences available for hate propaganda. The two dissenting members of the committee argued that hate propaganda offences were sufficient and that the proposed glorification offence would violate freedom of expression (Commons 2007, 12).

The Commons committee did not note that UN Security Council Resolution 1624 calls on states to ensure that incitement of terrorism is an offence, while at the same time calling for increased cross-cultural dialogue. Canada has already responded to that resolution by reporting to the UN Counter-Terrorism Committee that existing laws against incitement crime and hate propaganda are adequate. The committee also did not examine the controversy in Britain over the glorification offences, which were amended in committee in an attempt to better accommodate freedom of expression, or the effectiveness of British prosecutions against extreme speech both at the Finsbury Park Mosque and in protest against the Danish cartoons. The Commons committee did not examine other, less coercive, means to combat extremism and violent rhetoric than the passage of a criminal offence. Although the committee based much of its recommendation on the precedent of hate propaganda offences, it also did not examine Canada's troubled experience with such prosecutions, or the argument that they can give radicals more attention. Nor did it explain how prosecution of those who glorified terrorism would contribute to the prevention of terrorism.

It will be interesting to see if the Government of Canada acts on the recommendation to create a glorification of terrorism offence. Although there are precedents for similar speech-based offences in Britain and Australia, there will likely be strong opposition to such an offence from both Muslim and civil liberties groups in Canada. It is also noteworthy that the Senate committee did not recommend the creation of such an offence. Attempts to define glorification of terrorism as an offence will raise Charter issues and may adversely affect relations with Muslim communities.

At the same time, the fact that some people in Canada apparently see terrorists such as Osama Bin Laden or Talwinder Singh Parmar as heroes is a problem. The Commons committee seems to assume that only a criminal offence will respond to the dangers of extremism. If the government moves in the direction of a glorification offence, it will have to do more homework than was done by the Commons committee, and it will have to demonstrate why actions short of enacting legislation defining certain kinds of speech as a criminal offence will not be effective.

Investigative hearings and preventive arrests

As discussed above, the Commons committee issued an interim report that recommended an extension of investigative hearings, but subject to a qualification that they only be used with respect to imminent acts of terrorism. Although there was all-party agreement on this matter, the Conservative government's subsequent defence of investigative hearings, as required in the RCMP's continuing investigation of the 1985 bombing of Air India, suggests that its position today may be different. This apparent change of position highlights the need to explore the purposes of investigative hearings more carefully than was done in the interim report of the Commons committee.

The Senate committee recommended that both investigative hearings and preventive arrests be extended for three years, a period consistent with the government's defeated resolution on the matter. It also recommended that Attorneys General provide fuller and prompter reports explaining why the provisions were or were not used. Although preventive arrests and investigative hearings are no longer part of the law as a result of the defeat of the government's resolution to renew them, there may be attempts to revive them in the future.

Neither committee examined the case for reforming preventive arrests and recognizance with conditions provisions, despite arguments that there should be statutory guidance, as there is under Australian law with respect to the conditions of detention and whether a person subject to a preventive arrest can be interrogated during the maximum 72 hours of judicially approved detention (Trotter 2001). There was also no discussion of the fact that the Supreme Court found one of the grounds provided in the law for a judge to deny release to a person, namely the "just cause" provision, to be unconstitutionally vague in the regular bail context.[45]

Both reports also ignored the fact that the *ATA* amended the regular peace bond provisions in the Criminal Code to allow conditions to be placed on individuals on the basis of reasonable fears that they will commit a terrorism offence.[46] These regular peace

bond provisions were not subject to the five-year sunset or the special reporting requirements for preventive arrests. Although peace bonds have been found to be consistent with the Charter when used with respect to reasonable fears that a person will commit a sexual offence,[47] their effects or utility in the terrorism context are not known.

There is also no discussion in either report of the British experience, where a 7-day period of preventive arrest was extended to 14 days in 2003 and to 28 days in 2006, with the government continuing to ask for longer periods. One of the weaknesses of both committee reports is that there is little examination of the vast amount of comparative experience with anti-terrorism law (Ramraj, Hor and Roach 2005). Comparative analysis can be helpful in revealing both the strengths and weaknesses of the Canadian approach (Wark 2006). Although the Canadian legal and social contexts are distinct, the lack of comparative research in this dynamic area may be related to limits on the research resources and capacities of Canadian parliamentary committees, as well as the witnesses appearing before them.

Finally, there was no sustained discussion in the reports of the fact that the proposed investigative hearing of a reluctant witness in the Air India trial was in fact never held, despite the fact that the Supreme Court upheld investigative hearings as consistent with the Charter. The use of investigative hearings to compel a reluctant witness to cooperate raises larger issues about witness protection that go well beyond the issue of whether investigative hearings are "Charter-proof." There is a danger that judicial and legislative debate may be fixated on Charter issues and may ignore larger questions about the effectiveness of particular policies such as witness and informer protection (Roach 2001b).

Terrorist-financing and due-diligence defences

One of the major thrusts of Security Council Resolution 1373, enacted in the wake of 9/11, was to encourage countries to ratify the 1999 Convention on the Suppression of Terrorist Financing and to enact various laws against terrorism financing. Canada's *ATA* followed this orientation, both in enacting a broad range of terrorism financing offences under the Criminal Code, and in amending the *Proceeds of Crime Act* to provide officials with information about possible terrorism financing.

Both committees appropriately devoted chapters in their reports to the complex topic of terrorism financing, but they took significantly different approaches. The Commons committee took the more civil libertarian approach by recommending that lawyers be exempted from a Criminal Code requirement to report the existence of terrorist property in their possession or control, or information about a transaction in respect of such property if they are providing legal services as opposed to acting as financial intermediaries. The Commons committee also recommended that a due diligence defence be provided for those charged under the Criminal Code for knowingly dealing with terrorist property, facilitating such a transaction or providing financial or related services with respect to terrorist property (Commons 2007, 24). The Senate committee disagreed on both points. It accepted government arguments that due diligence defences are not necessary for criminal offences that already require proof that the accused is knowingly dealing with terrorist property. It also concluded that no special exemptions were necessary for lawyers, given the knowledge requirement, and that information about transactions related to terrorist property would as imminent crimes not be protected by solicitor-client privilege (Senate 2007, 51-7). These disagreements between the committees underline the complexity of determining the precise ambit of the new and broadly worded financing crimes and reporting obligations in the *ATA*.

Neither committee examined the efficacy of terrorist financing prosecutions as a means of either disrupting terrorists or preventing acts of terrorism. The failure of the committees to examine such matters may mean that questions of efficacy are left to ministers. Various rights watchdogs such as the Privacy Commissioner and the enhanced review mechanisms recommended by the Arar Commission will focus on the propriety of national security activities. Although independent review to determine the propriety of the state's national security activities is important, there is also a need for some review to ensure that Canada's various security agencies are taking adequate measures to investigate and prevent terrorism. The Auditor General and some Senate committees chaired by Senator Kenny have issued some scathing reports on inefficiencies and weaknesses in national security activities (Whitaker 2005). One role for legislative committees, particularly legislative committees that are given access to classified information, may be to make judgments about the efficacy and efficiency of national security activities (Roach 2007c). Unfortunately, there is no evidence that the committees that issued the three-year review reports were willing or able to take up this difficult but important review task.

Indeed, there is no evidence that they even saw efficacy review as an issue.

Listing of terrorist groups and charities

Another feature of the *ATA* is that it gives the cabinet the power to list individuals and groups as terrorist groups in part in order to facilitate sanctions against the financing of terrorism. To their credit, both committees recognized that listing is a complex process that occurs not only under new Criminal Code provisions added by the *ATA*, but also under the *United Nations Act* and pre-9/11 regulations aimed at the Taliban and al-Qaeda. Both committees recommended consolidation of these lists.

Consistent with its attentiveness to the concerns of minority communities, the Senate committee adverted to the experience of Liban Hussein, a man who was wrongly included on both the Canadian and United Nations lists and suffered "serious personal consequences" (Senate 2007, 47; see also Dosman 2004). The Senate committee, however, did not recommend that individuals not be listed. Neither committee dealt with the fact that a listed entity under the Criminal Code is deemed to be a terrorist group for purposes of a criminal trial, effectively substituting the cabinet's decision that a group is a terrorist group for proof beyond a reasonable doubt and raising Charter concerns (Paciocco 2002). The Senate committee recommended that the Justice Department lawyers challenge listing decisions before they are made by the cabinet (Senate 2007, 49), but did not recommend that independent special advocates play such a role. The use of independent counsel to challenge listing decisions could help respond to charges that the cabinet's listing decisions are politicized.

