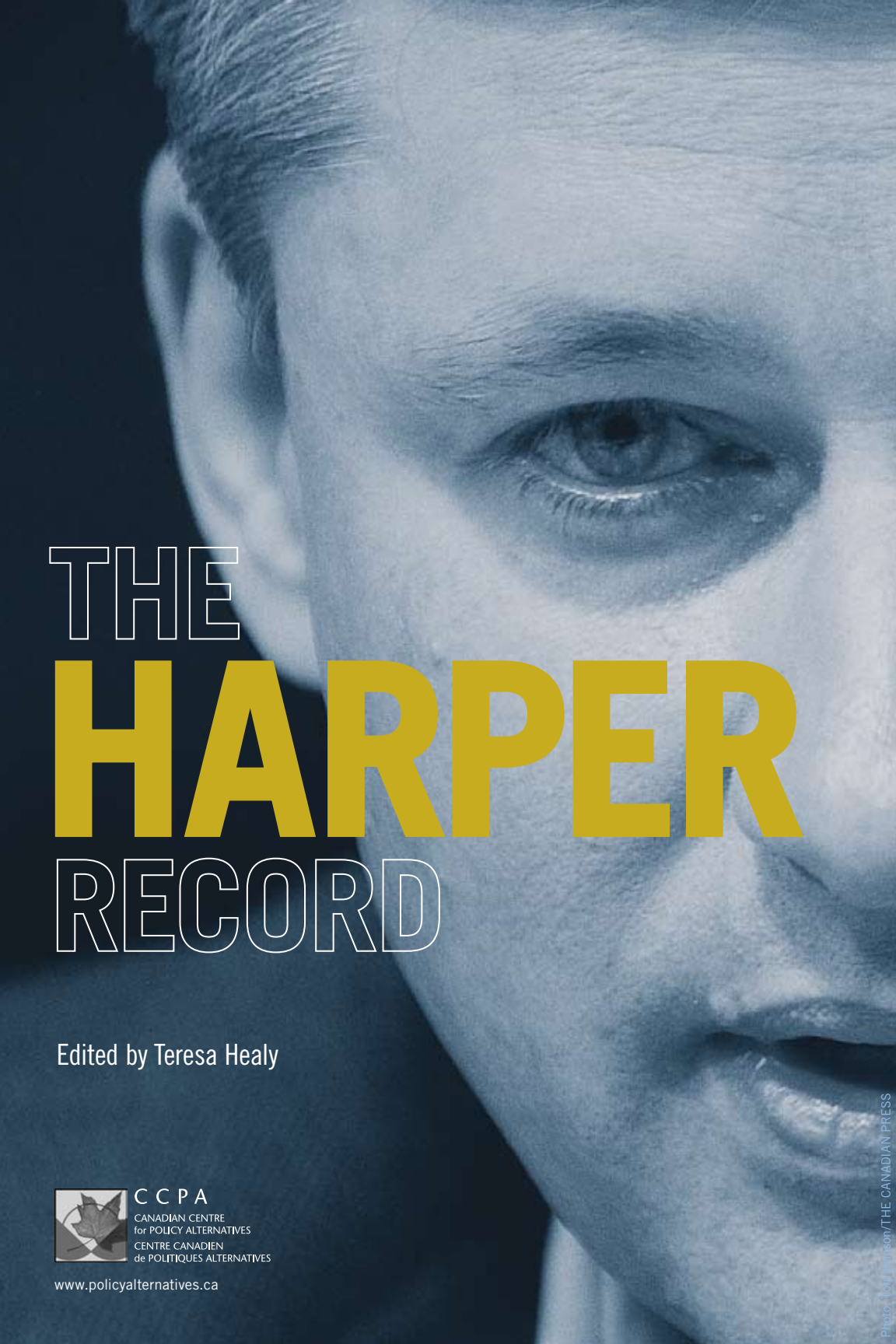

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Canada's Secret-Trial Detentions

The country's "intelligence" agencies set the agenda

Matthew Behrens

ON JANUARY 26, 2007, secret trial detainee Mahmoud Jaballah, then on day 52 of a punishing hunger strike at the "Guantanamo North" detention facility in Kingston, Ontario, called the office of the Campaign to Stop Secret Trials in Canada.

