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DV/December 5, 2001 – Anti-Terrorism - 38477

THE SPECIAL SENATE COMMITTEE ON BILL C-36

EVIDENCE

OTTAWA, Wednesday, December 5, 2001

The Special Senate Committee on Bill C-36, to amend the Criminal Code, the Official Secrets Act, the Canada Evidence Act, the Proceeds of Crime (Money Laundering) Act and other Acts, and to enact measures respecting the registration of charities, in order to combat terrorism, met this day at 1:30 p.m. to give consideration to the bill.

Senator Joyce Fairbairn (*Chairman*) in the Chair.

The Chairman: Honourable senators, I would like to welcome our witnesses this afternoon. This is our third hearing today on Bill C-36, which is the bill dealing with anti-terrorism procedures. The Special Senate Committee on this bill has been sitting this week to see the bill for the first time before us. However, we did do, at the request of the government, a pre-study several weeks ago. We were asked to give our recommendations and concerns. We did. Some of them are incorporated in the bill as we see it today, others are not. These hearings are open to a discussion on those and other matters from a very diverse group of witnesses.

This afternoon we have with us Professor Kent Roach from the University of Toronto, Professor Don Stuart from Queen's University and Professor Lorraine Weinrib from the University of Toronto. We will begin with your statements. We welcome you here. Thank you for taking the time to come.

We have just less than two hours for these presentations and questions. I would urge everyone to be as concise and to the point as he or she can so that our dialogue can be as diverse as anyone would wish.

Please proceed.

Ms Lorraine Weinrib, Faculty of Law, University of Toronto: Honourable senators, thank you very much for inviting me and I commend you on your very important work on this bill.

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My presentation focuses on the general picture into which the anti-terrorism legislation fits. I want to focus on the significance of the constitutional transformation that Canada has undergone in the last few decades and its impact on the exercise of emergency powers.

Our original constitutional structure was one based on legislative supremacy and common law inherited from Great Britain.

(Take 1340 Follows -- Ms Weinrib continuing: Within that constitutional order...)

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(Ms Weinrib continuing)

Within that constitutional order, the War Measures Act permitted Parliament to give executive authority, plenary power, to proclaim an emergency and to execute emergency powers to the executive. The executive exercised these powers as it saw fit for as long as it saw fit.

Some of the most flagrant abuses of power in Canadian history occurred under the auspices of the War Measures Act and legislative supremacy. We now live under a different constitutional regime, partly due to the adoption of the Charter, but also due to the influence of the post war rights protecting instruments.

Generally speaking, our system is a system based not on legislative sovereignty but on an array of what the Supreme Court of Canada has called "symbiotic, organic constitutional principles" that in some instances are actually stronger than the text of our Constitution. It is these principles that bring coherence, resiliency and the possibility of change to a system that might otherwise be incoherent given the way in which it has developed, and the fact that it is only partly written in constitutional instruments.

In particular, the constitutional principles allow our system to fill gaps in which we have no established constitutional text or directives. The constitutional principles that have been focused on to date in the Supreme Court of Canada are democracy, the rule of law, the independence of the judiciary and the protection of fundamental rights and freedoms. We understand that there are many more. The important point is that none of these constitutional principles entirely trumps any

other. They all work together, and they have the possibility of providing us with a coherent constitutional structure, which every modern liberal democracy needs.

The position that I want to put forward today is that in the general features of the response to the terrorist attacks in September, the legislative proposals that we have before us suggest a return to the constitutional architecture that we thought we had left behind, that of legislative sovereignty and the War Measures Act. I would argue that the work of this committee and the work of all public officials who will carry out the function should be imbued with the new constitutional principles rather than turning the clock back to the older constitutional framework. I would like to develop that argument.

The federal government's defence of the constitutionality of the anti-terrorism legislation is predicated on a prediction that the Supreme Court of Canada will apply a low deferential level of review if any of the legislation is challenged in the courts in the future. The justice minister has said as much, but we could infer that position from the type of offence that critics have brought forward against the legislation.

With strict constitutional review in the Supreme Court of Canada, one would expect the federal government to have to put forward super ordinate purposes and objectives, not merely in terms of the emergency conditions, but also in terms of the deep constitutional values, which I have mentioned. Initially, the defence of the legislation that was offered by the Minister of Justice, and indeed the Prime Minister, emphasized the terrible fact of terrorism, the international joint effort to combat terrorism and international obligations to attack the infrastructure of terrorist organizations. It was only late in the day that the government came forward with the suggestion that it is the international human rights system that is being protected, and indeed the ultimate rights, the right to life and the right to security that are being protected by the legislation.

Second, with a strict review of Charter rights as a challenge to some of the features of this legislation, the government would have to defend it on the basis that it had prescribed every prohibition and regulatory feature of the legislation as narrowly and carefully as possible. This principle derives from the international human rights system and is understood to allow people who are subject to regulation and, particularly exceptional regulation, to know exactly what is permitted and what is prohibited.

However, we see broad powers vaguely described in the bill, defended on the idea that no abuse is intended and no abuse will follow. We are being told that we can trust the people who will hold this power to use it as it is now intended rather than according to the full range of power that the provisions create.

Third, with a strict review under the Charter, we would expect the government to have to establish that it has impaired the constitutional right this is question as little as possible. The strongest argument the government could make that it has impaired the rights minimally is to fashion them as narrowly as possible, but also to adopt some of the features of the Emergencies Act of 1998, which replaced the War Measures Act.

Under that statute, the proclamation of emergency powers is a temporary instrument. There are specific features that underline the exceptionality and the need to return to normal conditions. In particular, there is parliamentary oversight, continuous reporting, final reporting when the emergency period ends and a special committee with access to confidential information. In short there is bicameral and multi-partisan engagement not only in the approval of the initial proclamation, but also in its ongoing application.

We see very little of that oversight and independent power in this proposed legislation.

Finally, a strict review under the Charter would prompt the government to tell us how the benefits of the legislation outweigh the burdens. We have seen very little examination of the burdens. It is not hard to imagine that, in many circumstances, the breach of charter rights possible under this legislation will ruin reputations, will destroy jobs and businesses, will undermine families, friendships, community links and also severely damage the sense of belonging of many identity communities in this country.

Prediction of how our courts will review any challenges that come up to either the legislation as written or particular applications is not an exact science. No one can predict with confidence whether the court will be deferential or whether the court will be stringent. However, there are strong factors that suggest that we should anticipate stringent review and create legislation that can withstand stringent review.

The stringent standard built into the review provisions in the Charter of Rights was the product of extraordinary and unprecedented public involvement in the

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drafting of the Charter. The general public and many interest groups with wide-ranging representation across the country insisted on no Charter at all if a stringent form of review was not applied. That is how we acquired the language in section 1 of the Charter.

I recall then justice minister Chrétien remarking that his government was delighted that the stringent language had been put back into the Charter because this brought the Charter text back to the liberal government's original design for a Bill of Rights for Canada.

It is not only the public endorsement that legitimates stringent review under the Charter. It is also the fact that public and parliamentary debate which extended from 1948 on a Bill of Rights for Canada, constantly returned to one remedial purpose, to create in the Charter a stringent standard of review that would leave behind us the emergency powers that had so stained Canadian history and that were brought forward again and again as test cases for how effective a proposed charter structure protection would be.

(Take 1350 Follows - Ms Weinrib continuing: Thus, we have public...)

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(Ms Weinrib continuing)

**Thus, we have public endorsement and we have a long legislative history in the drafting of the Charter that demonstrates that abuses under emergency powers were considered one of the problems that the Charter was supposed to eliminate.

The Supreme Court of Canada has also made clear that when it comes to questions of the liberty of the subject and discrimination based on personal characteristics that it will impose stringent Charter review. I must note that even the most committed and sustained Charter critics concede the point that judicial review is appropriate and legitimate when questions of liberty and discrimination are in the mix.

I might also comment on the stringency of review that emanated from the joint committee of the Senate and House of Commons in 1981-82 on the Charter. This strictness is what prompted the adoption of section 33, the notwithstanding clause in the Charter. If the government is clear that it wants deferential review and things that deferential review is what the public wants and deserves, then perhaps it

should just use the override clause to preclude constitutional review altogether. To have review as deferential as the government predicts this bill will attract in later challenges is not much better than having section 33 in place.

The federal defence of the anti-terrorism measure appears to draw us back to the constitutional framework of legislative sovereignty in that exceptional authority is given to the executive to determine the extent of our rights and freedoms. This is done without the legislative review and control and without the stringent judicial review that were specifically put in place at the legislative level by Prime Minister Mulroney, at the constitutional level by Prime Minister Trudeau, with the abuse of emergency powers specifically in mind. This is regrettable for three reasons.

First, our new constitutional arrangements were the product of long parliamentary and public deliberation on remedial corrections to the Canadian constitutional system. The Charter and the Emergencies Act emanating from different political parties, but public instruments that had been debated in elections and debated in detail in the provincial legislatures and the federal Parliament, reflect what I consider the new constitutional order in Canada. These instruments, the Charter and the Emergencies Act, give a very complex array of checks and balances. They forward both democracy and the rule of law. They protect our rights and freedoms more effectively than a regime where the executive holds tremendous power over determining what laws should apply in extraordinary circumstances.

In particular, I would like to point out that the Emergencies Act is modelled on the international human rights instruments in making very clear the differentiation between emergency powers and powers that are available to exercise in normal times and that require the constant return to normal circumstances when the emergency situation abates.

Second, the approach to combating terrorism is regrettable because, in our system of government, we already have a tremendous and quite exceptional concentration of power in the national executive. The constraints on democratic deliberation that we have seen in the exercise of party discipline and the closure of debate on this bill are current manifestations of a larger constitutional structure of concentration of power in the executive. This includes appointment to the Senate, judicial appointments and the power, as we have seen in this legislation, to ignore counterbalances that were placed in the Emergencies Act, which was supposed to

be our blueprint with what I would have considered to be quasi-constitutional status, for combating exactly the kinds of problems that we face today.

Third, liberal theory, which is now ensconced in the idea that we have a Constitution based not on legislative sovereignty but on a broader, more complex idea of constitutional principles, makes a strong differentiation between emergency powers and powers that are exercised under normal conditions. This theory also imposes on every actor, whether elected, appointed or employed who exercises public power, the responsibility to respect these constitutional principles.

We no longer segregate rights to the common law subject to legislation or rights to the Charter to the courts and leave the legislatures free to do whatever they think they can get away with in the circumstance that they think the courts will not constrain them. We have a much richer idea now of our constitutional order. We have left behind the idea that the legislature can authorize the executive to carry on and exercise extraordinary powers at will for as long as it wants.