The two dissenting members of the Commons committee questioned the necessity for any listing process, arguing that it is subject to politicization, abrogates due process by avoiding judicial hearings, and reduces "complex historical and political situations to a simple 'black and white' category" and may "impede peace and reconstruction processes" (Senate 2007, 124). The dissents issued by NDP and Bloc Québecois members in the Commons committee allowed for root and branch critiques of the *ATA* that were not present in either the majority report of the Commons committee or the Senate committee report.

One of the more controversial features of the *ATA* was the enactment of a new law, the *Registration of Charities (Security Information) Act,* which provides a means for the ministers of public safety and revenue to decertify or deny charitable status on the grounds of intelligence reports that may not be disclosed to the charity. Both the Commons and Senate committees recommended that security-cleared special advocates be available to challenge intelligence that is not disclosed to a charity through this decertification process. This independent challenge function could increase the legitimacy of a decision to deregister a charity.

The Commons committee accepted arguments that the broad nature of the decertification procedure could chill legitimate charities, and recommended that the Act be amended to require proof that the charity knew or ought to know that it was supplying resources to a terrorist group that had been listed by the cabinet. In all cases, charities should have a due diligence defence on the basis that they took reasonable steps to ensure that their funds would not support terrorists (Commons 2007, 36-8). In contrast, the Senate committee accepted an argument that adding a due diligence or humanitarian defence "could have the unintended effect of making charities more vulnerable to being used as front organizations for terrorists" (Senate 2007, 60). The conflicting approaches taken by the committees will not make the government's job in responding to the three-year review easier.

One striking fact that receives mention but little comment in both reports is that not one charity has been deregistered under the new Act, despite reports of widespread fundraising in Canada for various terrorist groups (Bell 2004). The Senate commented that this record indicated that "the government is using appropriate restraint" (Senate 2007, 60). Neither committee raised the issue of whether the government should use the Act more or of the efficacy of deregistering charities in disrupting or preventing terrorism. The same is true with respect to terrorism financing, where neither committee addressed the effectiveness of the resources that Canada has devoted to investigating terrorism financing. The performance of the committees again raises the issue of where, if anywhere, the efficacy of the state's national security activities will be reviewed.

National security confidentiality and secrecy

The Senate committee recommended a number of reforms to s.38 of the *Canada Evidence Act*, as amended in 2001. This obscure provision will play a crucial role in cases where the government claims that national security requires the non-disclosure of information in criminal prosecutions or other legal proceedings. The Senate committee recommended

that the Attorney General of Canada supply more information about how the release of information that it wants to keep secret will actually harm national security, national defence or international relations. It also recommended that a judge should be able to balance the interests in secrecy and disclosure, even in those cases in which the Attorney General of Canada has issued a certificate to block a court order for disclosure. If implemented, this recommendation would effectively give the courts, as opposed to the Attorney General of Canada, the final word about whether secret information that Canada generates or receives from others will be disclosed.

Both committees recommended that security-cleared special counsel be allowed to see secret information and challenge the government's case for non-disclosure of such information. In this way, both committees made recommendations that were consistent with the Supreme Court's decision in *Charkaoui*, even though only the Commons committee had the benefit of that decision when writing its final report. The Commons committee considered the practice of the Arar Commission, during which commission counsel with security clearances consulted with Mr. Arar and special security-cleared counsel challenged the government's case for secrecy (Commons 2007, 78-9). The Senate committee specifically recommended that "that the special advocate be able to communicate with the party affected by the proceedings, and his or her counsel, after receiving confidential information ...and that the government establish clear guidelines and policies to ensure the secrecy of information in the interest of national security" (Senate 2007, 42). This is different from the British system, where the special advocate cannot generally speak to the affected party after seeing the secret information. The ability of a security-cleared counsel to communicate with the affected party after having seen the secret evidence is a critical design issue that deserves more attention and careful thought.

Neither committee considered the experience of the Air India trial, in which defence lawyers were given access to some secret material on an initial undertaking that they would not disclose such information to their clients (Code 2004; Code and Roach 2007). Some would criticize such an approach for running the risk that defence counsel might leak secret information. Another possibility, again not explored by either committee, is to require defence lawyers to receive security clearances as a precondition of any access to classified information. Such an approach might generate a howl of resistance from the bar, but it is used in both Australia and the United States. Although security clearances could adversely affect choice of counsel, defence lawyers will have a better sense of their client's case than a special security-cleared counsel, who must take time to get up to speed with the case and who may be restricted from communicating with the affected person after having been exposed to the secret information. These omissions represent another example where the committees' lack of knowledge of comparative experience may have narrowed the range of their recommendations.

Neither committee recommended abolition of the Attorney General's power to block a court order for disclosure to, for example, protect an undertaking made to a foreign agency that information would not be disclosed in court proceedings. Both committees reported that they were not aware of any use of the Attorney General's certificate.

The dissenting members of the Commons committee argued that the Attorney General's secrecy certificate should be abolished. When used in criminal cases, they argued, the certificate "overrides the rights of the accused...to full disclosure by the Crown of exculpatory as well as inculpatory evidence, and the right to full answer and defence" (Commons 2007, 126). This may be true, but the existing law recognizes that if the Attorney General blocks disclosure, a fair trial may no longer be possible and the trial of the accused may have to be abandoned. The dissenters also objected to the use of the certificate in civil, access to information and *Privacy Act* proceedings on the basis that it could be used to "keep secret...a corruption scandal, a controversial program, a serious environmental threat, a miscarriage of justice, an operational fiasco, or any other kind of government wrongdoing" (Commons 2007, 123). This too may be true, but existing access to information legislation already provides robust protection for state secrets.

The Commons committee made a number of largely technical recommendations about the national secrecy provisions of the *Canada Evidence Act*, including that the lifespan of the Attorney General's certificate be reduced from 15 to 10 years, that appeals be allowed from judicial review of the certificate and that court orders for disclosure not take effect until appeal periods had ended. The Commons committee accepted the Privacy Commissioner's recommendations that the Attorney General should provide annual reports on the use of certificates blocking disclosure, but not that the extraordinary power of issuing a certificate be subject to a sunset (Commons 2007, 46).

Both committees tended to focus on the procedural issues surrounding the use of secrecy certificates and did not address a number of important practical matters raised by governmental claims of secrecy. Courts have repeatedly stressed that Canada is a net importer of intelligence,[48] and it is likely that this fact affects how often the government attempts to keep information secret. The government may often be attempting to protect not only Canada's secrets, but the secrets of our allies. The Arar Commission stressed the importance of respecting caveats or restrictions on information that Canada passes on to or receives from other countries. At the same time, it recognized that Canada could always ask another country to lift the restrictions that it had placed on the disclosure of information.

The Arar Commission, Justice Mosley in the *Khawaja* case and Justice Noël in the proceedings about the release of the Arar report all concluded that the government had at times made unwarranted and extravagant claims of national security confidentiality.[49] Such findings affect the government's credibility. There is a danger that it may have cried the wolf of national security confidentiality too often. In addition, there are arguments that all countries must move from a Cold War paradigm, where secrecy was often an overarching value in counterintelligence operations, to a new paradigm that recognizes terrorism as a leading threat to national security and one that may require increased disclosure of secrets if terrorists are to be successfully prosecuted and incapacitated. None of these practical factors, including the dangers of extravagant claims of secrecy, were considered by the committees.

The committees also did not discuss how the procedure in the *Canada Evidence Act* can disrupt and delay terrorism prosecutions by requiring issues of non-disclosure of secrets to be litigated in the Federal Court before being returned to the criminal trial court, which must accept any non-disclosure order made by the Federal Court but then decide whether a fair trial is still possible. There was no reference to past experiences with this awkward two-court procedure, which is producing delays in the *Khawaja* terrorism prosecution and is not used by our allies.

Neither committee discussed a decision made in early February 2007 holding that provisions that required closed proceedings in all s. 38 matters were an unjustified and disproportionate violation of freedom of expression.[50] Even though the reports had already been written and were being translated at the time, the committees should have been aware that both the Supreme Court and the Federal Court had earlier raised concerns about such inflexible provisions for closed courts.[51] The Commons committee not only ignored these important rulings, but recommended the revival of mandatory closed proceedings under a provision that was added to the *Canada Evidence Act* by the *ATA* but repealed by Parliament in 2004. The committee appeared oblivious to the fact that a number of courts had ruled mandatory and sweeping publication bans to be unconstitutional. Some commentators assert that Parliament has a right to ignore Charter rulings by the courts (Huscroft 2007), while others argue that Parliament should not be the captive of judicial interpretations of the Charter (Hiebert 2002). Nevertheless, it seems strange that the committee would not even mention Charter rulings against mandatory closed courts that it apparently rejected. A likely explanation is inadequate legal research. This suggests that the research support for the committees is inadequate. This is not simply a technical point if it results in recommendations that could produce legislation that will be struck down by the courts or recommendations that ignore valuable comparative experience with anti-terrorism laws.