"I just saw Stockwell Day," Jaballah's weak voice reported, adding that the Minister of Public Safety and Emergency Preparedness had pulled aside a curtain to Jaballah's cell door, peeked in, and quickly bolted. The other detainees reported the same quick peek-a-boo.

Jaballah was being held on a "security certificate," a measure by which the Canadian government can indefinitely detain without charge refugees and permanent residents, all based on secret allegations neither they nor their lawyers are allowed to see.

It was the first time Day had come face to face with three of the five detainees who — though he had never met or spoken with them — he had condemned as "vicious individuals."[1] But rather than deal with the detainees' concerns, he instead insisted to the press that all was well, right down to the presence of chocolate sauce in the facility's refrigerator.[2]

Day's callous disregard for the safety of individuals on life-threatening hunger strikes reeked of an arrogant smugness that echoed his Liberal predecessor Anne McLellan. Indeed, both Liberals and Conservatives

have long tried to reassure Canadians that indefinite detention without charge, based on the lowest standards of proof of any court in Canada, was a wholly legal and constitutional procedure.

Three weeks after Day's visit, however, the Supreme Court of Canada would unanimously find that the heart of the secret trial process was unconstitutional. "How can one meet a case one does not know?" the Court asked.[3]

This decision was far from perfect, since it failed to understand that being held for years with no charge and no end in sight constituted indefinite detention, nor that individuals' equality rights were denied by the two-tier justice that applied the low standards of a security certificate only against non-citizens. But it was nevertheless enough to send the issue back to Parliament.

Some commentators subsequently argued that security certificates required only a bit of tinkering to bring them in line with the Charter, but most opponents insisted that nothing short of abolition could serve the best ends of justice. They also argued that the certificates represent the thin edge of a wedge constituting a major assault on the human rights of targeted communities — "enemies *du jour*" who, for the past decade or so, have largely been Arab Muslims, First Nations activists, and anti-globalization organizers. All are named in reports by Canada's spy agency, the Canadian Security Intelligence Service (CSIS), as if they were the cesspools within which alleged national security threats germinated.

CSIS also dreams up the secret suspicions that underlie security certificates. The agency has a well-earned penchant for inaccuracy, exaggerated threat assessments, substitution of feelings for facts, racial profiling, and use of information gleaned from torture, all of which have been documented in revelations from the Arar Inquiry, the Air India Inquiry, and the annual reports of the agency's generally accommodating oversight body, the Security Intelligence Review Committee (SIRC).

The certificate process itself is terminally biased against a named individual. The government argues that detainees are allowed to see the case against them, yet the public "summaries" of allegations are just that: allegations. Inquiries into the sources of those allegations, requests for

documentation, and attempts to cross-examine particular individuals are rejected on grounds of "national security confidentiality."

But how does one respond in 2008 to the following CSIS concern, recently released in one such summary: "In December, 1998, he looked over his shoulder on three (3) occasions for no apparent reason, after making a call from a public pay phone."[4]

It's a Kafkaesque nightmare with no end, as Jaballah learned when, cleared on a 1999 security certificate, he was re-arrested on a second certificate in August, 2001. That fall, CSIS explained that, although there were no new facts, they did have a "new interpretation" of what had already been found not credible by the Court. Despite this, the second certificate was upheld.

For Montrealer Adil Charkaoui, detained in May 2003 and under house arrest since February, 2005, the CSIS allegations against him have changed on three separate occasions, leading one to conclude that the spies in Ottawa are constantly nailing different types of Jello to the wall, hoping one will actually stay up.