One of the greatest disappointments in the federal government's approach to the problem of combating terrorism, which I consider real and dangerous, is that the federal government seems to take the view that all Canadians deserve is the minimal level of protections that a court in the future may afford. I think that we deserve better. I think that we should consider our new constitutional order as requiring each and every public figure to consider carefully the extent to which the legislation honours the rule of law, democracy and the protection of our fundamental rights and freedoms.

Mr. Don Stuart, Faculty of Law, Queen's University: Honourable senators, first, I congratulate the Senate so far for its public statements on this bill at an early stage. The bottom line of my presentation will be that this bill is not adequately fixed. I very much hope the Senate keeps going.

If I had a background to describe, it would be that I was a law professor in South Africa in the 1960s under apartheid. I arrived in Canada in 1970 just in time for the War Measures Act. I have been teaching for 30 years at Canadian law schools, mostly at the Faculty of Law at Queen's. I have had an opportunity to speak with many students, lawyers and judges. I am, of course, extremely proud of the Canadian criminal justice system.

I see in this bill a wider pattern of quick-fix law and order legislation. This is the kind of legislation of which Canada should not be proud and should not accept.

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I should add that I have not been an academic all my life. I prosecuted in Toronto for a year.

There is no doubt at all that none of us will be the same after seeing the horrifying images of those planes crashing into the World Trade Center and seeing all the victims. We expected our government to be proactive. They were. We are very pleased to support any efforts in increased airport security, acquiring anthrax vaccine, getting more intelligence -- this is a colossal failure of intelligence -- hiring more resources, such as more anti-terrorist police and more CSIS personnel. I even find myself supporting that rather uncomfortable war in Afghanistan.

When I look at this bill it is something that Canada did not need. We had ample law, as stated by my colleague Mr. Roach, who spearheaded the conference at U of T, and who will speak more to this probably. Those of us who have been thinking about criminal law teaching and principles for years would see absolutely no reason to create new crimes to deal with terrorism and the types of police powers and CSIS powers that have been created here. They are quite extraordinary. I do not think we need them at all. We have plenty of laws to deal with this situation.

Despite recent government amendments, I see that they do not yet meet the high standard of justification needed to support massive drag-net powers of this sort.

(take 1400 follows Mr. Stuart continuing: Basic principles of a criminal justice system that deserves the..)

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(Mr. Stuart continuing)

Basic principles of a criminal justice system that deserves the name require a meaningful proof before you send someone to jail of a meaningful act and what we call fault. Also, we need to have people fairly labelled and punishment must be proportionate. Notwithstanding the amendments the government has approved -- the tinkering around with the definitions -- in my view, the definitions are still far too wide. I include in that a consideration of the listing section.

In my view, the devil of this bill is in the detail. I do not think there are too many people in this country who have read every provision of this bill. This is produced by a group of 15 people in the Department of Justice at the rate of about three printed pages a day. Those of us who are professionals -- the law teachers --

have been scouring over this bill. I have not read every provision. It is far too complicated. To suggest that we actually know or Parliament knew what they were voting on when they passed it seems to be a stretch.

If you actually look at the way these new offences have been defined, they do not achieve what they say they will. The Justice Minister stands up and says, "We have a narrow offence about knowingly participating in a terrorist group," but when you look at the bill, the word "knowingly" is nonexistent. There are other things we can point to as well.

In terms of police powers, in my view we had ample powers of electronic surveillance, for example. That did not have to be extended in the anti-gang legislation either. There has been no evidence ever tabled since 1974 that Canada lacks sufficient power to electronically survey. Of course, they should be used against terrorists. We did not need to extend the powers.

Of course, we certainly did not need to add horrific, new, extraordinary pieces of police power, something called detention without charge. It is not called "detention without charge." It is called "recognizance" with conditions. That sounds like a release mechanism. It is not. One can be detained on reasonable suspicion for up to 72 hours. If you are not cooperative, it is another year.

For someone with my background, this is detention without charge. It is an extraordinary power that repressive regimes will escalate, and that is the danger. The danger has been recognized because the government have said that it will sunset that provision. That is a huge recognition that this is an extraordinary power that should not be enacted. It should be withdrawn.

The same, too, about the investigative hearing; that is 83.13. This is the power of compelled testimony. We can get into the details in the questions. That is an extraordinary power. I would seek to persuade honourable senators that it is not needed and it is certainly dangerous, and would rely on many police informants, at the very time we have had a major report called the Sophonow inquiry report that talks about the dangers of wrongful conviction based on the overuse of police and cell informants.

The other thing that I find unsatisfying and destabilizing about this bill is that this bill has a huge overuse of ministerial authority, although there have been some changes. Some of those powers are now subject to review in the latest amendments. However, we still have an unfettered power of the Minister of

National Defence to authorize electronic surveillance. It is fundamental to the Charter standards, and certainly to me, that any authorization of electronic surveillance should be by a judge and a judge alone.

We have what seems to me still an unrestricted power of the Minister of Justice to enter what is called a fiat when he thinks information is sensitive. While some of the other provisions are reviewable, but I do not think that one is. We have the power of the government to promulgate a list of terrorist entities, which is reviewable, but after the event.

This morning you heard from some coalition groups. I must confess that I listened to the Coalition of Muslim Organizations when they presented orally. As well, I have looked at their brief. One of the senators said, "Well, that is just anecdotes." The anecdote is not an anecdote for the person who is actually targeted. That is one of the answers to Irwin Cotler when he says, "You criminal lawyers should think outside the box." It is international terrorism. The threat is existential. Yes, it is an existential worrying threat. However, what we are talking about is this legislation, which will have an impact on Canadians in Canada, and there are certain standards that must be met. For me, the box is not outside the box, it is in the box. The box in Canada is when a CSIS person, who is an Arab Canadian, and knocks on your door. Your life is probably ruined just by the knock. It is also inside the box to think of someone who is detained without charge and is interrogated for up to 72 hours, apparently in a police cell. There is no requirement at all where this detention takes place. I think these are extremely disappointing moves in Canadian history.

The government has come up with sunset clauses concerning the two most contentious provisions. The opposition speakers are dead right -- this is no sunset clause; it is a phoney sunset clause. After five years, the provisions here call for a vote of the government of the day to extend them. A sunset clause means expiration. After expiration, it must be reintroduced and rejustified with first reading, taking into account the experience on the last one. That is no sunset clause. Why it is five years rather than three is also a mystery, other than the obvious political connotations.

It seems to me that that is a major problem with the amendments.

The most pragmatic thing that could usefully be done at this stage is on the issue of review. Senators, as I understand it, called for a parliamentary office to review in particular those two extraordinary provisions of the bill.

The other thing I have perhaps not emphasized enough is the extraordinary number of secret provisions under what is to be called the security information act. I think it is better called what it used to be, which is the Official Secrets Act. We need to have someone poking around on a full-time basis, not a part-time basis. That person must be independent. That person has to be independent.

I am not just dreaming this up. I have been doing a lot of reading in the last couple of days to prepare for this appearance. I have been reading an author by the name of Clive Walker. The English people have had lots of experience with anti-terrorism legislation in Northern Ireland. There is a long history of the need to beef up the review process.

What has the government settled for? The proposed section 83.31, which is an entirely statistical account. There were 41 investigative hearings. There were 41 detentions without cause -- no explanation and no context. This is taking the government's faith from the people who are enforcing the law as to what the reality is.

That is not adequate. There are other options. I suggest a permanent overseer of this legislation. I would have felt strongly about it whatever the form of the legislation. We are not talking about a 20-page specially targeted narrow terrorism bill. We are talking about a bill that is 175 pages long which permanently amends 15 federal statutes.

It is not just a question of overseeing these two powers. You need to oversee everything. I suggest that, perhaps, the most important role of the Senate to consider is whether or not you will say something like, "We have standing committees and we cannot actually review something," or that you want to carry on your break that you pointed out in the proceedings before and suggest, as Irwin Cotler did and was not listened to, that these review mechanisms must be extremely real.

There is a systemic problem with this bill. I describe that in the paper which I believe you have before you. It is a complete feeding frenzy law and order quick-fixes.

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(Take 1410 follows: Mr. Stuart continuing: You have had no other bill)

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(Mr. Stuart continuing)

You have had no other bill that has come with such huge amounts of complexity. The last one that came your way was the anti-gang bill. That was another bill that was not needed to deal with the violence of the Hell's Angels and the Rock Machine. They could have been charged with murder, attempted murder, bombing or whatever.

That bill was not needed. We have ended up with hugely complex trials in which lawyers are the main beneficiaries. We were told that was narrowly targeted with the implication that it was for the Hell's Angels and the Rock Machine. It created a fiasco of a trial in Winnipeg against a gang of young Aboriginal people. All the gangsterism charges were withdrawn.

I am getting into that because I testified at the House of Commons on that. That hearing was in secret because they said it was a security measure. I testified and described Manitoba setting-up that monolith of a security trial system that cost $17 million and the over incarceration of Aboriginal people who should not have been convicted of drug offences, yet they were.

There is no record of that. Why? It was secret. That is the trouble of reviewing registrations as big as this with all these secrecy provisions. In my view, it is difficult to be specific and constructive about the bill because the Criminal Code powers, the new offence powers and the police powers should be withdrawn. Pending that, there should be an extremely meaningful review.

Mr. Kent Roach, Faculty of Law, University of Toronto: Honourable senators, thank you for inviting me to testify before this special committee. I congratulate you on your first report, which has had a salutary effect on Bill C-36.

I do not think it is an exaggeration, however, to say that work remains to be done. With the House of Commons having signed off, Canadians and, I think in particular, Arab Canadians, are really depending on you in this committee. I take what we are doing extremely seriously.

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With my colleague, Professor Choudhry, we have prepared an extensive brief that is available to you. In this brief, we have put aside general misgivings that we have about this enterprise. We have focuses on three urgent changes, on a clause-by-clause basis, that we believe are needed for Bill C-36. I will focus on those three things, but I will be happy during questions to address anything else within my expertise.

First, and most importantly, is the danger that Bill C-36 in other law enforcement powers will be used to engage in racial and cultural profiling, which we define in our brief as the use of race or ethnicity as a factor in a decision to target a person for investigation. We are concerned about race being used as a crude proxy for criminality. Our proposal for a statutory ban on racial profiling would not prevent the use of race, combined with other identifying factors, when law enforcement is apprehending a specific suspect. We are concerned about race and culture as a crude proxy, the phenomena of being guilty until proven innocent that was spoken to with some eloquence this morning.

We are concerned about using the way a person looks, most specifically in the context of September 11, Arab and Middle Eastern appearance, as a reason for targeting that person. There is reason to believe that some African Canadians and some Aboriginal people in Canada have experienced racial profiling.

I remind you of the case of J. J. Harper, the Aboriginal man who was stopped in Winnipeg with fatal consequences. An inquiry later suggested that he was stopped because he was Aboriginal, and for no other reason.