The *Security of Information Act*

As discussed above, the broad and complex provisions of the old *Official Secrets Act* now renamed the *Security of Information Act* — received relatively little critical commentary at the time that the *ATA* was enacted (Wark 2001). Although it amended most of the Act, Parliament left intact the oft-criticized offence in s .4 that applied to the possession of leaked official information. This offence was struck down in 2006 by a judge in the Juliet O'Neill case, and both committees recommended the creation of a more narrowly defined offence. The Commons committee surveyed various proposals ranging from repeal of the offence to the creation of a new offence with fault requirements and a disclosure in the public interest defence. In the end, however, the committee unhelpfully concluded it will "not make any specific recommendation as to how section 4 of the Security of Information Act should be amended" (Commons 2007, 63). The Senate committee recommended that any new offence only apply to secret official information the disclosure of which would harm national security, national defence or other public interests. The fact that the committees did not specify an actual response to the *O'Neill* decision means that the

Department of Justice will play its often dominant role in drafting a response and ensuring that it is consistent with the Charter (Kelly 2005). Concerns have been expressed that the Charter lawyers in the Department of Justice may be more averse to the risk of Charter invalidation and more influenced by court decisions than are parliamentarians (Hiebert 2002). That said, the parliamentarians involved in the three-year review did not seem particularly anxious to craft a response to *O'Neill*.

The Senate committee proposed a sweeping and generous public interest defence that would relieve a person of guilt whenever a judge determines that the person leaking or receiving the information "acted in the public interest and the public interest in disclosure outweighed in importance the public interest in non-disclosure" (Senate 2007, 97). The present public interest defence in s. 15 of the Act is much more restrictive. It requires a whistle-blower to first approach the Deputy Attorney General of Canada. Although the Senate draws an analogy to the judicial balancing of the interests in disclosure and non-disclosure that is done under some parts of the *Canada Evidence Act*, a crucial difference is that public servants, not the court, would in the first instance decide to release the secret information.

It should also not be assumed that civil servants will leak information for altruistic purposes. Justice O'Connor was highly critical of those who leaked secret information about Maher Arar in an attempt to discredit him to the media, including to Juliet O'Neill (Canada 2006b, 255). The *O'Neill* case and any broader whistle-blower defence can be portrayed as a victory for press freedom. Nevertheless, the role that the Canadian media played in transmitting the damaging leaks about Maher Arar has generated some much-needed soul-searching (Greenspon 2007). Although the Canadian media may aspire to the role that the *New York Times* and other American media outlets have played in revealing post-9/11 abuses, they have not played such an important watchdog role.

Their treatment of the *Security of Information Act* also demonstrates the different approaches taken by the Senate and Commons committees. The Senate committee concluded that the concept of prejudice to the interest of the state incorporated in some offences was too broad, including references to offences committed with political or religious motives (Senate 2007, 99). In contrast, the Commons committee found that the term was too narrow and should be expanded by leaving it open-ended (Commons 2007, 65). The government and Parliament will have to choose from the significantly different approaches taken by the two committees with respect to both the breadth of various security offences and government secrecy. The Commons committee generally followed the government in stressing the need to maintain and expand broad offences and robust protections for secrecy, while the Senate committee was more responsive to civil society and judicial critiques of the *ATA* as over-broad and favouring the government's interest in secrecy over the public's interest in disclosure and openness.

Interceptions of communication by security intelligence agencies

An interesting feature of the *ATA* that again escaped much critical commentary in 2001 was the amendment of the *National Defence Act* to recognize the existence of Canada's signals intelligence agency, the Communications Security Establishment (CSE). These amendments enabled the Minister of Defence to authorize the interception of private communications, provided that the intercepts be for the sole purpose of collecting foreign intelligence and be directed at foreign entities and that there be satisfactory measures to protect the privacy of Canadians. In addition, the CSE can help the government of Canada protect its own computer systems and provide technical and operational assistance to CSIS and the RCMP. The Senate committee reported that, as of April 2005, fewer than 20 ministerial authorizations had been issued and only 5 were still ongoing (Senate 2007, 79). The Commons committee did not report any such information. The Senate committee at least provided valuable information that might in other times have remained secret (Farson 1995). Neither committee, however, dealt with the fact revealed by the Arar Commission that, since 2002, the CSE has "added many new staff and expanded its office space to three additional buildings" (Canada 2006b, 146). Canada's ears in the sky appear to be multiplying. The committees did not deal with the risk that the technical and operational assistance that the CSE provides to domestic officials could be quite extensive.

Both committees rejected suggestions that CSE intercepts be authorized by judges as opposed to ministers, with only the dissenting members of the Commons committee arguing that judicial warrants should be required, as they are for CSIS intercepts (Commons 2007, 127). There are some interesting questions as to whether ministerial authorizations will survive Charter challenge (Cohen 2005). The Senate committee did, however, call for a clear standard for ministerial authorizations and

reporting of the number of such authorizations each year, as well for publication of the CSE's policies on retention and destruction of the material collected. The Senate conceived of the retention issue as mainly one of privacy, but the destruction of CSIS tapes during the Air India investigation also suggests that there may be instances where the police have a case for access to security intelligence intercepts.

The Commons committee recommended that the review commissioner for the CSE report on any violations of the Charter or the *Privacy Act* as well as the legality of the CSE's activities. It also recommended that the commissioner always be a retired or semi-retired superior court judge (Commons 2007, 55). This recommendation recognizes the importance of effective review of perhaps the most secret of all of Canada's national security actors. It also recognizes that review agencies are creative hybrids of all branches of government. Public inquiries and the CSE commissioner rely on sitting and retired judges to bring quasi-judicial qualities to the review process, while SIRC relies on retired senior politicians from all major political parties (Roach 2007d).

Although only the CSE and not CSIS was mentioned in the *ATA*, it is unfortunate that neither committee addressed the warrant structure under the *CSIS Act*, which was enacted in 1984 and has remained virtually unamended since that time. The leading decision upholding the constitutionality of its warrant scheme is now 20 years old, and it was a divided one at the time it was decided.[52] Since then, the scheme for granting electronic surveillance warrants and the exclusion of evidence from illegal wiretaps have significantly changed. In some ways, it is now easier to obtain a Criminal Code wiretap warrant than a CSIS wiretap warrant in a terrorism investigation, because only the latter requires one to show that less- intrusive investigative means would not be successful. Neither committee examined the performance and capacity of SIRC, which reviews the activities of CSIS. Concerns have also been raised about SIRC's ability to adequately and publicly review CSIS (Wark 2006), and the Arar Commission has recommended a substantial increase in SIRC's workload (Canada 2006b). Although a case can be made that the committees had already undertaken an overly ambitious mandate, it would have been helpful for them to examine how the 1984 *CSIS Act* fits into a changed legal, security and review landscape.

Immigration law security certificates

Both committees examined the issue that confronted the Supreme Court in *Charkaoui*, but in a more comprehensive manner than was open to the court. Unlike the Court, the committees focused not only on the dilemma of judges receiving secret evidence not disclosed to the detainee when deciding whether to uphold security certificates under immigration law, but also on similar national security secrecy provisions that could apply under laws relating to evidence, charities and the listing of terrorist groups.

Like the Supreme Court, both the Senate and Commons committees found that there is a need for some form of adversarial challenge to governmental claims that secrecy is necessary and to the secret intelligence that is presented to the judge reviewing the security certificate. For example, it is possible that the security certificate detainee may have vital information that would reveal the intelligence to be inaccurate or unreliable. Both committees recommended that security-cleared counsel should represent the interests of the affected person whenever information is withheld for reasons of national security.

The two committees went beyond the Supreme Court's survey of a range of less rights-invasive alternatives, and proposed that the affected party be entitled to select a special advocate from a roster of security-cleared counsel who are funded by but independent of the government. Both committees have done research that should help Parliament to select among the range of available responses to *Charkaoui*, and also to make amendments that will apply to matters beyond the security certificates under immigration law. At the same time, a recent decision by the Federal Court upholding *ex parte* procedures under s. 38 of the *Canada Evidence Act* suggests that Parliament will not necessarily have to respond with new legislation enabling and structuring security-cleared counsel, because the Federal Court may already have the power to appoint them.[53] A failure by Parliament to respond to *Charkaoui*, however, would mean that Canada would be deprived of any democratic debate in Parliament about the precise and controversial contours of the new procedural mechanisms. It would also mean that judges would decide when and if a security-cleared counsel was necessary, and the excluded litigants would not necessarily have a right to have their interests represented when they are excluded from the court for security reasons.