Jaballah, Charkaoui, and the other three men subject to certificates — Mohammad Mahjoub, detained in June, 2000; Hassan Almrei, since October 2001, almost continuously in solitary confinement; and Mohamed Harkat, since December, 2002 — face an endless road ahead of detention, draconian house arrest, more hearings, and government efforts to deport them to torture.

CSIS and the "Super-Muslims"

Security certificates and related human rights violations occur as a result of official Ottawa's traditional deference to its scandal-plagued spy agencies. At the forefront of assuming the good-will and veracity of CSIS has been the Federal Court, which seems to overlook the annual findings of exaggerated threat assessments and Charter Rights violations by CSIS. Indeed, the *Globe and Mail* reported that, "between 1993 and 2003, CSIS filed warrant applications at a rate of between 200 and 300 a year, for a total of 2,544 applications. Only 18 of these requests were rejected by the Federal Court, the last denial occurring five years ago."[5]

Similarly, in security certificate cases, the Court continues to buy into the CSIS concept of Super-Muslims — individuals so thoroughly indoctrinated in the ways of evil and iniquity that they can never be released on bail. To take but one example, the denial of bail to Hassan Almrei, the last remaining detainee at Guantanamo North (aka Kingston Immigration Holding Centre), is based on the assumption, supported wholly by secret evidence, that Almrei "espouses the philosophy of Osama bin Laden which promotes violent acts of terrorism against civilian populations in Western countries, including Canada".[6]

Almrei has consistently denied such allegations. Nothing in the public record has ever shown him to pose a threat, and the Canadian government, in a document released during the Arar inquiry, admits that it does not have enough information on him to lay a criminal charge. But Almrei was still willing to wear a GPS monitoring bracelet, live under constant house arrest with video cameras at the only entrance to a basement apartment, have only limited supervised outings, have contact only with individuals approved by the state, have no computer or cell phone access, consent to a phone tap and mail opening, and consent to agents of the state entering his abode any time of day or night without notice or warrant. Despite these severe deprivations of liberty, however, the judge nonetheless was afraid that Almrei would spend considerable time alone in a basement and that "the risk of surreptitious communication by Mr. Almrei is too great."[7]

Unless Almrei has become telepathic during his more than seven years of confinement, it is unclear how, with phones tapped, video cameras at the entrance, agents likely monitoring the house from the outside, and no access to a cell phone or computer, he could engage in communications, surreptitious or otherwise. Smoke signals in an era of smoke alarms are out; halal carrier pigeons would be too obvious. It is only if one believes the concept of "Super-Muslim" that such a conclusion may seem plausible.

A nation run by fear

Regardless of who holds the reins of power in Ottawa, the environment in which survivors of torture seek answers and detainees under "secur-

ity" laws seek disclosure has been marked by an Orwellian form of backlash: those attempting to use the tools of democracy to uphold things like the right not to be arbitrarily detained and tortured suddenly become accused of being the victimizers of the very spy agencies responsible for their suffering.

Indeed, the "intelligence community" treats efforts at disclosure, clarification, or accountability as a form of "judicial jihad,"[8] while a recently retired RCMP chief superintendent, Ben Soaves, calls it "judicial terrorism."[9]

The "CSIS agent as victim because he takes part in rendition to torture and then has to answer questions about it" syndrome is not just internal to the agency. The Inspector General of the Canadian Security Intelligence Service puts a caring arm around the shoulders of the beleaguered CSIS with her spring 2007 comment that, "Over the past two years I am sure that, at times, CSIS has felt 'overburdened' by review in their efforts to respond to various mandated reviews."[10]

Similarly, the former head of the Security Intelligence Review Committee, Paule Gauthier, declared in 2005:

> Canadians must decide if we have the stomach and the money for this kind of work... If we don't have the nerve for it now, we'd better develop it quickly... If we want to keep playing the national security game, we're going to have to play in the big leagues. It won't always be nice, it won't always be easy, and it won't always be pretty, but that's the world we live in. The sooner we get used to it, the better.[11]

It's small comfort to those for whom such practices as torture and indefinite detention are not nice or pretty, but there still remains an air of awe, or maybe fear, when it comes to challenging the basic assumptions and conclusions of CSIS and the RCMP. It's reminiscent of the way that J. Edgar Hoover and the FBI cowed an American public during the height of the manufactured "Red Scare."