The extraordinarily broad crimes in Bill C-36, about which my colleague Mr. Stuart has spoken, and novel police powers present dangers. However, when combined with the risk of racial profiling, these dangers become unacceptable.

Moreover, these dangers will not be borne equally by all Canadians. They will be borne by those, such as Mr. Mohamed Attiah, who was wrongfully fired from his job at Atomic Energy.

Although there has been much public debate on racial profiling, Bill C-36 is completely silent on this subject. The silence is deafening and for some in our community, ominous.

On one hand, Bill C-36 does not explicitly authorize racial profiling. Given the experience with Japanese Canadians and other groups, Parliament has resisted

employing race-based measures that would clearly violate section 15 and would hopefully never be upheld by the courts under section 1 of the Charter.

However, there is no cause for complacency. Although Bill C-36 does not authorize racial profiling, it also does not prohibit it. The danger is that racist stereotypes that we would be too embarrassed and ashamed to write into the law may nevertheless be used by various law enforcement officials in the administration of this bill, if it were to become law.

Bill C-36 does not contain an anti-discrimination clause of the type found in the Emergencies Act or the international covenant, as recommended by this committee in its first report. You recommended it, and Parliament did not listen to you.

The government tells us that Bill C-36 is about protecting human rights and not meant to target the Arab and Muslim population of Canada. Then why do they not state this clearly and unequivocally in the legislation? What is the harm? That should not be too much to ask.

We recommend that a statutory ban on racial and cultural profiling be added to Bill C-36. A ban alone is not enough, particularly if there is to be meaningful parliamentary review. For this reason, we recommend that the new reporting requirements of new section 83.31, which are now statistical with many escape clauses, be increased to require information on the racial and ethnic origins of those subject to investigative hearings and preventive arrest. We propose specific language at page 8, particularly section 4 (C) of our brief. If you told me that I could only have one thing, I think that is probably what I would choose.

Without that data, Parliament will be handcuffed into examining whether there has been racial profiling under Bill C-36. The data that you will have under section 8 3.31 will not be useful in three years' time or anytime that you are reviewing. It will be raw statistical data.

We also recommend that the courts and the respective human rights commissions be given broad remedial powers to deal with any racial profiling that does occur. It is not too late to do this. The non-discrimination section in the Emergencies Act, about which my colleague Ms Weinrib spoke, was added at the committee stage in recognition of our shameful treatment of Japanese Canadians and others.

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A ban on racial profiling should not be seen as an impediment I am to law enforcement. It prevents discriminatory and crude law enforcement. It does not impair good law enforcement that examines the backgrounds, travel histories and other individual factors relating to terrorist suspects. We must do all that we can to respond to the legitimate concerns of those who fear that they may be targeted under this legislation simply because of their race or cultural origins.

My second point concerns the crucial definition of terrorism. On the committee's advice, improvements have been made to the infamous sub clause (*e*) in 83.01. However, they do not go far enough. Nurses' strikes might still be targeted as terrorism if they were found to cause a serious risk to public health and safety. Strikers should not be defined as terrorists. We propose that this proposed section be deleted or at least the specific elements of infrastructure that are to be protected by it be spelled out.

We also propose that in that crucial definition section, the extension of terrorist activities by reference to conspiracies, attempts, counselling and threats be deleted. These provisions extend crimes of terrorism too far. In the case of politically or religiously motivated threats of violence, these words become acts of terrorism under this bill.

(Take 1420 Follows -- Mr. Roach continuing: That undermines the value...)

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(1420 -- Mr. Roach continuing)

That undermines the value of clause 83.01(1)(*i*), which was intended to address the concerns that people's religious views were being targeted.

Finally, we express concern about the lack of respect for fundamental criminal law principles requiring act and fault. We call for the deletion of the criminalization of being in any country in association with a terrorist group as a crime. There is no act there. Last but not least, we call for the deletion of the newly amended clause 83.9 (2)(*b*), which in our view makes matters worse by taking away the fault requirement for the new offence of facilitation of a terrorist offence.

The offence says that you must knowingly facilitate, but the subclause says that you do not have to know that any particular terrorist activity will be facilitated.

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There are, of course, other problems in Bill C-36, and I would be happy to address them in questions. Thank you.

Senator Beaudoin: My question is addressed in particular to Ms Weinrib. Your first sentence was in respect of emergency measures. The government, in this case, had the choice between an emergency measure under the new Emergency Act, 1998, or a permanent bill such as this one. As Minister McLellan said, Bill C-36 is permanent; it is not an emergency measure. It does not use the notwithstanding clause, and the bill is destined to stay, rightly or wrongly. The government has that power, and it was decided.

It was possible to declare emergency power, and Parliament has done that before. This time, the alternative was selected, which is Parliament's prerogative.

What are your comments on this? If you want it to be an emergency measure, it must be declared, according to law. The choice must be made and it should appear clearly in the bill that it is an emergency measure that will be transitory in nature. An emergency measure is transitory. If we come to the conclusion that this bill should be an emergency measure, it would change the entire bill. We would have to rewrite almost every clause. Is that what you are suggesting?

Ms Weinrib: I would like to think that, because the Emergencies Act is still available and on the books, and because it contemplates the same kind of powers and the same kind of problems that we have here, the government must give us an explanation as to why it has not provided all the security, checks and balances that the Emergencies Act provides, or something similar. Hence, the government may be surprised, when the bill goes before the courts, if it expects that the courts will defer to what it has done because the exceptionality of the condition is so urgent. It seems that the government wants it both ways -- it is not an emergency, but it is a permanent problem we have now to suppress, punish and prevent terrorist acts on an international scale. Those acts that are driven by fundamentalist, nihilistic cells about which we currently know so little. That is one way of dealing with it.

Once one acknowledges that the government is using these extraordinary powers, then there must be some explanation for not using the Emergencies Act, other than it would be too difficult, too challenging or too burdensome to have to subordinate the powers, which the government wants to exercise, to the constant review and reporting mechanisms.

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In my view, the Emergencies Act is not constitutional but rather it is quasi-constitutional, because it has such a strong parallel to the derogation clauses under the International Human Rights Instruments and under the new national Constitutions since the Second World War. The Emergencies Act actually activates, in our political system, the recognized need for constitutional democracies to have the power to respond in extensive ways when there are pressing challenges, but to revert to normal power, when normal conditions return.

In this proposed legislation we need it to either fit within the Emergencies Act, with a framework in the background of derogation from rights and freedoms that are guaranteed; or we need the override; or we need much more of the kind of protections that would be built into the statute if the government recognized that, later in the day, it would have to defend the law under strict review under the Charter.

It seems to me that the government has chosen a route that does not make sense in respect of our Constitutional order, our statutory order or our international human rights framework. Government seems to want to create, through legislation, extraordinary powers with a dramatic investment of discretion, and often un-reviewable discretion in the executive; it does not want to have a strict review in the courts; and it does not want to have the oversight, checks and balances that the Emergencies Act provides. However, I am not sure that this makes sense.

Senator Beaudoin: Let me explain this to you. There are two possibilities, of course. They have the right to choose. That is why, in the pre-study, we came to the conclusion that, since they opted for a permanent act giving additional power to the police, it was only natural for us to request a sunset clause to counter-balance the bill.

We know that if it was an emergency act, there would be no such thing, because an emergency act is transitory, and we would not need a sunset clause. However, since it is permanent and the powers are important, we agreed on the sunset clause.

Mr. Stuart, Mr. Roach and you, Ms Weinrib, come before us and suggest that we amend many clauses. You seem to take the attitude that we should have an emergency measure. Thus, we started the debate from square one.

Mr. Stuart: Senator, may I answer your question? The choice was made by the government to not use the Emergency Act. Therefore, we are talking about the

prospect of permanent legislation. It is clear to me that the standard of justification for it should be higher.

Senator Beaudoin: That is right.

Mr. Stuart: That means there should be and should have been a proper clause-by-clause analysis in the House of Commons, which did not occur for political reasons.

(1430 follows -- Mr. Stuart continuing: On the issue of the sunset clause...)

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On the issue of the sunset clause, you are dead right. It should all be sunset. I hope that someone has said that there have been hysterical reactions to this; I am one of the hysterical reactions to this. I am one of those reactionists.

I hope that in five years time there have been no terrorist trials under the new provisions and very little use of the new police powers. The trouble is that there will also be 400 other provisions that were never probably debated in permanent law. It seems to me that, at the very least, you need a powerful review mechanism.

We are all practical people, I think. This will pass as is. The question is, now what? Is there any last ditch major amendments that can be made? We must say there are a couple, and we will get into the details. I can detail any point, but we are waiting for the questions.

Mr. Roach: Senator Beaudoin, I would add on the emergency versus permanent item that we have gone permanent but we have weaker anti-discrimination provisions than if we had gone emergency. The non-discrimination clause that your committee has recommended is stronger than section 15 of the Charter. It is more absolute. It is not subject to section 1. As my colleague, Ms Weinrib says, if you look at page 6 of our brief you will note that it complies with the international convention, which says, that there should be no discrimination in emergencies. This is a fixable disadvantage of having gone permanent.

Why not put in a non-discrimination clause that provides the same high standard of non-discrimination into the permanent legislation? The Charter is the

minimum. Using Charter litigation to target racial profiling has been very difficult. It is extremely difficult to prove. It is extremely difficult to litigate.

A statutory, non-discrimination clause tied to parliamentary reporting would give you the benefits of the extra caution that we should pay to non-discrimination norms in emergencies. That would fit quite nicely.

You did mention, Senator Beaudoin, that we have recommended fairly extensive changes. We tried to resist that temptation at the risk of being overly pragmatic. Our brief proposes three surgical deletions from the bill and a rather larger amendment on non-discrimination. I do not see our brief as in any way inconsistent with the tenor of this first committee's report.

Senator Beaudoin: In regard to it being permanent, we have made some amendments. We agreed on a sunset clause. You have additional amendments, and I understand that, of course.

However, I cannot see how we may revert to an emergency measure right from the beginning.

Ms Weinrib: If I may comment again, the purpose of a sunset clause is the same as active review clauses, as we see in the Emergencies Act. It is best to have both, but to have neither when the powers are extraordinary nor the circumstances are as close to any definition of emergency as we would formulate, is dangerous. The purpose of a sunset clause and the purpose of review are to reflect the extraordinary conditions and the extraordinary response. We want political accountability and transparency.

We all know that very often a sunset clause does not produce accountability and transparency. It is there as a tool to prompt accountability and transparency, but it is not a guarantee. The most direct improvement on the bill would be to create as much accountability and transparency as possible, not only in the creation of these new powers and offences, but also in their implementation, step by step. The best example that I can give you of that is this detail of a very elaborate Emergencies Act that does reflect the international human rights system. I would expect that we would build in more accountability and more transparency in anticipation of strict Charter review and because there must be accountability for what happens.