The issue of security certificates revealed some interesting differences between those members who dissented from the Commons committee report. Serge Ménard of the Bloc argued that security certificates should only be continued if the allegations made in

them were subject to the criminal law standard of proof beyond a reasonable doubt, if special advocates were available to challenge secret evidence and if it was never possible to deport someone to face torture (Commons 2007, 133). In this, he parted company with Joe Comartin of the NDP, who argued that security certificates should be abolished (Commons 2007, 139). Mr. Ménard's position raises the issue of whether it would be possible to bring criminal prosecutions instead of using security certificates. Security certificates, even if subject to adversarial challenge, will allow the government to use secret intelligence against a detainee without disclosing it to that person, whereas criminal prosecutions will require that any evidence used against the accused be disclosed to the accused.[54]

Both committees also made some other important recommendations with respect to security certificates. They both recommended that judges only consider information and intelligence introduced in support of security certificates if it was reliable and appropriately obtained. The Senate committee referred to the Arar Commission's warnings about the dangers of relying on evidence obtained through torture (Senate 2007, 106-7). Both committees, however, rejected a proposal by the British Columbia Civil Liberties Association that only relevant evidence be considered. In the absence of such an amendment, the intelligence that is used to support a security certificate may involve wide-ranging information about the detainee's associations, travel patterns and political and religious views. The approach recommended by both Serge Ménard and the British Columbia Civil Liberties Association would have disciplined security certificates away from the wide-ranging intelligence about security risks to more narrow, focused questions of evidence of planned wrongdoing. Parliament should respond to *Charkaoui*, but there is a danger that Charter-proofing security certificates by adding security-cleared friends of the courts to the process will gloss over more fundamental questions about the fairness of relying on secret intelligence, as opposed to evidence, to justify indeterminate detention or deportation of suspected terrorists.

The *Suresh* exception of deportation to torture

The Senate committee noted that both the United Nations Committee Against Torture and the Human Rights Committee had called on Canada to reaffirm its commitment to the absolute right not to be subjected to torture. These calls came in the wake of the Supreme Court of Canada's controversial statement in its 2002 decision in *Suresh v. Canada* that in some "exceptional circumstances" deportation to a country where torture is a possibility might be consistent with the Canadian Charter, even though it would violate international law. The Senate committee recommended that the immigration law be amended to repeal the *Suresh* exception (Senate 2007, 110) The Senate committee in general paid more attention to international human rights concerns than the Commons committee, and this perhaps reflects the fact that the former committee heard from a United Nations representative, while the latter did not.

Although the Senate committee recommended that Canada affirm its absolute commitment not to deport someone to torture, it was not naïve about the dilemmas posed by suspected terrorists who cannot be deported to home countries with poor human rights records. It recommended that work be done to ensure the effectiveness of assurances that a person would not be tortured. The Senate committee also recommended that Canada show leadership at the United Nations in working on the dilemmas created by suspected terrorists who may be subject to indeterminate detention and control in circumstances in which they cannot be deported because they will be tortured.

The Commons committee ignored the conundrum of deporting non-citizens suspected of terrorism to torture or subjecting them to indeterminate detention in Canada. This is unfortunate, because the issue of how we deal with security certificate detainees who could be tortured if deported to Egypt or Syria is a pressing one. On the one hand, Canada should honour its international commitments against condoning torture. On the other hand, refusal to deport such persons could result in indeterminate detention. The release of most of the security certificate detainees under house arrest conditions is the present solution, but it is unlikely to be a satisfactory or permanent one. The detainees will continue to exercise their Charter rights to challenge the very tight restrictions placed on them, and the British experience with control orders suggests that one day they will win. Here again, examination of how other countries struggle with the difficult choices inherent in security policies would have been helpful. It might reveal pitfalls for Canada to avoid and challenges that Canada will soon face. The British experience with respect to escalating challenges to control orders and problems in administering control orders after indeterminate detention of terrorist suspects was scrapped

could provide important lessons for Canada. If Canada does not understand the difficult experience of countries with more experience with terrorism, it may be destined to repeat many of the mistakes those countries have already made.

Review and oversight: parliamentary committees and the Arar Commission

Both committees addressed the important issue of review and oversight, but again in different ways. The Commons committee recommended that a national security committee of parliamentarians be created, as proposed in 2005 by the Martin government. This committee would consist of six members of the Commons and three members of the Senate. It would have the power "to engage in on-going compliance audits" of various departments involved in national security to "ensure that law and policy directions are being properly applied, and that rights and freedoms are being respected in day-to-day activities" (Commons 2007, 85). No mention was made of how this committee of parliamentarians would interact with existing review bodies including SIRC, the CSE commissioner, the Commission for Complaints against the RCMP, the privacy and access to information commissioners and the Canadian Human Rights Commission. No mention was made of the dangers of excessive and duplicative review, an issue that the Arar Commission was concerned about (Canada 2006b, 476). The committee also did not address concerns that a statutory committee of parliamentarians might have less-inherent powers than did a parliamentary committee (Whitaker 2005).

The Commons committee seemed to assume that the new committee of parliamentarians would focus on assessing the propriety and legality of national security activities. The committee demonstrated no awareness that if the new committee were to focus on review for legality and propriety, it would occupy a crowded field populated by many other review bodies. It also failed to explore the possible role of a legislative committee in assessing the efficacy and efficiency of the state's national security activities. Although such tasks are sometimes undertaken by the Auditor General and some Senate committees (Whitaker 2005), there is no visible body with this efficacy mandate.

The majority of the Commons committee also ignored the crucial issue of whether a new committee of parliamentarians should have access to classified information. Only the dissenting members of the committee argued that such a committee should have access to information that was classified secret. They even contemplated the possibility that the parliamentary committee might have powers to authorize "the release of previously classified information" (Commons 2007, 128), an intriguing approach that has been recommended by other commentators (Ackerman 2006). They did not, however, deal with the possibility that parliamentarians with access to secret information might be prevented from using that information publicly. One of President George W. Bush's earliest defences in support of warrantless intercepts by the National Security Agency was that congressional leaders had been briefed on the topic (Roach 2007d). Access to secret information could bind parliamentarians to secrecy. This does not necessarily mean that legislative committees should not have access to classified information, but it does suggest that the issue is more complicated than the Commons report suggests. The Commons committee's lack of insight into review matters does not inspire confidence that it would effectively discharge new review functions.

The Senate committee recommended that a standing committee of the Senate "with dedicated staff and resources" be created (Senate 2007, 122). It understandably resisted proposals for a joint committee that would have twice as many members from the Commons than the Senate. Commentators in Britain have concluded that, on anti-terrorism matters especially, the unelected Lords have been more concerned with rights issues than have the elected members of the Commons (Hiebert 2005; Nicol 2004).

Although this may change with Senate reform, the relative stability of the Senate is an advantage. The steep learning curve with respect to the complexities of security policy-making suggests that there is a need for continuity on parliamentary committees in this area. The 2004 and 2006 elections meant that only four of the seven members of the Commons subcommittee remained constant, even during the time of the delayed three-year review of the *ATA*, whereas the majority of the Senate committee members came to their task familiar with the issues because they had been part of the Senate committee that reviewed the *ATA* in 2001. Senator Kenny has also developed expertise and a profile on security matters that is not matched in the Commons. Although the Senate may have originally been intended to represent the rich as a minority, the Senate's report on the *ATA* demonstrated much more interest in Muslim groups'

concerns with anti-terrorism policies than did the elected Commons committee.

The Commons committee focused almost entirely on the parliamentary review of national security activities, but the Senate committee took a broader approach. Following the part 2 recommendations of the Arar Commission, it recommended that the RCMP be subject to self-initiated review with access to secret information in a manner similar to SIRC's review of CSIS (Senate 2007, 118). The committee did not, however, address the Arar Commission's proposals to extend SIRC's mandate to include a number of other national security actors (Canada 2006b). But it did endorse the Arar Commission's recommendations with respect to the need for explicit information-sharing agreements and suggest that Canada complain to foreign governments if Canadian information was misused (Senate 2007, 92). It also recommended that the federal government take steps to protect information that under outsourcing contracts might be vulnerable to seizure under the *Patriot Act*, and that federal officials report any demands for personal information to the Privacy Commissioner (Senate 2007, 91). In this way, the Senate committee demonstrated more awareness of existing review mechanisms than did the Commons committee. At the same time, neither committee engaged in a comparative analysis of review mechanisms in other countries, even though some of this information was readily accessible in a 2004 discussion paper on a national security committee of parliamentarians (Privy Council Office 2004) and in the Arar Commission's report (Canada 2006a).