A broader agenda of attacks

The cold-war-style imaginings of CSIS and the RCMP underlying these certificates would be comical were they not so devastating — not only

to the men and their families, but also to the communities which, given the ripple effect of the certificates, hide away in fear, leaving those targeted ostracized and isolated.

The certificates are but one part of a much broader swath of damage to people and democratic structures in Canada, only a few among which would include:

- placement on no-fly lists with no right of appeal;[12]
- receiving an unplanned visit from CSIS while at work, creating an air of suspicion about oneself;[13]
- communities who cannot pray without fear they are being surveilled and recorded;[14]
- acts of extortion by CSIS, including threatening to jeopardize immigration for overseas loved ones if one does not spy on the community;[15]
- increasing use of secrecy in refugee hearings and greater government efforts to prevent disclosure in criminal court proceedings;[16]
- branding of charities as "terrorist" fronts without any due process;[17]
- increasing militarization of police actions in racialized communities, resulting in mass arrests that are designed as media stunts rather than crime-ending efforts;
- Islamophobic messages constantly generated in the media;[18]
- a free-wheeling racism that is defended as a justified response to "political correctness;"
- criminalization of refugees and immigrants, and vastly increased numbers of immigration detentions (which numbered 12,824 individuals in 2006–07); and
- deportations (12,636 for same reporting year).[19]

Another part of the equation is Canadian complicity in torture, whether through deportation or, in the case of citizens, working with overseas intelligence agencies to seize travelling Canadians, arrest and detain, interrogate and torture them. As was shown at the Arar Inquiry, there appears to be a disturbing pattern of such behaviour on the part of CSIS and the RCMP, which also led to the detention and torture of Muayyed Nureddin and Abdullah Almalki in Syria and Ahmad El Maati in both Syria and Egypt. These three men, though granted an inquiry into the role of Canadian officials in their torture, were not allowed to attend the entirely secret inquiry chaired by former Supreme Court justice Frank Iacobucci, nor were they allowed to see a single word of the 35,000 pages of government documents allegedly screened by the inquiry.

Keeping the lid on such an inquiry deflects attention from what is clearly a pattern of nefarious behaviour. Other cases of human rights violations continue to pop up. In April 2007, Stockwell Day promised to look into the case of Algerian refugee Benamar Benatta, whom Canada illegally transferred to the U.S. on September 12, 2001, with the dangerous proviso that he was a Muslim who knew about airplanes and might be connected to 9/11. Held for five years under conditions that the United Nations said constituted torture, Benatta, now back in Canada as a Convention refugee, is still waiting for answers from Day.

Then there is the case of Montrealer Abousfian Abdelrazik, who appears to have been detained at the request of CSIS and subsequently tortured in 2003 in Sudan, where he remains stranded five years later after his name was unjustifiably placed on a no-fly list.

Resisting new certificate legislation

It is against such a backdrop that the renewed battle against security certificates heated up in the fall of 2007. But despite the best efforts of people from across Canada to turn back the tide, the cards had already been stacked by the minority Conservative government, the duplicity of the Liberals, and the apparent bias of the Federal Court.

Indeed, while Stockwell Day promised immediate action following the February 2007 Supreme Court decision, not a word was heard from him for over eight months, nor were there any consultations with stake-

holders. Stepping into the breach, quite helpfully, was the Federal Court, the same institution that had always upheld a process unanimously rejected by the Supreme Court, but which appeared unwilling to consider whether such affronts to justice were necessary in the first place.