This bill could become ordinary legislation that stays on the books. We have learned from our history and that of every other country that these powers are

eventually used in ways that were never intended. It is very difficult to get them off the books later.

Senator Fraser: Mr. Roach, I was very interested in what you had to say about racial profiling. Clearly, we all oppose root and branch racial profiling in the way it is normally understood.

I was reading the definitions that you provide in your paper and the discussion of them. I found myself starting to think that perhaps this is one of the areas where we may be creating more problems than we solve by writing things into the law.

You cite a definition from American law refers to racial profiling as meaning the practice of the law enforcement agent relying to any degree on race, ethnicity or national origin in selecting which individuals to subject to routine investigatory activities or indeed subsequent police work. That is pretty sweeping.

I was trying to think of a hypothetical example to explain my difficulty here that would be removed from the current context. The best I could come up with is to suppose that there is a Tahitian liberation movement. A plane from Montreal to Tahiti is blown up. There are reasons to believe that it was blown up in the service of the Tahitian liberation movement by people based in Canada.

If I were the police, surely not the last, but the first criterion for my search would be Tahitians. The mere fact of being a Tahitian is not enough to target you as a terrorist, but you will waste a lot of time if you say that the whole population of Canada is under equal suspicion. You cannot afford to waste time when you are talking about people killing other people in large numbers.

Mr. Roach: We must move through at this level of detail. I welcome your question. My response would be that to impose a kind of dragnet on Tahitians would be a very crude method of law enforcement. Presumably, we would want to target both people of Tahitian, or non- Tahitian origins that have sympathy with the particular terrorist organization. This would not stop you from looking at things like travel patterns. If the Tahitian liberation army were receiving training in country X, you would look at people who have moved between country X and Canada. There are many different law enforcement variables.

This says that we do not use race and ethnicity as a kind of crude proxy for criminality. Even if police forces may find it administratively convenient to do so, we are saying, as a society, we will not do that.

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Senator Fraser, if you think that racial profiling is necessary in the context of this bill, then I would invite you to amend the bill and make a clear statement that police should engage in racial profiling.

(Take 1440 Follows – Mr. Roach continuing: Thereby, there would be…)

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(Mr. Roach continuing)

Thereby, there would be a clear statement. It will not be subterranean. It will not just be in the practices of law enforcement agencies. I am sure that the Muslim lawyers who appeared here this morning would challenge that provision in court, under section 15 of the Charter. I would be happy to assist them, and we can fight it out on that basis.

This amendment tries to establish that we do not want *sub rosa* administrative racial profiling, however seductive or administratively convenient that might be. We as a community are making a statement against that. That is the right thing to do.

If you feel that you want our police forces and our security agencies to engage in racial profiling, then I invite you to make a clear statement in the law to take the heat that will happen on the front pages of the newspapers if we enact an explicitly race-based law. Let us fight it out on that basis before the courts.

Senator Fraser: Mr. Roach, you are putting profoundly offensive words into my mouth that do not reflect any thoughts I have ever held, let alone expressed here today. I began, you will recall, by saying that none of us is in favour of racial profiling as it is normally understood, which would include large portions of the definition that you lay before us.

My question referred to the advisability of writing into the law a provision such as the one you cite. You still think that is a good idea. I have my doubts, but I would thank you not to attribute racist motives to me.

Mr. Roach: Senator, I was not attributing racist motives to you. I was trying to say is that there is an issue of transparency here. If we as a society feel we must make the regrettable decision to authorize racial profiling, let us do it according to the rule of law.

The rule of law would suggest that we would put that in legislation. We would take democratic accountability for that and that that would be reviewed before the courts. That is all I am saying.

Senator Fraser: It may be what you are saying. It has very little to do with what I was saying.

Mr. Stuart: I would like to address a related issue, which was subject of discussion this morning with the group who certainly feel that they are being racially targeted on the issue of the definition of terrorism about motive. They were saying that it is a requirement of anyone to be defined as a terrorist under this legislation.

As we all know, honourable senator, before you can be a terrorist you must have a "political, religious, or ideological purpose, objective, or cause." I know that people have asked the minister to withdraw that, and she has refused to do so. Her reasoning is interesting. She said that those words are in the bill because it is internationally required that we target terrorism and anyone else can be caught under the normal laws.

That is a huge recognition that the normal laws are sufficient, actually. For example, let's say that we had an anthrax scare in Canada, and we found someone in Downsview who was the culprit. If we said, "Why did you do it?" But could not establish a political, religious or ideological purpose, he is not a terrorist. It seems to me that the deletion of that clause on motive would widen the definition of terrorism.

For those of us who have been teaching the stuff, I cannot think of another example in criminal law where the Crown is required to prove beyond a reasonable doubt what the motive of this violent act was. We have just learned that it is too difficult to do, so we do not require it. This is the first time in the legislation of which I am aware that it is in there. If you deleted (*a*), you would immediately make the definition of violent terrorism wider. You would avoid the Muslim organizations saying that out of the mouth of the Minister of Justice, this is aimed at us. Whatever is done must be done for political, religious or ideological purposes. What is easier than to go after religious, Muslim groups in that context?

If the change I am suggesting were made, a number of objectives if the Senate were to recommend again that the definition of motive be withdrawn? It would not

change the bill. It would widen the definition of terrorism and it would appear to make it less targeted at minority groups.

Senator Fraser: That would be your way of avoiding the racial profiling quagmire.

Mr. Stuart: The issue of racial profiling is extremely important.

Senator Fraser: As do we all. That is not the issue I am trying to raise here.

Mr. Stuart: The real issue at the moment, as we heard somewhat this morning, is that groups have already been targeted, in their view, in a racial way. We are all interested in protecting against that. This is a highly political statement.

Premier Harris is saying that there will be no racial profiling in Ontario. His key expert on terrorism is saying that there will be racial profiling. There is a credibility gap.

The choice not to invoke the Emergency Act meant that we did not invoke the detailed provisions that that act has about the compensation of those wrongfully targeted. Bill C-36 is a product of 15 people working in secret in the Department of Justice. I understand that they thought these ideas up themselves. They were not relying on anyone.

I originally thought they must have gone to CSIS and asked what CSIS would like from their wildest dreams. I understand it was more a process of 15 talented lawyers producing a very complicated bill. Their purpose was to punish, investigate, and give police enforcement powers. It seems to not have occurred to them to deal with the question of those who were wrongfully targeted. That was dealt in page after page in the Emergencies Act of 1988 as a late recognition that there was an overuse of the War Measures Act in 1970. That concern is not in the present bill.

Senator Lynch-Staunton: First, I wish to congratulate all those responsible for organizing and participating in the symposium that was put on at the University of Toronto some three weeks ago. Thank you for putting all the papers together so quickly and making them available to all of us. They have been extraordinarily helpful and will be, no matter the fate of this bill. No question there is some lasting value there.

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I wish to touch on two aspects of this bill. First, based on a comment made yesterday by Mr. Mosley just as we were ending our hearings with the Solicitor General and the Minister of Justice.

There are a number of recommendations in our pre-study report. To my mind the two most important are the overall sunset clause and the naming of an officer of Parliament to allow some parliamentary oversight, not after the fact, but during the course of the execution of activities involved in the bill.

Senator Bryden asked Mr. Mosley, who is the senior criminal law officer of the department, whether there was a constitutional issue involved in considering an oversight officer. Mr. Mosley replied that under our system we believe it would be inappropriate for an officer of Parliament to conduct a review of the exercise of the jurisdiction of a provincial Attorney General or Minister responsible for the police. In the Emergencies Act, there is parliamentary oversight and there is a sharing of the administration of the act.

Does the argument presented by Mr. Mosley add up? Is that a valid argument against consideration of an officer of Parliament?

Mr. Stuart: I do not see the objection, if there is a constitutional problem. I am a criminal lawyer. I am less into these big division of power issues.

(Take 1450 Follows -- Mr. Stuart continuing: There is the Inquiries Act...)

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(1450 -- Mr. Stuart continuing)

There is the Inquiries Act. Something constructive can come out of the debate, in which the senators and others have been great..

There is a great deal of Canadian concern about portions of this bill. Why not set up a commission of inquiry that is chaired not by an officer of Parliament, but by a judge. We have independent commissions of inquiry to review the work of attorneys general, and Premier Harris was called to account for the water quality issue. I do not see that there is any constitutional problem with that.

The Inquiries Act allows you to set up an inquiry, and this is a matter of major international importance. It would be set up in such a way that you task a judge. There seems to be a significant amount of resistance in this bill to trusting the

judiciary. In my limited way, I view the criminal justice system of Canada as working at its best when there is a division of powers. Parliament does its work, there is a check by an independent judiciary, and there is a relationship between charter jurisprudence and judges doing their inquiry.

Justice Cory announced why he thought there was a wrongful conviction in the *Sopheno* inquiry, in a great deal of dispatch. It took him less than one year. If the Minister of Justice tables a report about the statistical use of this bill, then there is another report coming, or just before that, by the justice who has looked at everything.

On the issue of reporting, senator, I agree with you. As a pragmatist, I believe this to be one of the most important issues. Let us remind ourselves about the history of parliamentary review. I will give you two examples. First, when we passed electronics surveillance provisions in 1974, we were told that we would have an annual report on the use of electronic surveillance. It became a complete cynical joke, because the report is less than one page. There were 185 authorizations requested, and 183 were granted. We do not know about the ones that were not granted.

We also found out that for years we had been listening to these reports, and we discovered, thanks to the Supreme Court of Canada, that there were many more electronic surveillance by body packs on so-called consent searches.

The other example was the occasion when they reformed the mental disorder provisions in the Criminal Code in response to an unconstitutionality ruling by the Supreme Court in a case called *Swain*. We were told that there would be reviews of that. To my knowledge, there has never been a public justification of why the capping provisions were never proclaimed -- the length of time people were detained in mental institutions.

Parliament is not good at reviewing itself. That is why it is extremely important that the review needs to be by someone independent of the minister. The best vehicle of which I am aware, given the enormity of it and if it is true that some latitude should be given to a government in crisis, is to quickly produce a major piece of legislation and to do some crisis thinking about the mechanisms of review.

I would be much more comfortable if there were someone reviewing this on a full-time basis. One of the suggestions is to trust SIRC, the Security Intelligence Review Committee. Personally, I have much respect for one of its members, Mr.

Bob Rae. He will not spend a year doing this, for sure. It will be a part-time review, but we need a full-time review.