A Report Card on the Three-Year Review Conducted by the Committees

Some of the work of the Commons and Senate committees demonstrates that parliamentarians are capable of sustained analysis and intelligent critique of a large body of anti-terrorism law. Both committees did a good job of placing the *Charkaoui* issue of how secret information is treated into a larger policy context that included similar issues under the *ATA*. The Senate committee recognized the complexities of many of the issues surrounding the detention of suspected terrorists who may face torture if deported to countries such as Egypt or Syria. The Commons committee was alive to the important role of the *ATA* in regulating charities and those who might provide financial services to terrorists. It also recognized the key role of Canada's signals intelligence agency and the effects of its activities on privacy. The ultimate influence of the reports remains to be seen. Although they provide some valuable information and analysis for policy-makers, they must compete with court decisions, United Nations edicts, reports from public inquiries and rights watchdogs such as the Privacy Commissioner and the experience of our allies for the limited attention of policy-makers.

Moreover, the committees also made some poorly reasoned recommendations. The Commons committee opened the glorification of terrorism issue without recognizing the controversies that it would cause or exploring alternative strategies to deal with extremists who would glorify acts of terrorism. It recommended more mandatory secrecy provisions, even though the courts would strike them down under the Charter. It recommended the creation of a new parliamentary committee on security matters, without situating the committee with respect to the many other bodies that review national security activities. It did not reflect on the potential for legislative committees to evaluate the efficacy of national security activities and it did not advert to the dangers of excessive and redundant review with respect to the propriety of national security issues.

The committees ignored some important issues. Although each committee devoted considerable attention to the secrecy provisions in the *Canada Evidence Act*, they ignored the danger that governments may make extravagant claims of secrecy[55] or that secrecy claims in the Federal Court might delay terrorism prosecutions in the criminal trial courts. Neither committee considered the case for a root and branch reconsideration of Canada's broad definition of terrorist activities or its official secrets law. The committees have not given the government or Parliament the raw material to take on either of these complex tasks. The committees split on the appropriate response to the decision in *Khawaja* to sever the political and religious motive requirement from the definition of terrorist activities. They also did not provide helpful advice on the more limited and immediate task of responding to the *O'Neill* decision, which invalidated the leakage offence under the *Security of Information Act*.

Although the committees discussed now-expired investigative hearings at some length, they did not link them with how authorities induce reluctant witnesses to

cooperate and how they protect such witnesses. They also did not examine the case for and against giving parliamentarians access to secret information and an oversight role in examining whether Canadian officials are taking adequate measures to prevent terrorism.

The differences between the two committees are intriguing and suggest that getting separate committees to conduct three-year reviews has the potential to enrich parliamentary deliberation about security legislation. The Senate committee adopted many of the concerns of Muslim and civil liberties groups about profiling, political or religious motive requirements in terrorism prosecutions, effective and independent review of national security activities and deportation to torture. In contrast, the Commons committee rejected or ignored these concerns and instead focused on issues such as privacy and concerns that laws could apply to the legitimate activities of charities and lawyers. The sum of the committees' work was greater than the individual parts.

The differences between the committees will not make the government's job in crafting a response easy. The government now has some conflicting advice from the two committees on important issues such as whether to enact a glorification of terrorism offence, whether to repeal the political or religious motive requirement and whether charities and others alleged to have provided financial support to terrorists should have a due diligence defence. Contradictory advice may, however, be inevitable given the complex and controversial nature of security legislation.

The Government Responds to the Commons Committee

On July, 18, 2007, the government issued its formal response to the Commons committee report. The response was accompanied by a headline-grabbing press release that stated that the ministers of Justice and Public Safety "reiterated Canada's New Government's intention to reintroduce legislation to restore the anti-terrorism powers lost over recent months and to address recent decisions made by the Supreme Court of Canada in regards to the security certificates" (Canada 2007a). Unfortunately, the government's response did not discuss the rationale for reviving investigative hearings or preventive arrests. It also did not mention the Commons committee's interim recommendations that investigative hearings only be available to investigate imminent acts of terrorism. This unanimous interim recommendation to limit investigative hearings seems, rightly or wrongly, to have disappeared off the radar screen.

The government's response also did not deal with the Senate committee's report and this meant that some issues like the *Suresh* exception for deportation to torture and how it affects the long-term sustainability of the security certificate regime were not addressed in the government's response. As suggested above, the Commons and Senate committees brought different perspectives to their work and it would have been helpful for the government to have responded to both reports at the same time.

Although the government indicated that it would accept the Commons committee's recommendation that only "reliable" evidence be used in security certificate proceedings, it did not provide any firm indication of how it planned to respond to the Supreme Court's decision in *Charkaoui*, beyond stating that it would study "the possibility of establishing a special advocate role in the security certificate process" (Canada 2007b, 23). It did, however, hint that it might provide for increased adversarial challenge to secret evidence only in security certificate cases and not in all proceedings where the government makes representations to judges without the other side being present. Such a limited approach could possibly be justified on Charter grounds,[56] but it would go against the recommendations of both the Commons and Senate committees for a more generalized use of special advocates when the government presents secret information (Canada 2007b, 23). Both committees recommended reforms that went beyond the minimum standards of the Charter.

The government accepted the Commons committee recommendation to retain the existing definition of terrorist activities, noting that both the Australian and British reviews of their comparable definitions had reached similar conclusions. The government was not shy about citing relevant comparable experience to support its position, even though the Commons committee generally neglected the comparable experience. The government only indicated that it "will carefully consider" whether the glorification of terrorism offence proposed by the Commons committee "ought to be created, bearing in mind that Canadian Charter of Rights and Freedoms (Charter) and the policy implications" (Canada 2007b, 5). As suggested above, the government should consider not only whether a glorification of terrorism offence can be

justified as a reasonable limit on freedom of speech, but also whether it represents a wise policy in responding to extremism.

The government's reticence on many of the most controversial issues dealt with in the three-year review — investigative hearings, preventive arrests, glorification offences, the response to *Charkaoui* and review of national security activities — may only defer the controversy until a new security bill is introduced. A fuller explanation of where the government is heading on these issues might help establish the basis for a better debate on the merits of its proposals. As discussed above, one of the flaws of the debate over the expiry of investigative hearings and preventive arrests in early 2007 was that it was conducted in a rushed manner, with the clock ticking on the expiry of the provisions.

The Canadian government's response can be contrasted with that of the new British government a week later. Prime Minister Gordon Brown made a detailed statement about his government's security plans, including its intent to provide for longer periods of pre-trial detention in a new terrorism bill to be introduced this fall. This was accompanied by the posting of six detailed documents outlining possible measures in the new bill as well as other policy options on the most controversial issues, including pre-trial detention and the use of intercept evidence. (Home Office, 2007) Advance warning of the government's plans may allow opposition to mobilize, but it also provides time for reflection, research and debate on the various policy options both within and outside Parliament. It is difficult to know why the British government was more forthcoming about its future legislative plans than was the Canadian government. Although it is difficult to know whether this is a cause or an effect of the government's approach, debates in parliament and the media about anti-terrorism policy in Britain are often better informed and more sophisticated than they are in Canada. If the government waits until a bill is introduced to signal its policy intentions, there is a danger that the debate over the Bill will be framed by initial and perhaps unreflective sound bites.

Although it did not address the most controversial issues, the Canadian government responded to many of the Commons committee's more detailed recommendations. The result was a decidedly mixed verdict, with a significant number of the committee's recommendations being rejected by the government. For example, it rejected some of the Commons committee's recommendations for expanding terrorism and security offences. Moreover, it correctly noted that the committee's call for the revival of a mandatory publication ban in some proceedings went directly contrary to a number of recent judicial decisions on freedom of expression (Canada 2007b, 18-9), and that it would not be pursued by the government. The government, which receives its Charter advice from experts within the Department of Justice (Hiebert 2005; Kelly 2005), seemed to be better informed and more willing to follow court decisions interpreting the Charter than was the Commons committee.

The government also rejected the Commons committee's proposals to provide more protection for lawyers and charities from measures designed to stop anti-terrorism financing. It concluded that solicitor-client privilege "should not be used as a shield" for the knowing involvement of lawyers in various terrorist activities (Canada 2007b, 5, 8). It also rejected the recommendation to add a due diligence defence to financing offences, correctly noting that they already require proof that the accused knowingly dealt with terrorism property. The government rejected the Commons committee's recommendation that only charities that knew or ought to have known that they were involved in terrorism should be deprived of charitable status. It stressed that the deprivation of charitable status was "an administrative remedy" and pointed out the danger that charities might "structure their affairs" to take advantage of a due diligence defence (Canada 2007b, 14).