Federal Court decisions following the finding of unconstitutionality still reflected a preferential option for the powerful, with one judge opining that "I do not believe that the Supreme Court intended the previous rulings are to be revisited or that current proceedings necessarily are to be altered as a result of its determination."[20]

In what worked extremely well as a vehicle to stamp out real debate and limit the terms of discussion to mere technicalities, the Court, in conjunction with the CSIS-friendly Canadian Centre of Intelligence and Security Studies (Carleton University), produced a study on the use of "special advocates," security-cleared lawyers who could look at what was secret, but who could never be properly instructed because detainees still did not know the case against them.

The report's publication in August 2007 was perfect timing to help shape the discussion when, six weeks later, Stockwell Day introduced a new bill that essentially mirrored the old legislation, save for a few bits of window-dressing (the much-criticized special advocate and an extremely limited "appeal").

Day praised his work as the best law of its kind in the world, and then pressured Parliament for rapid passage to prevent chaos.

When the House committee "studying" the bill planned hearings, it originally invited only seven witnesses, none of whom were involved in the day-to-day work surrounding secret trials in Canada. Pleas to hold real, democratic, accountable hearings were met with complaints by MPs that they wanted to go on Christmas vacation. "I haven't had a holiday since 2004," explained Liberal MP Ujjal Dosanjh, who ignored the warnings from leading law associations that the bill would not pass constitutional muster in a new court challenge.[21]

Meanwhile, the Department of Justice was already advertising for special advocates while Bill C-3 was still at the House committee, no doubt confident that legislation by steamroller would succeed. A Liberal party fixated with its own electoral dysfunction "held its nose" and supported the bill, and the Senate spent all of one day listening to some two

dozen witnesses who, following Day's appearance, unanimously called for the "chamber of sober second thought" to exercise due diligence and stop the bill in its tracks.

Casting sobriety to the wind, the Liberal-dominated Senate passed the bill less than 24 hours later. A last-ditch campaign urging Governor-General Michaëlle Jean to refuse royal assent met a similar fate, and CSIS wasted no time in issuing "new" certificates that, like the bill that allowed for them, were slightly longer carbon copies of the old ones.

What was different this time, however, was the public availability of the inflammatory allegation summaries. They appeared not on the CSIS website, but, in an unprecedented move, on the website of the Federal Court itself. Critics were aghast, noting they had never seen a court post "evidence" until it had been properly tested in court.

Chief Justice Alan Lutfy was asked to remove the allegations and to post balancing material to undo the incalculable damage that had been done. But it was too late. For weeks the allegations remained, and newspaper stories incorrectly treated them as a sign that the government was finally revealing the cases against the detainees.

Since that time, the Federal Court has tried to rush these cases through, insisting, at all costs, that the cases move forward regardless of the wishes of those concerned. For the security certificate detainees, a new round of hearings is set to occur in the fall of 2008, with the ultimate aim of deporting them to countries where they will face torture, or worse.

This is all part of the $24 billion that has been spent on Canada's "national security" since 2001 — funding which never seemed to reach the women murdered by intimate male partners because the shelters were full, the homeless who froze on the streets because there is no national housing program, those who died awaiting medical treatment, First Nations reserves on boil water alerts, and millions of others for whom true national security has been denied.[22]

All this may seem overwhelming, yet it is significant to remind ourselves that grassroots action has made a difference. Between 1991 and 2001, CSIS issued on average two security certificates annually. Public efforts began in 2001 to abolish the process and, since the 2003 certificate issued against Charkaoui, only once has this mechanism since been

enacted: a bizarre "Russian spy" case that appeared more a public relations exercise than a threat to national security.

Clearly, the security climate had not changed, but the political climate had. Demonstrations, public education, hunger strikes, civil disobedience, and legal challenges had all contributed to making security certificates an issue of national importance, and appear to have had a restraining effect on CSIS. The fact that four of the detainees are now home with their families, although under harshly restrictive bail conditions, does not mean this struggle has come to an end. The spies continue lurking in the shadows, waiting for their time to pounce, and the need for public vigilance remains incredibly high.