Senator Lynch-Staunton: An inquiry is one thing, however, an inquiry is usually after the fact, whereas the recommendation of the committee, which was supported unanimously by the full Senate two weeks ago, was to have an officer of Parliament who would do an ongoing monitoring of the bill in the same way as the Official Languages Commissioner, the Privacy Commissioner and the Information Commissioner. The Auditor General comes in after the fact. They want someone during the execution and leading up to it. Certainly, that is a key recommendation, and it was supported unanimously by the Senate. I hope that we would have, in due course, an amendment to the bill along those lines.

The other aspect I want to discusses is the question of judicial review. I certainly supported the concept at the time, but now I am having second thoughts. I am hopeful that you can dissuade me from my apprehension about the importance of judicial review.

My understanding, after some research that I admit is incomplete, is that judges are reluctant to involve themselves in taking a decision on political decisions -- on ministerial decisions -- which, for the most part, have a political character. However, they will take decisions on the procedure that was used or misused to lead to that decision, or to an accusation of bad faith in coming to the decision. They prefer not to involve themselves in evaluating the decision itself, which was politically based, and so they will, in effect, confirm it or refuse to deal with it. Is that, in layman's terms, a fair evaluation of the role of a judge in the evaluation of ministerial decision?

Mr. Stuart: My problem with your concern would be that, on a daily basis, judges decide whether something should be disclosed for a fair trial to the accused. Often, the Crown attorneys say that this is privileged or that it is not relevant to the hearings. Also, there is a politically charged environment about access to therapeutic records of complainants in sexual assault cases. At some level, all of those decisions could be seen to be politically charged, and on a daily basis, judges exercise their discretion.

I would rather have judges exercising a discretion than none at all. I am somewhat worried about your concern. For example, the one power that I believe is un-reviewable is this notion of a fiat, which is clause 38. (15), I believe.

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Perhaps this could answer your question directly. Not before you, is a doctrine called Cabinet Secrecy under section 39 of the Canada Evidence Act -- existing law and not affected by this act. That is an un-reviewable decision. There is a certificate and no one is able to review it. As one of my U of T colleagues points out, we will actually get to know in the year 2017 whether the Prime Minister of Canada actually authorized the security things in APEC.

To me, there is an important document of cabinet secrecy, which could have been justified in that case but it was not put to the test. Every time you see a ministerial power in this bill, it would be better, because there have been some changes made, to have it reviewed. If your concern is that judges be somewhat cautious in exercising their review powers, rather that they have them than do not have them. If there is no review of ministerial power, who will review it? We hear that there is ministerial accountability, but this government, now armed with the security of information in parts of this bill, will not talk about what is going on, very easily.

Mr. Roach: Certainly, your description of review administrative law sounds right to me. It does not get into the merits and it is concerned about reasons and procedural fairness, and perhaps patent un-reasonability. To the extent that it is being imported into the bill, I agree with Mr. Stuart that it is better than nothing. Certainly, the courts have been creative at times in requiring reasons that are extremely important and in providing a clue to the evidence and to what the minister was thinking about.

That underlines the wisdom of your commitment to a parliamentary officer, who would certainly have unquestioned jurisdiction over decisions made by the Solicitor General and the Attorney General of Canada.

On some of the other federalism points in our proposal that deal with racial profiling, we suggest that the Human Rights Commission which has jurisdiction in respect of the particular law enforcement agency, may have a role to play. That would be the Canadian Human Rights Commission in respect of the RCMP, but would be the Ontario Human Rights Commission in respect of the Metro Toronto Police or the Ontario Provincial Police.

(1500 follows-- Ms Weinrib: In terms of the suggestion...)

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Ms Weinrib: In terms of the suggestion that one could not have rigorous review because provincial officers could demand information, it seems to me that this is an excuse. The government has not raised any other principles or structural factors within our constitutional structure to limit any of the powers it wants here. There are many examples where there is a voluntary sharing of information, because the criminal justice system is shared by the federal and provincial levels. The other thing is that these powers are so extraordinary in that they need the emergency powers in the constitutional sense so that the federal government has much more capacity to move in on a mandatory basis into areas of exclusive provincial jurisdiction.

In terms of your second point, much depends on what charter claims are being put forward in the context of a challenge to a minister's exercise of discretion. If it is a claim against incarceration or a claim against some sort of discriminatory foundation to the primary decision, then courts are comfortable with being much more intrusive. Mr. Roach mentioned reasons. It may be that, if there are no reasons, the court will say it has no choice but to invalidate or to give relief to the claimant because the government officer has not indicated that the decision was made on valid factors. That is, just drawing a conclusion from the fact that no reasons were given is a way of intervening without actually second-guessing an exercise of political authority.

Senator Lynch-Staunton: At least two of our panellists agreed with the Quebec bar who said yesterday better a judicial review than no review at all. However, it is of limited value; it is not the kind of review authority that we should have in this bill.

Mr. Stuart: Senator, I think most of us, starting at the Toronto conference, are reluctantly conceding that the bill is probably charter-proof. As of last week I am not quite so sure any more. There was the case in the Supreme Court of Canada where the issue was whether the public had the right to know the details of an elaborate RCMP sting operation. The Supreme Court of Canada unanimously said yes -- they used the evocative phrase "Canada is not a police state" -- and they ordered the disclosure. Here we have nine members of the judiciary who, as of last week, said Canadians have a right to know what law enforcement people are doing.

On the issue of CSIS, clearly privacy and secrecy is a good idea. However, lack of reviewability? I do not think so. As far as I understand this particular court, if that is a barometer, it might well start to be more active. If a minister

says, "I am not telling you why we did that," or if the first report comes from the Attorney General saying, "It is sensitive information to tell us how many Arab Canadians we targeted, we will not tell you," I think there might be opportunities for charter challenges.

One of the difficulties with relying on charter challenges is that -- this is my other big theme -- we have become so used to law and order quick fixes that we just okay all these huge pro-state amendments in criminal law making the criminal law incomprehensible. Since I have been in Canada, the Criminal Code has almost doubled in size. We have more legislation, but the crime rate has been dropping. It is not the legislation, I am sure, because nobody understands it. We need simpler legislation rather than more complex legislation.

Mr. Roach: Just on the issue of whether it is charter-proof, we talk about it on page 3 of our brief. Proposed section 83.31(4)(*d*) says that the annual report shall not contain any information that would otherwise be contrary to the public interest. You should be aware that in 1992 in Morales, the Supreme Court of Canada struck down a reference to the denial of bail on the public interest as simply too vague and too sweeping to justify the denial of bail. Although I understand and support proposed subsections (*a*), (*b*) and (*c*) which refer to hindering ongoing investigations, endangering people and prejudicing legal proceedings, I have misgivings that that last basket clause, which was added by the House of Commons, is charter-proof.

Senator Lynch-Staunton: In the last few years, Parliament has tabled bills which immediately those affected by it are warned will be tested in the courts whether they are charter-proof or not. We have seen the tobacco bill that was struck down; we have seen the Nisga'a treaty legislation, which is in the appeal court of British Columbia; and a few other bills. This is a long, costly process. Would you agree that when the challenge is serious -- reasonably well-founded to raise questions -- the government has an obligation before Parliament decides on the proposed legislation to go to the Supreme Court for an opinion so that, before a vote is taken on a bill, we have the satisfaction of knowing by court decision that the charter questions have been resolved and now we can decide on this bill with that aspect of it put aside?

Mr. Roach: In certain situations, the reference procedure would be appropriate. It allows these issues to be tested in the courts not on the back of a particular person who has been targeted. Having said that, the court will be

somewhat careful about not giving carte blanche because obviously the facts of particular cases can make a difference. Certainly, the more extraordinary powers that are subject to sunset provisions -- there is already an indication by Parliament that these are extraordinary -- might be candidates for a reference to the Supreme Court.

Mr. Stuart: I agree with that. I would add that charter challenges are often very specific. For example, one of the senators this morning said we heard that there is no knowledge requirement for knowingly facilitating and Mr. Roach read it out to you. In the format that we have here, as you go through clause-by-clause provisions, when you deal with the offences as they show up and it says, "knowingly participate" and then suddenly there is this funny little sub-heading -- I have never seen it before -- that says "prosecution". I have not seen it in any criminal law statute anywhere the world. It says, "Do not worry because you do not have to prove these things." Then you suddenly find in provisions like the one Mr. Roach has already read out.

Mr. Roach: It is proposed section 83.19(2), and there are others.

Mr. Stuart: Each one of them. The examples that the minister uses are always very self-serving. For example, she says, "knowingly participate in a terrorist group, you recruit someone for a terrorist group." Who could be against that? When you look at that offence, you find out that you do not actually have to know the details of the terrorist group, the acts are something like providing a service.

You have heard from the lawyers groups that that means people practising immigration law are in jeopardy -- people who are the least paid legal lawyers in the country, who work the hardest for the least salary doing a workhorse job -- could technically be targeted by that provision. Then when you think of one of the Muslim associations -- they gave you the detail this morning -- that send money to a refugee group in Afghanistan. Then you discover that actually the group is now an expatriate Taliban group, so now they are implicated. These provisions are important.

I would expect that if the bill passes in its present form there would be such challenges. If we ever did have a terrorist trial, this would just mean a huge delay and huge complexity while we sort that out. I agree there should be an opportunity to refer some of those contentious provisions beforehand.

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I want to conclude with the thought that those of us who have been professionally interested in criminal law reform trying to get a better balance in the justice system would be appalled. In the last 15 years all changes to legislation seem to be aimed at making everything tougher and, I would add, ever more complex.

(TAKE 1510: Mr Stuart continuing: There is no proper balance.)

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(1510 -- Mr. Stuart continuing)

There is no proper balance. The only mechanism for judging this law now seems to be whether it is charter-proof. The minister stands up and says that the best heads at the Department of Justice claim that it is charter-proof. Most of us would agree, because they are bright lawyers. The question is: Is this good law? Against this academic, legalistic outlook, you must evaluate the anecdotal evidence coming from the Muslim groups who believe they are already being targeted. They say they are good Canadians, this will make it worse, and will we please do something about it. That is the context. This is not whether it is charter-proof, but it is about whether it is good law.

Senator Furey: Mr. Roach, I was intrigued by your comments in respect of the new clause 83.1 (1). I believe you said that the criminalization of threat to commit terrorist activities undermines that new clause. This morning we heard that the clause provides nothing more than a false sense of comfort. Does it have any value at all?

Mr. Roach: Unless the word "threat" is deleted, it does not have any value. There are references to conspiracy attempts, accessories after the fact and counselling. If you read Mr. Stuart's book or my book on criminal law, you will have some idea what those things mean. We do not need them in this context. The one thing you will gain from looking at any criminal law text is that we have no general jurisprudence on threats. It seems to me that we are making all of these things criminal acts, such that if someone does it, plans it, attempts it, and also if someone threatens it.

Proposed subsection 1.1 states that the expression of a political, religious or ideological thought, belief or opinion does not come within subclause (*b*) of the

definition of terrorist activities unless it constitutes an act or omission that satisfies the criteria of that paragraph.