The government recognized that questions of review were more complex than the addition of a national security committee of parliamentarians, as recommended by the Commons committee. The government did not disagree with the recommendation that the activities of Canada's signals intelligence agency be reviewed for compliance with the Charter and the *Privacy Act*, but concluded that amendments to require such compliance might "weaken...the fundamental principle" that the CSE should comply with all laws (Canada 2007b, 20). Again, the government seemed to defer the most important questions for more study. Although it indicated that "various forms of review are essential to ensure that Canada's national security laws and practices safeguard both security and civil liberties" (Canada 2007b, 24), it only stated that sometime in the future it would propose an approach to national security review that "will meet the basic objectives" set out in the Arar Commission's second report (Canada 2007b, 25). This suggests that the government will, like the Senate committee, take a more comprehensive

approach to review and not simply focus on the issue of a new committee of parliamentarians. The government did not, however, reveal the review options it was examining or the balance between reviews of the efficacy of the government's efforts in preventing terrorism and the propriety of it's efforts to respect human rights.

Finally, the government indicated that while the review of the *Anti-terrorism Act* "has been a positive and useful exercise," it pointedly refused to commit itself to another similar review process, as had been recommended by the Commons committee. It stated that "the Government generally believes that such reviews should be conducted when they are needed, as opposed to having a pre-set timetable" (Canada 2007b, 24-5). The result is that subsequent reviews of the *ATA* or related legislation will be left to the discretion of governments, because the *ATA* does not require subsequent parliamentary reviews.

Although the delayed three-year review could certainly have been improved, it would be unfortunate if no comprehensive reviews of security legislation were conducted in the future. Comprehensive and periodic reviews allow a form of systemic and public stock-taking that is not undertaken even when a government decides that controversial security legislation must be amended. The internal reviews that the government proposes to rely on in the future will generally not be made public. This is unfortunate, because one the virtues of the comprehensive parliamentary review process is its potential to increase parliamentary and public understanding of complex and interconnected security issues. Comprehensive reviews are difficult, and as with this review of the *ATA*, they can be delayed. It is, however, better that they be conducted late rather than not at all.

Conclusion

An optimist can hope that the committees' reports will have an enlightening and educative effect on debates about the *ATA* in Parliament and society. They could be part of an iterative process in which our knowledge and understanding of the complex issues involved in security legislation are gradually enhanced.

But there are plenty of grounds for pessimism. The committees' reports had virtually no impact on the debate about whether to renew investigative hearings and preventive arrests. In part, this was because the comprehensive three-year reviews were delayed and came too late to influence the debate about investigative hearings and preventive arrests. Once the Commons descended into a welter of partisan accusations and counter-accusations, any analysis of the policy issues were beside the point. Parliament will have to improve its performance if it is to do justice to the committees' three-year review reports.

Some parliamentarians seem to despair of the public, and perhaps some of their own colleagues, ever being able to understand the complex issues that arise from a review of the *ATA*. Joe Comartin of the NDP and Serge Ménard of the Bloc Québecois in their dissenting report warn that:

> The arcane nature of the *ATA* has significant consequences for the public debate that should surround such major legislation. Because few people have both the training and the time needed to understand it sufficiently to reach an informed judgment, the public debate comes down to trust. Either the public trusts the ministers who claim that despite their haste a fair balance has been struck between the requirements of fighting terrorism and respect for fundamental freedoms, and in the police who assure us that in any event they will not abuse the new powers that they have been given; or they trust the civil liberties organizations and the academics who devote their lives to studying the legal conditions necessary for respecting our rights. The verdict of these latter groups is disturbing, to say the least. (Commons 2007, 115)

These two lawyers paint a dismal picture of a public that is effectively disenfranchised from the making and review of anti-terrorism legislation. To their mind, the public must simply choose whether to trust the state or its critics, even though both sides have an interest in spinning their analysis to suit their own purposes. The stark choice between trusting the state or its critics also suggests that the debate will inevitably be polarized. This argument that security issues are ultimately questions of trust rather than reason or deliberation is depressing, but it must be taken seriously. It more or less accurately describes the polarized debate about the sunsetting of preventive arrests and investigative hearings. That debate was less substantive than was the original debate surrounding Bill C-36 in 2001 or the debate between the justices of the Supreme Court when, in a divided decision, they held that investigative hearings were consistent with the Charter but should be subject to the presumption that the hearings would be conducted in open court.

Parliamentary and public debates about national security matters should be becoming more sophisticated and nuanced as we move away from 9/11 and devote more resources and thought to national security matters. Unfortunately they seem to be getting less substantive. One factor may be the precarious nature of minority governments. The government that introduced Bill C-36 enjoyed a majority. It could afford to let a substantive debate about the merits of its legislation play out, at least for a time, before it invoked closure and party discipline to ensure that the *ATA* was enacted before the end of the 2001. Minority governments, which are always on the verge of going to the polls and always searching for partisan advantage and wedge issues, may be less willing to allow a substantive debate on the merits of legislation.

The nature of the parliamentary debate will also influence the nature of media discourse and, through that, public discourse. The relatively substantive Bill C-36 debate in 2001 was well covered in the media, whereas in 2007 the media, like Parliament, ignored both the Commons and Senate reports and the substantive issues that were discussed in them. Instead, the media focused on the drama of the partisan allegations made by the government and the opposition. This focus was only punctuated by media attention to the drama of the Supreme Court's decision in *Charkaoui* (Sauvageau, Taras and Schneiderman 2006). The media largely focused on who were the winners and losers in the case and not on the more difficult issue of how Parliament should respond to the decision or the complex issues surrounding the balance between secrecy and disclosure. Too much of the parliamentary and media discourse was based on the simplistic and divisive idea that supporters of security legislation were soft on the Charter while critics of security legislation were soft on terrorism. Canada was able to avoid that type of poisoned and polarized debate in the immediate aftermath of 9/11. It is a shame that it has now emerged in 2007.

If the trend toward simplification and polarization of the issues continues in Parliament and in the media, Canada could fall further behind other democracies in the sophistication of its debate over complex and difficult issues involving the reconciliation of rights and security. This creates a risk that Parliament may lurch from one extreme to the other and enact legislation that is unconstitutional or inappropriate or both. Lack of public knowledge and engagement with security issues can have harmful repercussions on the development of vital public policy. It may make it more difficult for Parliament and the government to develop sustainable security legislation that enjoys wide public support and confidence. It increases the risk that Parliament may only legislate in response to real or imagined crises. It also increases the risk that Parliament could enact unconstitutional and/or inappropriate security legislation.

In 1979, Franks observed that the main reason for poor parliamentary debates about security matters was that "Parliament and the public have not had an adequate information and knowledge base on which to base discussion" (Franks 1979, 65). Unfortunately, little seems to have changed more than a quarter of a century later (Whitaker 2005). Indeed, the partisan and largely uninformed debate over the expiry of preventive arrests and investigative hearings represents a new low.

One thing that has changed since Franks made his observations, however, is the increased role of the courts under the Charter. The Supreme Court in its *Charkaoui* decision expected that Parliament would, within a year of its decision, be able to craft new legislation to allow for greater adversarial challenge of the secret information that the government presents to justify security certificates. Although *Charkaoui* was decided under immigration law, it has implications for multiple sections of the *ATA* that also allow the government to present secret intelligence to courts. Both the Commons and Senate committees were well aware of the serious implications of *Charkaoui* for the *ATA*. Both committees recommended that security-cleared counsel should be available to challenge secret evidence not only for security certificates, but with respect to reviews of the listing of terrorist groups, the denial of charitable status and applications for non-disclosure of sensitive information under various parts of the *ATA*. On this issue, the committees did their homework and their job.

The dismal debate over the sunset provisions, as well as the precarious nature of legislation introduced by a minority government,[57] however, raise the issue of whether Parliament can do its job. If Parliament cannot enact legislation to respond to the difficult issues raised by *Charkaoui*, the courts will have to fill the policy vacuum. There are already signs that courts may be willing to create their own devices to allow for adversarial challenge of secret information. A recent Federal Court decision suggests that security-cleared friends of the court could be appointed by judges on a case by case basis.[58] The Federal Court has already commissioned its own research into special advocates, suggesting that it has an interest and may attempt to take

ownership of the issue. If Parliament were to fail to take on the complexities of security legislation, the courts would have the final word by default. This would refocus our debate about security policy on those areas most directly affected by the Charter. Many other issues related to the workability of Canadian security law, including its treatment of secret information and the review of the state's often secret national security activities, could be neglected because they do not raise Charter issues.

The three-year review of the *ATA* was delayed, and this meant that parliamentary debate over renewal of investigative hearings and preventive arrests proceeded in something of a vacuum and without a full consideration of other issues raised by the *ATA* and other security legislation. Regardless of one's views about whether investigative hearings and preventive arrests should have been renewed, few would argue that the parliamentary debate over renewal was informed or edifying. In addition, the work of the two committees played a negligible role in the debate. The committees had no need to hear from so many witnesses and write detailed reports if parliamentary debates about security legislation are going to amount to simple accusations that one side is soft on terrorism and the other is soft on the Charter. The public deserves better than such a simplistic and polarized debate.