As I read it, if your religious, political or ideological thought is classified as a threat to commit any of these terrorist acts, which can sometimes be the nature of religious, political and ideological thought to become somewhat extreme, then the new subclause 1.1 would not protect it.

I would be more confident that 1.1 would have some value if that one word, "threat," were deleted. I am as guilty of this as everyone else. I do not think that we have paid too much attention to this one little word "threat." It means that if someone says: For religious reasons, I threaten to blow something; or I threaten to endanger this, then at least there is a danger that those words themselves, and not the acts, not the planning, not the conspiracy, but simply the words, could constitute terrorist activities. It is a long answer, senator. Subclause 1.1 may have some value, but its value would be increased if the one word "threat" were removed.

Senator Furey: Considering the gist of the entire bill, do you think it would be in keeping with the intent of the bill to criminalize membership in terrorist groups? The question is apart from a few constitutional problems with freedom of association and other such considerations that would normally arise.

Mr. Stuart: That is one of the political positions on this issue, that it raises constitutional arguments. The revised definition of "gangs," which you presumably passed in the Senate last week, is now up for more potential charter challenge. The charter challenge is not freedom of association at all. It is much more based on criminalizing guilt by association, which has, until now, been contrary to normal Canadian criminal principles. The questions are: Where is the physical act requirement that might include a threat? Where is the fault? For example, someone sending money to an Afghani group that turns out to be a Taliban group, is not guilty in this traditional law unless they did a significant act, which they did by sending some money. However, they must know what the substance of the group was. If they did not know that substance, then they are not guilty.

Before my time expires, I would like to make the point that at least Mr. Roach, other criminal law teachers and I are strongly of the view that, on the issue of

definition, subclause (*e*) should be completely deleted. Simply taking out the word "lawful" in front of "advocacy" does not do the job.

There was talk this morning about Nelson Mandela. I was a law professor teaching in Johannesburg at the time of his act, which was to disrupt a railway station with an explosive device. He committed that act, according to the person this morning who spoke about the Geneva Convention, and he was jailed 27 years, beginning 15 years before the Geneva Convention definition was changed. Under this definition, it is difficult to distinguish acts of aggressive protesting that had been occurring in Canada, even without the word "lawful" deleted. We are all of the view that the intent of the government could be better preserved -- and I think the Senate was as well -- by keeping the definition at (*a*),(*b*), (*c*) and (*d*). That is a very important point.

One of my students put up a hand and said: "Is not all terrorism a form of protest?" I said: "Yes, it is." It seems to me that if we had been talking about a narrowly targeted bill directed at an act or threat of violent terrorism addressed against the stability of the nation, and with specific powers, I would be thinking differently. Subclause (*e*) is a catch-all provision and it will cause a great deal of trouble.

Senator Mahovlich: Mr. Stuart, I like your idea of trying to make it simpler. Can you give me a simple definition of what a terrorist is?

Mr. Stuart: Anyone who threatens or participates in violent activity directed against the instability of the nation would be a good definition. We heard something along those lines this morning. I answered your question, but I do not particularly want to answer your question. From my position, we do not need a definition of "terrorism." The laws of murder, attempted murder, threatening to commit murder, threatening to bomb or hijack, are all in place. They were adequate to deal with violent gangs in Quebec, and they are adequate to deal with terrorist activities.

Senator Mahovlich: We need a definition in this particular bill.

Mr. Stuart: The only thing I can say is that each one of us criminal-law type scholars who have looked at this bill, and the Senators and others, have said that you can preserve the definition by just deleting the proposed subclause (*e*), and by preserving (*a*), (*b*), (*c*) and (*d*).

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Senator Murray: Ms Weinrib, you and others have properly drawn attention to the Emergencies Act and to the safeguards that exist under it, and in particular, to the provisions for parliamentary review of regulations. We hope to import some of those safeguards into this bill by way of amendment before this process is over. However, I am hopeful that I did not misunderstand you.

(1520 follows -- Sen. Murray continuing: Are you suggesting that...)

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(Senator Murray continuing)

Are you suggesting that under the present circumstances, the government ought to have proceeded under the Emergencies Act? I reviewed it some weeks ago and again today briefly. It occurs to me that it would be both too much and too little for the present circumstances.

There are powers, as you know, that would be accorded to the authorities under the Emergencies Act that you would not want to give the authorities except in the most extreme conditions. Present circumstance does not qualify. It would be too much.

It would also be too little in that the time-frame under which the emergency can operate is 60 days. You can come back and renew it and so forth, but it is too short a time-frame.

Would you agree that the Emergencies Act would be inappropriate for the present circumstances?

Ms Weinrib: This is a question that we have actually been tossing around at the law school. Certainly now, it does not make sense to sort of rewind everything that has been done and go back. There have been suggestions that I think make sense. Perhaps initially the government might have been advised to use the Emergencies Act for a short period in order to give time to deliberate on what permanent legislation it needed It could have given time t determine what adjustment of the kind of safeguards that the Emergencies Act provides would be appropriate in permanent legislation.

Perhaps we would not be in the situation that we are in now where so much is going on under current legislation. We actually do not really know what is going

on, but under the Emergencies Act we would have a lot of reporting and accountability. We would also not be under the pressure we are under now to pass this bill, even though I think we are all uncomfortable with the degree of democratic engagement and deliberation that we have been able to contribute in the short amount of time allowed.

That is one idea that has been floating around. It is not practical to speak about that now.

Senator Murray: I take the point, but I cannot forebear to think that if they had done that, the cry would have come from many witnesses that a mallet was being used to strike a gnat.

Ms Weinrib: Of course, one does not have to use all the powers. Also, there would have been reporting provisions.

Senator Murray: You do not have to use all the power of Bill C-36 either.

Ms Weinrib: What is the significance of the fact that the Emergencies Act is there? Is there some requirement to use it once it is there? There is, at least, a requirement to deal with the framework that it provides and to adapt that framework when you are exercising exceptional powers.

It is not enough for the government to say this is not an emergency; this is temporary. This is how modern liberal democracies deal with this sort of problem. They protect rights is not only through the courts, which is long after the fact and sometimes too little, too late. They do create these regimes of exceptionality that have oversight, accountability and they terminate at a particular time.

Senator Murray: I take your point. The Emergencies Act, as you know, deals with three different types of emergencies -- public welfare, public order and international emergency. The act defines the elements of an emergency. It then places upon the government the onus to come into the public and say, "here are the circumstances that we have in mind and here are the powers that we intend to use and here would be the direct effects."

I take your point about the framework. That has not been respected truly in the present bill.

Ms Weinrib: We all learned early that sunlight is the best disinfectant.

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Senator Bryden: I was interested to hear Mr. Stuart say that 15 lawyers in secret constructed this bill in three weeks. I am pleased to see that the academic community was able, in the same length of time, to hold a conference and publish a book by 25 legal professors. The time-frame is urgent for everyone. I have a copy of your book by the way.

I have a question regarding profiling. I relate to a question that was raised by Senator Jaffer at the pre-study. It was addressed to Mr. Ward Elcock, who is the head of CSIS and to Giuliano Zaccardelli, Commissioner of the RCMP. Senator Jaffer asked whether their organizations use racial profiling. Mr. Elcock replied:

> We do in fact do some profiling. The profiling we do is essentially to provide immigration with essential set of things to look out for in respect to a particular group or organization. That is not a racially profiled list. It is not based on colour; it is based on origin, on educational, on work background and a number of other things. It is a fact of life that in some cases we are targeting say Somalis who went to a particular school. It may look as if this is racial profiling, but it is not.

Then Commissioner Zaccardelli replied to the same question:

> Senator, on the point of racial profiling, we do not do racial profiling. We investigate criminal acts or acts that we believe are criminal in nature. We investigate those acts and try to prosecute those acts as best we can. We do not consider the persons gender, colour or religion. We simply investigate criminal acts. We do some profiling. It is not racial profiling. Obviously, in the domain of drugs, for example, we consider certain country that produce drugs and so on. We considered certain people who might be involved in the drug trade or other contraband. We try to do that type of profiling. We profile modes of transportation. We never do racial profiling. That is unacceptable in this country and I will never accept that as part of policy of the RCMP.

I quote those to get your response. I believe that, as I think with Senator Tkachuk, for the 300 or 400 people who happen to be watching this on television, that they not confuse racial profiling with a type of investigative process, which involves some profiling. Would you comment?

Mr. Roach: I would be happy to comment. I am gratified by those comments. Those comments support the idea that there could be a no racial profiling clause in

this bill, or at the very least a non-discrimination clause. These are our top law enforcement officials telling you that racial profiling is a crude law enforcement technique to which they will not resort.

I see those statements as perfectly consistent to go back to your first report and have a non-discrimination clause, using that as a response to the real concerns that are being raised. Some of these anecdotes about Mr. Mohamed Attiah and others have some force.

Senator, I do not see any inconsistency with those statements. In my presentation, I said that racial profiling was not good law enforcement. I am happy and proud that our top law enforcement officials have renounced it.

I would like this committee to return to its original report and put a non-discrimination clause into Bill C-36. For the life of me, I cannot see what harm that would be when the fear among some members of our community, as you heard this morning, is palatable.

Senator Bryden: Mr. Stuart, you indicated that the requisite reporting is merely statistical. I believe you said that that would not be very helpful and what was needed was to know how many Arabs, Jews or Maritimers were included in that.

(Take 1530 follows: Senator Bryden continuing: My question is not one...)

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(Sen. Bryden continuing)

My question is not one of law so much as, by doing that in a public report, are we really helping those people who, at least in the public eye, tend to be targeted or harassed, if that is a good word, or are we identifying groups? It troubles me to add details, to try to come up with evaluative or descriptive details of some sort. I would want to be careful, before doing that, that we are not aggravating a situation, and that we would have some way of making the best use of the material.

Mr. Roach: It was my proposal, so I will take responsibility for it, senator.

You are right that the collection of race-based crime statistics is a sensitive issue. It is one on which you should consult and look at the briefs of the Muslim lawyers and other groups that have appeared before you. My point is that in three

years' time at the parliamentary review, the Muslim lawyers and other groups may come here and say that the situation has gotten worse and that there are more problems. That could happen.

I am saying that the present reporting requirements will not let you evaluate the legitimacy of those claims because all you will have is raw numbers. If you are to take seriously that there not be disproportionate targeting, then I do think, although there are definitely risks in race-based crime statistics, that they are necessary. Many people who are concerned with racial profiling would agree with me that these are necessary just so that we have the information. When the Muslim lawyers, if they do come before this committee in three years' time during the parliamentary review, say there are still problems, I am afraid that the reporting statistics as presently contemplated will not assist you in determining whether their claims are accurate and what if anything should be done in response to their claims.

Senator Bryden: We could go behind the bare numbers in that type of situation to go back to their source.

Mr. Roach: Perhaps, but the report right now just calls for bare numbers and has many limitations. I would want you to be confident that there is access to it because several commissions, such as the Manitoba Aboriginal Justice Inquiry and the Ontario Commission on Systemic Racism, had much difficulty in evaluating whether claims of racial profiling made by minority groups were actually accurate. As a criminologist, I would say that it is difficult to get to those statistics. I would want you to be confident that you could get those statistics, because it may be that in three years' time you will wish that you had those statistics.

Senator Joyal: Ms Weinrib, in reference to the article that you published in the book that was referred to by previous witnesses, at page 104 you call for two controls of the special powers that are now included in the Criminal Code or would be included in the Criminal Code. One would be, of course, parliamentary control; the other is judicial.

With regard to the judicial control, I was reassured when I listed to Chief Justice McMurtry in Toronto earlier this week. He seemed to alleviate part of your fear that there would be judicial restraint in reference to the bill. It seems to me that your preoccupation has been addressed by at least one chief justice.

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With regard to the second area, which is the parliamentary control, your article was written before the amendments were tabled by the Minister of Justice. Does that change the conclusion or analysis that you make when you compare the parliamentary control under the Emergencies Act and the parliamentary control that is provided within Bill C-36?

Ms Weinrib: It is important to move as close as we can to what the Emergency Act actually provides: constant real-time reporting. This has significant value in terms of the day-to-day functioning of people who are administering this kind of legislation. If they know, not that there is a possible chance that someone will challenge this and it might get to the courts three years later, but that there will be actual processing on a timely basis of real information, valuable information about how the administration of these powers is being executed, that will transform the way the powers are executed.

The fact that the Emergencies Act is there and the fact that it mirrors what the international human rights instruments and modern Constitutions provide for the exercise of extraordinary powers gives us a paradigm that we should look to.

Senator Murray is quite correct that there may well be some features of the Emergencies Act that are inappropriate to the particular challenge of dealing with the kind of terrorism that we have experienced, and from week to week, perhaps even from day-to-day, as intelligence comes in and as intelligence is shared from country to country, we will have more of an idea of what has to be done. The constant oversight of these provisions and, hopefully, very rigorous review periodically to ensure that we have the powers that we need, that we dispense with and repeal the powers that we do not need and that we were mistaken in thinking that we needed, and perhaps the development of more targeted narrow powers in the future, is the type of process that we should deal with. It should be step by step and we should be constantly analysing what the situation is, as the Emergencies Act requires, and what powers correspond to the actual exigencies.

The Chairman: Thank you all for being here this afternoon. It has been enlightening for us. We thank you for making the journey.

(Take 1540 follows: The Chairman continuing: Our next witness…)

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(The Chairman continuing)

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Our next witness is Mr.Monahan from Osgoode Hall Law School. He is almost part of our committees. He is here testifying year after year on these complex issues. It would not be a good hearing without you. Thank you for coming. Please proceed.

Mr. Patrick J. Monahan, Professor of Law, Osgoode Hall: Honourable senators, it is a pleasure to be back testifying again before you. I did have the pleasure of testifying at the House of Commons committee that examined Bill C-36, but had not had the opportunity to appear before the pre-study committee.

I did not feel slighted by that, senator. However, I am glad to be here to have an opportunity to talk to you about this important bill.

Let me take a few moments to lie out the context within which I approach the analysis of Bill C-36. I should say that my focus is on the extent to which civil liberties are either protected or not adequately protected by the bill. I am not an expert on police powers, but I do write and speak about civil liberties. That is what I would like to talk to you about today.

By way of introduction I would am echo the words of Irwin Cotler, Member of Parliament, who spoke eloquently on this. There is no necessary opposition between the interests of security and the interests of liberty. Indeed, security is a prerequisite to liberty because we can only enjoy our liberties in a free and democratic society if we have security from a terrorist threat, such as the type that we saw on September 11.

In that sense, terrorist attacks, mass murder of civilians, of innocents, is an assault on rights and an assault on liberty. Not only on those who would lose their lives or suffer injuries in the attacks, but on all of us because those kind of wanton attacks and heinous crimes provoke the state to respond in a way that limits our liberties significantly.

If those terrorist attacks are not halted, as we all know, the state will be forced to take ever more repressive and intrusive measures. We will have a downward spiral in which the values of our free and democratic society are imperilled.

In my view, it is essential that we as a society and country take the necessary action to prevent and to eradicate, if possible, these types of activities.

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I would note as well that section 1 of the Charter of Rights refers to Canada as being a free and democratic society. Chief Justice Dixon, in his writing on section 1 of the Charter, notes that section 1 reflects the fact that Canada is a free and democratic society, and gives effect to that value. To protect that value, measures are sometimes required in the interests of protecting security. That is what Bill C-36 is about.

I have noted the testimony before this committee. I appeared at the House of Commons, and I did make some suggestions as to changes that I thought were necessary in the bill. I will get to those in a moment.

Let me say, as a general matter, that it seems to me that the focus and thrust of this bill, as honourable senators know, is really on providing the tools to investigate and to prevent terrorist attacks through detecting terrorist attacks prior to their occurring and through destabilizing terrorist organizations. The bill is also aimed at making it an offence to facilitate or participate indirectly in terrorist activities. Finally, it is directed at the financing of terrorist organizations.

While our current criminal law does provide adequate tools to punish terrorist activity after the fact, the minister has argued, and I think with some force, that our current law does not provide the necessary tools to deal with those aspects of terrorist activity.

What then of the bill itself? As I indicated to you, I did appear at the House of Commons. I had suggested that there were some difficulties with the definition of terrorist activity and many other witnesses had similar comments.

There was a particular focus on the provision referring to lawful advocacy or dissent or stoppages of work. There was a concern that that provision might have swept into the web of terrorist activity such things as strikes or protests that might have been unlawful, but certainly were not the types of activities that were intended to be caught through the definition of terrorist activity. I had suggested that the word "lawful" should be deleted from that definition.

(Take 1550 Follows - Mr. Monahan continuing: I had suggested some...)

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(1550 -- Mr. Monahan continuing)

I had suggested some other amendments to that definition. I noticed that the minister has picked up on those suggestions and has narrowed the definition of "terrorist activity." It is now clear that strikes, demonstrations or political protests will not be caught within the definition of "terrorist activity." We can also take comfort by the fact that there was another amendment added to say that expressive activity that does not involve terrorist activity will not fall within the reach of the definition of "terrorist activity."

The definition of "terrorist activity" has been significantly tightened, and that is the key to the bill. All of the other provisions of the bill, as you know, flow from that definition. The definition that we now have is adequate.

There were two other aspects of the bill that caused me some concern. One is the provision for investigative hearings, which, as you, know permit the police to detain individuals and to force them to answer questions, where there are reasonable grounds to believe that they may have information about an impending terrorist activity or an activity that has taken place.

The second aspect is the provision for preventive arrest, whereby you can impose a recognizance on an individual if you believe it is necessary to prevent the carrying out of a terrorist activity. I said that these are new powers, and they are not completely unprecedented. It is appropriate, therefore, that they be subject to some kind of sunset clause that will cause a real review of those powers. I notice the government has accepted that proposal.

The government has also instituted what I think is a fairly robust annual parliamentary review of the operation of those particular provisions, so that we will have detailed information on an annual basis as to how those provisions are actually applied in practice. Those are positive amendments. I certainly do not mean to discount the concerns, and I did not hear the entire testimony of the previous witnesses, but I suspect that they were raising concerns about those provisions. I do not mean to discount the fact that individuals might differ on that.

These are difficult choices and judgments that must be made. It seems that, with the additional safeguards that the government has now added in the form of the sunset clause and in the form of the annual review, these measures ought to be supported by the senators.

In general terms, there is a justification for taking action. It does not mean that we should not require that the action be measured, but it seems that in examining

the provisions of this bill, there seems to be an attempt to balance and to ensure that the infringement of liberties is no greater than is necessary. I point out simply that these measures are less limiting of liberties than similar measures taken, or comparable measures taken, in the United States. Indeed, initial measures that were regarded in the U.S. as uncontroversial in September, are similar to those of Bill C-36.

Honourable senators may have noticed other provisions, such as those for military trials that have been taken by the President, which have proven much more controversial. Those elements are not present in Bill C-36. We can take some comfort in knowing that there are comparable provisions in other jurisdictions, and we have not gone as far as the United States in some of its most recent initiatives.

Thank you. I would be more than happy to answer questions from the members of the committee.

Senator Beaudoin: It is a pleasure to see you back before the committee. Our concern is in the area of the equilibrium between civil liberties and rights and freedoms, of course, and the effectiveness of the system, because we need some additional power, but we must have a balance. In our pre-study, we agreed on the necessity of a sunset clause. Minister McLellan clearly stated that the bill is permanent. The government made that decision, and it is quite appropriate.

This morning, Professor Mendes put the emphasis on the annual report, or on the sunset clause. We need both because the measure will be permanent, although we may always change that, of course. Parliament, within its sphere, is always supreme. We are certainly aware that it is not a simple thing to legislate on such a level every five years. Therefore, we need to balance all the interests and, of course, to have all the appropriate checks and balances.

I understand that you agree with the principle of a sunset clause. In our pre-study, it was global at first and now it is partial. Do you agree that it should be partial only?

Mr. Monahan: Yes. I was of the view that the sunset clause should apply specifically to the investigative hearings and the preventive arrest because these were novel kinds of powers for which we did not have a track record to know how they would be applied in practice. For that reason, I thought it was justified to apply a sunset clause.

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In respect of other provisions of the bill, for example, the definition of "terrorist activity," which lies at the heart of the bill, I see no reason to provide for that definition ceasing to apply. It is either correct or it is not correct. If it is not correct, it should be amended; if it is correct, then there is no reason to impose a sunset clause. That is because we know that the activities of September 11 were not an anomaly, but rather they were the continuation of an emerging trend over the past number of years. Unfortunately, we can expect that trend to continue for the foreseeable future.

I do not see any reason why, for example, you would put a sunset clause on this entire bill. However, it for those particular powers that seem to me to be novel and to raise particular concerns for which there should be the sunset clause. That is why I am also comforted by the annual review, which I know that this committee, in its pre-study, recommended. The government wisely acted on the recommendation that this committee made.

Senator Beaudoin: There is one thing that is not in the bill: The annual report.

Mr. Monahan: You recommended an annual report on the entire --

Senator Beaudoin: No, we did not. Mr. Mendes recommended that earlier today.

Senator Fraser: We recommended it.

Mr. Monahan: You recommended the appointment of a special officer.