Consideration of Parliament's review of the *ATA* and parliamentary debate on the issues reveals some mixed messages. The partisan discussions in the House over the sunset provisions were undoubtedly a low point. The House and Senate reviews of the Act, although far from perfect, inspire hope of more considered responses and legislative reform. Although they need more research support, particularly with respect to comparative experience, parliamentarians in committee can engage with the difficult issues raised in our security legislation. As suggested above, the unelected Senators were more responsive to minority concerns about our security legislation, whereas the elected Commons committee was more concerned with privacy and security interests that could potentially affect all Canadians. We need both perspectives, because anti-terrorism legislation involves many complex issues, including evolving threats to security, liberty, equality and privacy. The government, however, has indicated that it has no intention of conducting further three- or five-year reviews of the *ATA*. This is unfortunate, because we need more Parliamentary reflection about the difficult issues inherent in anti-terrorism legislation.

Minority governments, especially those that may be on the verge of an election, are in a difficult position when it comes to enacting or reforming security legislation. Parliamentarians must resist the urge to simplify, distort or sidetrack the difficult issues raised by security legislation for partisan advantage. They must resist the urge to characterize complex issues in terms of a dichotomy that alleges that one side is soft on terrorism and the other side is soft on the Charter. More of the discipline that parliamentarians bring to their detailed work in the committees must somehow be brought to the floor of the Commons. It remains to be seen whether government, Parliament and Canadian society are up to the difficult task of dealing with the merits and complexities of our security legislation. If they fail to do so in a sensitive and considered way, however, the courts may, by default, take the lead.

Notes

I thank Jean-Paul Brodeur, Mel Cappe, Reg Whitaker, Wesley Wark and two anonymous reviewers for helpful comments on an earlier draft.

1 Bill C-36, containing the *ATA*, was introduced on October 15, 2001, and received royal assent on December 18, 2001.

2 United Nations Security Council Resolution 1373 called on states to enact laws against terrorism and the financing of terrorism but, in a reflection of international disagreement, did not define terrorism. See Roach (2007b) for a critical examination of the resolution's influence on many post-9/11 anti-terrorism laws.

3 *R. v. Khawaja*, [2006] O.J. No. 4245 (O.S.C.) [henceforth *Khawaja* 2006].

4 In our adversarial system, which respects the right to silence, the police cannot a compel a person with relevant information to assist them in their investigation.

5 *Application under s. 83.28 of the* Criminal Code *(Re),* [2004] 2 S.C.R. 248 [henceforth *Re Section 83.28*].

6 *Re Vancouver Sun*, [2004] 3 S.C.R. 332 [henceforth *Vancouver Sun* 2004].

7 *O'Neill v. Canada (Attorney General),* [2006] CanLII 35004 (O.S.C.) [henceforth *O'Neill* 2006].

8 *Toronto Star v. Canada*, [2007] F.C. 128 [henceforth *Toronto Star* 2007].

9 *Khawaja,* [2007] F.C. 463 [henceforth *Khawaja* 2007a].

10 The case involved the conviction of two men for conspiring to bomb an Air India flight in 1986, which was overturned because of the Crown's failure to make full disclosure of relevant information that it held including the identity of a key informant and participant. *R. v. Khella* (1998) 126 c.c.c. (ed) 341 (Que. C.A.)

11 *Khawaja* 2006.

12 *Khawaja* 2007a.

13 *Khawaja,* [2007] F.C. 490 [henceforth *Khawaja* 2007b].

14 *Khawaja* 2007b.

15 Charter issues have also played a role here as it could be argued that the Canadian Forces' hand-off of its detainees, first to American forces (Roach 2003, chap. 5) and now to Afghan officials (Byers 2007), violates the Charter and international law if there are not adequate assurances that the prisoners will not be subject to torture or the death penalty. A very recent 5-to-4 decision of the Supreme Court, however, casts doubt on whether the Charter will apply to the actions of Canadian officials abroad (*R. v. Hape,* 2007 S.C.C. 26, at 101).

16 The chair of the committee was Conservative member of Parliament Gord Brown. The vice-chairs were Roy Cullen from the Liberals and Serge Ménard from the Bloc Québecois.

17 *Re Section 83.28,* at 65.

18 Criminal Code s. 810.01.

19 *Hansard*, February 9, 2007.

20 Ibid., 6623.

21 Although the comprehensive review was supposed to be completed more than a year before the sunset, the actual sunset provisions seemed to contemplate a debate on renewal alone because they provided that the renewal motion could not be amended (*ATA* s. 83.32(3)).

22 *Hansard*, February 9, 2007, 6650.

23 Ibid., 6626.

24 Ibid., 6646.

25 *Hansard*, February 12, 2007, 6677.

26 *Hansard*, February 19, 2007, 6996-7.

27 Ibid., 7125.

28 Ibid., 7128.

29 Ibid., 7133.

30 *Charkaoui v. Canada*, [2007] S.C.C. 9 [henceforth *Charkaoui* 2007].

31 *Hansard*, February 23, 2007, 7251-2.

32 Ibid., 7260.

33 *Hansard*, February 26, 2007, 7286.

34 Ibid., 7333.

35 Ibid., 7298, 7331.

36 Ibid., 7322.

37 Ibid., 7405-6.

38 My count of witnesses listed as appearing before the Commons committee indicates that 38 were government officials or ministers, 32 represented interest groups, 15 represented review agencies and 8 were individuals. This amounts 93 persons, although the committee only reports 87 witnesses, perhaps because some people appeared but did not actually testify before the committee.

39 Most of the repeat groups were concerned about civil liberties and human rights. These included the British Columbia Civil Liberties Association, the Canadian Civil Liberties Association, the Civil Liberties Union, the International Civil Liberties Monitoring Group, Amnesty International, the Canadian Council of Refugees and the Association of University Teachers. Other groups included the Chiefs of Police, the Mackenzie Institute, the Canadian Bar Association, the Federation of Law Societies, the Canadian Islamic Congress, the Canadian Arab Federation and the Canadian Jewish Congress.

40 The author was among the individual witnesses who appeared before the Senate committee.

41 My count of witnesses listed as appearing before the Senate committee indicates that 61 were either government officials or ministers, 49 represented interest groups, 16 represented review agencies such as the Privacy Commissioner and 14 were individuals, usually academics.

42 *Suresh v. Canada,* [2002] 1 S.R.C. 3 [henceforth *Suresh* 2002].

43 *Suresh* 2002.

44 At the same time, the committee recognized that aggrieved individuals could also complain to the Canadian Human Rights Commission, review bodies for both the RCMP and CSIS and the courts (Senate 2007, 88). The Senate committee, however, did not anticipate the recent actions of privacy commissioners in calling for a suspension of the no-fly list until there was an adequate statutory framework for the program and adequate review of its privacy implications in terms of the transfer of information.

45 *Hall*, [2002] 3 S.R.C. 309.

46 Criminal Code, s. 810.01.

47 *R. v. Budreo*, (2000) 142 C.C.C. 245.

48 *Ruby v. Canada,* [2002] 4 S.R.C. 3 [henceforth *Ruby* 2002]; *Charkaoui* 2007; *Khawaja* 2007b.

49 Justice O'Connor commented that more of the hearings could have been made public "if the Government had not, for over a year, asserted NSC claims over a good deal of information that was eventually made public... This 'overclaiming' occurred despite the Government's assurance at the outset of the inquiry that its initial NSC claims would reflect its 'considered' position and would be directed at maximizing public disclosure" (Canada, 2006b). Justice Mosley commented, in *Khawaja* 2007b, at 150, that "those holding the black pens seem to have assumed that each reference to CSIS must be redacted from the documents even when there is no apparent risk of disclosure of sensitive information such as operational methods or investigative techniques or the identity of their employees." In *Canada v. Commission of Inquiry into the Actions of Canada Officials in Relation to Maher Arar,* [2007] F.C. 766, at 91, Justice Noël indicated that some of the information redacted from the Arar Commission report could not, if released, injure national security, national defence or international relations. At the same time, Justice Noël affirmed some of the government's objections to the release of parts of the report.

50 *Toronto Star* 2007.

51 *Ruby* 2002; *Vancouver Sun* 2004; *Ottawa Citizen Group v. Canada (Attorney General of Canada),* [2004] F.C. 1052.

52 *Atwal*, [1987] 36 C.C.C. 161.

53 *Khawaja* 2007a.

54 The Attorney General of Canada could apply under s. 38 of the *Canada Evidence Act* for the non-disclosure of some information, but such information could not be used as evidence in a criminal prosecution (*Charkaoui* 2007).

55 See note 41.

56 The Federal Court has, however, indicated that in some cases special security-cleared lawyers could be used when the government seeks the non-disclosure of information under s. 38 of the *Canada Evidence Act* (*Khawaja* 2007a).

57 Introduction of new security legislation in a volatile minority Parliament may produce unpredictable results ranging from paralysis, to defeat of a government bill, to odd amendments and coalitions. One likely scenario was described by Franks, who predicted that with a minority government there are diminished "chances of important but contentious legislation with no immediate urgency, such as reforms to security legislation, being considered" (Franks 1979, 13). Of course a terrorist attack, a narrowly averted attack or a failed terrorism prosecution could add a sense of urgency and lead to rushed legislation. Such a response will, like the enactment of the *ATA* itself in 2001, only generate a range of Charter challenges in the courts.

58 *Khawaja* 2007a.

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Résumé

Cet article propose une évaluation préliminaire du processus de décision entourant l'examen sur trois ans de la *Loi antiterroriste* (LAT) et l'expiration en février 2007 des audiences d'investigation et des pouvoirs d'arrestation préventive qu'elle prévoit. Il analyse aussi l'incidence des délais ayant retardé l'examen de la LAT et fait en sorte que les débats parlementaires relatifs au réexamen quinquennal des audiences d'investigation et des pouvoirs d'arrestation préventive furent menés en février 2007 sans bénéficier de trois années complètes d'examen par les comités de la Chambre des communes et du Sénat.

Comparant les travaux de ces comités, l'article met en contraste d'importantes divergences d'analyse. C'est ainsi que le comité élu de la Chambre des communes a eu tendance à privilégier les questions de confidentialité susceptibles de porter préjudice à tous les Canadiens, mais aussi certaines craintes selon lesquelles la LAT puisse léser les avocats et les organismes caritatifs. En revanche, le comité non élu du Sénat s'est intéressé aux préoccupations sans doute moins répandues concernant le profilage racial et religieux, l'évaluation des agences de sécurité et l'expulsion éventuelle de non-citoyens soupçonnés de terrorisme vers des pays où ils risquent la torture.

L'article traite aussi des rôles respectifs du Parlement et des tribunaux relativement aux lois sur la sécurité. Pour ce faire, il analyse différentes décisions judiciaires ayant invalidé des dispositions de la LAT et de lois connexes, tout en étudiant la capacité du Parlement d'approfondir le dialogue avec les tribunaux en promulguant de nouvelles lois qui dépassent le cadre de certaines violations de la Charte établies en cour. Il examine la possibilité d'une réponse législative efficace au jugement *Charkaoui* et à d'autres décisions fondées sur la Charte ayant invalidé certains éléments de la définition d'une activité terroriste, de même que l'infraction de divulgation illicite prévue à la *Loi sur la protection de l'information* et l'obligation de mener à huis clos la procédure judiciaire. Il précise toutefois que le Parlement pourrait se révéler incapable de convenir d'une loi répondant au jugement *Charkaoui* et qu'une récente décision dans l'affaire *Khawaja* donne à penser que les tribunaux pourraient, de leur propre initiative, désigner un avocat ayant une autorisation de sécurité pour contester les informations secrètes soumises par le gouvernement en l'absence des personnes directement visées.

Après une description préliminaire de la LAT et des circonstances entourant sa promulgation en 2001, l'article examine le rapport intérimaire du comité de la Chambre des communes sur les audiences d'investigation et les arrestations préventives. Ce rapport recommandait que ces pouvoirs soient renouvelés, mais que les audiences d'investigation soient uniquement accessibles aux fins d'enquête sur des actes de terrorisme imminents et non sur des actes passés. Il revient ensuite sur les débats parlementaires ayant mené au rejet de la motion du gouvernement visant à renouveler pour trois ans les audiences d'investigation et les pouvoirs d'arrestation préventive. Il soutient que les recommandations du comité de la Chambre des communes ont joué un rôle négligeable dans ces débats, caractérisés de tous côtés par une partisanerie qui a empêché d'en discuter de façon rationnelle. Il évalue le processus d'élaboration des rapports de révision finaux sur l'examen triennal des deux comités et décrit comment ceux-ci ont recueilli les dépositions de nombreux témoins issus du gouvernement, d'organismes d'examen indépendants et de groupes de la société civile. Malgré l'insuffisance du soutien apporté aux comités, surtout en matière de recherche comparative, l'article conclut qu'ils ont pu mener leur examen et faire des recommandations sur une grande variété de questions touchant les lois sur la sécurité, et non seulement la LAT.

L'article recense et approfondit 12 enjeux majeurs découlant des rapports finaux des comités du Sénat et de la Chambre des communes. Il compare, met en contraste et analyse l'approche des comités face à ces enjeux, puis détermine leurs domaines d'entente et de mésentente. Il vise non pas à défendre des mesures particulières pour résoudre ces enjeux, mais bien à évaluer les recommandations des comités et les lacunes de leur analyse. L'article analyse aussi la réponse donnée par le gouvernement en juillet 2007 au rapport du comité de la Chambre des communes. Il s'interroge enfin sur la capacité du Parlement de mettre à profit le travail des comités de façon intelligente et rationnelle. Malheureusement, le récent débat sur les audiences d'investigation et les pouvoirs d'arrestation préventive laisse peu de place à l'optimisme quant à la capacité du Parlement de gérer la complexité des nombreuses questions non résolues dans la législation canadienne sur la sécurité, y compris la nécessité d'élaborer une réponse globale et durable au jugement *Charkaoui* de la Cour suprême.

Summary

This paper provides a preliminary assessment of the policy-making process surrounding the three-year review of the *Anti-terrorism Act (ATA)* and the expiry of investigative hearings and preventive arrest powers contained therein in February 2007. It explores the implications of delays in completing the review, which meant that parliamentary debates concerning the five-year sunset of investigative hearings and preventive arrests were conducted in February 2007 without the benefit of the full three-year review of the *ATA* by committees of both the House of Commons and the Senate.

The paper compares and contrasts the work of the Commons and Senate committees and highlights a number of important differences between their analyses. The elected Commons committee tended to focus on concerns about privacy that could potentially affect all Canadians, as well as specific concerns that lawyers and charities might be adversely affected by the *ATA*. In contrast, the unelected Senate committee took on perhaps less popular concerns about racial and religious profiling, a review of security agencies and whether Canada should deport non-citizens suspected of terrorism to countries where they could be tortured.

This paper also addresses the respective roles of Parliament and the courts with respect to security legislation. It does so by examining how various court decisions have invalidated parts of the *ATA* and related security legislation, and by investigating Parliament's ability to expand its dialogue with the courts by enacting new legislation that goes beyond the specific Charter violations found by the courts. It examines the possibility of an effective legislative response to *Charkaoui* and other Charter decisions invalidating parts of the definition of terrorist activities, the leakage offence in the *Security of Information Act* and mandatory closed court procedures. It also notes that Parliament may not be able to agree on legislation to respond to *Charkaoui*, and that a recent decision in the *Khawaja* case suggests that the courts may, on their own initiative, appoint security-cleared counsel to challenge the secret information presented by the government without the directly affected persons being present.

After a preliminary description of the *ATA* and the manner in which it was enacted in 2001, this paper examines the interim report of the Commons committee on investigative hearings and preventive arrests. This report recommended that these powers be renewed, but that investigative hearings only be available to investigate imminent and not past acts of terrorism. It next examines the parliamentary debates that ended in the defeat of the government's motion to renew investigative hearings and preventive arrests for three years. It finds that the Commons committee's recommendations played a negligible role in those debates, which were characterized by partisanship on all sides as opposed to rational discussion of the merits. It examines the process that led to the final three-year review reports of the two committees, and outlines how the committees heard evidence from large numbers of witnesses from government, independent review bodies, and civil society groups. Although the work of the committees could have been better supported, especially with respect to comparative research, the paper concludes that the committees were able to examine and make recommendations with respect to a wide range of issues affecting security legislation and not just the *ATA*.

The paper identifies and explores 12 major issues that arise from the final reports of the Senate and the Commons committees. It compares, contrasts and assesses the approach of the committees on these issues, identifying areas of agreement and disagreement between the two. Its purpose is not to advocate particular ways to resolve these issues, but to assess the recommendations made by the committees as well as omissions in their analysis. The paper also assesses the government's response in July 2007 to the report of the Commons committee. The conclusion of this study explores whether Parliament is up to the task of building on the work of the committees in a rational and intelligent way. The recent debate over investigative hearings and preventive arrests unfortunately does not justify optimism about Parliament's ability to grapple with the many complex and unresolved issues in Canadian security legislation, including the need to devise a comprehensive and sustainable response to the Supreme Court's decision in *Charkaoui*.