Senator Beaudoin: Since the bill is permanent, the legislation will be permanent. It may be that the Supreme Court will be more severe in the interpretation of section 1. When we use the emergency measures, it is so transitory and so extraordinary that they may be lenient on the interpretation of section 1.

(1600 Follows -- Sen. Beaudoin continuing: In this case, they will...)

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(Senator Beaudoin continuing)

In this case, they will be more severe because the bill will last perhaps many years. What is your view on this?

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Mr. Monahan: My view is either we believe that the measures in the bill are justified, or they are not. I believe that they are justified. However, someone might say that they do not believe that these measures are justified and wants the Supreme Court to be lenient because that person is worried that the bill is suspect. That person would want a sunset clause to make it temporary so that the Supreme Court would let it go through without subjecting it to a proper analysis.

I do not think that is the basis upon which the Senate should be proceeding. The Senate should be proceeding on the basis of whether the bill has merit. Is it an appropriate measure? If it is, then I am confident that the Supreme Court of Canada will uphold it on that basis.

Senator Beaudoin: I am still inclined to think that the idea of a total sunset was not bad. I agree with you about the definitions and things of that sort. There are now only two cases with a sunset clause, if I am not mistaken. I would have preferred more than that because the additional powers that are not restricted to two only. If it is good for two, and we may find that it is good for more. I do not see why, logically we should not extend that to those cases also?

Mr. Monahan: What are those cases, senator? There is no reason in logic why you could not extend it. For example, sunset clause could be added for the financing of terrorist activity or the facilitation of terrorist activity.

However, why should those offences be made temporary? I do not see why they should be made temporary, because there are international conventions that we have signed that commit us to enact laws to make those offences. What would be the reason why we would say that we have any doubt about the necessity of such a measure? If we have no doubt about the necessity of the measure, I think there is no reason to impose a sunset clause for some unspecified reason.

Senator Beaudoin: Ms Weinrib or one of the other witnesses this morning suggested that Bill C-36 is a kind of implementation of the treaties that we have signed internationally on the same questions as Bill C-36. We are not very often passing legislation in support of treaties. We should do that because we are entering treaties and we must legislate to give effect to them. That is part of our system of constitutional law.

Ms Weinrib may be right when she said that this bill is one possibility of implementation. I would like to know your reaction to that?

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Mr. Monahan: I would agree with Ms Weinrib, although I did not hear her testimony. I believe that she is correct assuming that is what she said. The convention on the suppression of financing of terrorist activity permits Canada to enact legislation to prevent such activity. By enacting the statute, we are acting to implement our obligations under those conventions.

Senator Beaudoin: You agree with that.

Mr. Monahan: Yes.

Senator Fraser: I will ask you for a short law lecture.

Mr. Monahan: That is an oxymoron.

Senator Fraser: A number of witnesses before this committee have suggested that it would be useful to include in this bill a non-discrimination clause. It sounds attractive because we are all deeply concerned that this bill not facilitate that kind of thing.

However, the longer I am in the Senate, the more I realize that nothing is ever simple. I have been brooding about this.

It has occurred to me that it may be a precedent. It may have unintended consequences that if we start to include in some bills non-discrimination clauses that basically echo the Charter, then those that do not include such clauses will end up being second class bills in which, by implication, one might assume some degree of discrimination is permitted because they did not say it was not. Is that loopy reasoning?

Mr. Monahan: I do not think it is loopy reasoning at all. I would say, that as you quite properly noted, we do already have an anti-discrimination provision, which is the section 15 of the Charter of Rights.

Of course, as senators know, that applies not merely to a statute and the terms of the statute, but to the way in which the statute is administered. The police or other law enforcement agencies, where they are granted discretion under the terms of the statute, must exercise that discretion in accordance with the Charter, including section 15.

My concern about including an anti-discrimination clause would be that unless it was identical to the Charter, in which case it would seem to add nothing, then we

would raise the possibility that there would be something slightly different in the wording of the anti-discrimination clause that we might include in the bill as opposed to the Charter.

If that were so, then I think that would raise difficulties. Then the courts would have to determine why one word or another was in included in one but not the other.

If they were simply identical, I would see no purpose. If they are to be different, I see problems of interpretation in terms of trying to determine what was really meant? Did they mean that the Charter applies or is there some other set of principles?

I think that it is unnecessary because we have already the anti-discrimination clause in the Charter of Rights.

Senator Bryden: Mr. Monahan, I do not think I have been on a committee where you have been a witness since Pearson, and that is a long time ago.

Mr. Monahan: One of us was on the wrong side of that.

Senator Bryden: By very little.

The report that the pre-study committee of the Senate made and presented in the Senate had a number of recommendations. The Senate adopted the amendments unanimously. Other people had good ideas as well, but the amendments that were made to the original bill reflected the amendments that were proposed in that pre-study report in many particulars of the report. All of them except and as a matter of fact in my experience here it was rather shocking the number that were tracked and that we were successful on.

(Take 1610 Follows - Senator Bryden continuing: There were two amendments that...)

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(Senator Bryden continuing)

There were two amendments that the House committee did do pick up on. There were certainly two that are not contained in the bill that was finally passed by the House of Commons.

You have discussed one of them. That one is that there be a sunset clause on the entire bill with the exception of those provisions that dealt with the implementation of international agreements or treaties. In the bill, as you know, is the sunset on the two areas that are of concern.

The other recommendation that was not included is that of parliamentary oversight. I am speaking from memory, but that there was to be an officer of Parliament to oversee the operations of this bill who would report.

There was no officer of Parliament created by Bill C-36. There is to be an annual report by the Minister of Justice on the operations of the bill. There is to be a report by the Solicitor General. As well, of course, we have the reports from the Privacy Commissioner and all of the other usual things. In addition to that, the provinces have agreed to have reports on their administration at the provincial levels by their Solicitor General, if they have one or their Attorney General, if they only have an Attorney General.

The issue is still before this committee. In three years there is a general review of the bill and in five years a sunset of those two provisions. There is still an issue whether in addition to what is there, we should still be considering an amendment to go back to the House of Commons based on creating an oversight by an officer of Parliament or ramping up one of the officers that already exists. The Commissioner of Human Rights having oversight for the entire bill was been suggested this morning.

Having set that up, I would like to have your view on the constitutional relationship between the divisions of powers because so much of what is under this bill will be administered at a provincial level, not a federal level. In particular, what is your view of the role of an officer of Parliament?

I will put into that one other aspect. As Senator Beaudoin indicated earlier, we could have proceeded by way of invoking the Emergencies Act to deal with this. We have not done that; we will have a permanent act. However, we look at the apparatus within the Emergencies Act to find an apparatus to oversee this act.

Having done that brain dump, such as it is, I would like to hear your comments.

Mr. Monahan: First, it is essential that there be effective review and oversight. The proposal to establish an officer of Parliament with specific mandate

to review this bill is an interesting one. It does raise a number of difficulties, some of which you have mentioned.

First, the administration of justice is a provincial jurisdiction. Most of the police forces are under the control of the attorneys general or the solicitors general of the provinces. Therefore, I am not certain how the officer of Parliament would effectively review those bodies. It may be that it could be worked out through agreement.

Second, there already exist review mechanisms for federal police forces. The RCMP and CSIS already have mechanisms to review their activities. Again, they will be the primary persons enforcing the bill.

The other question that arises in my mind is how would this new officer of Parliament work in conjunction with these other mechanisms that we have? An alternative might be to see whether the mechanisms that already exist could not be used. I do not know whether the Canadian Human Rights Commissioner really has the expertise to deal with this. Perhaps the intelligence review committee or other bodies that already exist could, within their mandate, review some of these matters. I like to be practical about things and not set up a new a commission or body every time we pass a new statute, if possible, but rather try to see what we already have.

I do think that it is important that there be effective oversight. The provisions for annual reporting are quite useful. It will be important. The three-year review of the entire bill will be important as well. As senators know, when there are parliamentary reviews of that type, they are often quite significant and generate useful analyses.

I do not have a strong view one way or another. I have some questions about how it would work. I wonder whether we could not build on existing institutions and review mechanisms.

Senator Bryden: We have had before us one officer of Parliament, the Privacy Commissioner. When asked a similar type of question, but only as it related to his role, he indicated that the creation of a supervisor to do what he does, if that is part of what this overriding person is, would create an entire new bureaucracy. If it were basically to do the same thing as he does, that would be redundant. I think that he said that one is redundant and the other is unacceptable.

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I do not know whether it improves the situation if you reach into four people and you choose one office to which the others would report.

It might possible to enhance the authority and the responsibility of one group through their legislation. It could be SIRC, the privacy commission, the information commission or even the human rights.

Mr. Monahan: The advantage in having those bodies involved is that while a report from the minister or ministers is useful, that will be the government's view. The advantage of someone like the Privacy Commissioner or the independent intelligence review committee is that it will test that to some degree and force the minister to justify the views that are taken. There is merit in having those particular institutions that we already have to play a role in reporting on how this bill is impacting on their various areas of expertise and responsibility.

(Take 1620 Follows - Senator Kelleher: I will follow on Senator Bryden's question...)

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(1620)

Senator Kelleher: I will follow on Senator Bryden's question, specifically concerning clause 83.31 and the reports of the Attorney General and of the Solicitor General. Earlier you said, and I believe the words you used that caught my attention were: "a robust review process already in place by virtue of the amendments."

When the Senate was preparing its report on pre-study and recommended an officer of Parliament, it was because of a desire to have someone at arm's length from the government -- the executive, i.e. the cabinet -- to report to Parliament directly.

When one looks at the content of the reports as outlined in clause 83.31 and the various new subclauses, it consists of nothing more than a statistical list. It does not tell us anything about the cases; it does not tell us how many were rejected; and it does not tell us whether they were serious or anything of that nature. That bothers me. It is not helpful, and it is just a statistical monitoring.

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More importantly, they are reporting on their own activities that they have caused to occur during the year. Human nature being what it is -- If I had, during my tenure as Solicitor General, fouled up, I would not be too anxious to have that in my report. Hence, I am concerned about how effective this will be in helping in this area. I agree with your suggestion that we take a look at other existing functions or commissions so that we do not build a bureaucracy unnecessarily.

I am somewhat familiar with SIRC, having been under their supervision for a couple of years. They have a bureaucracy that has some experience in these areas in respect of the kind of reporting that would be required and what to look for. They would probably be dealing with the various areas that SIRC has knowledge about.

I am concerned that what we have now is really not all that strong. Do you have comments on those thoughts?

Mr. Monahan: Senator, you make an excellent point about the value of having an independent body -- independent of the government -- to review these reports and to review these activities generally. The information that we have will be useful to us because we will at least know the extent to which these powers are being used. They must tell us how many cases there are; and they must tell us how many cases there are in which, for example, persons are required to enter into recognizances. We will also have those reports by province, because the Attorney General of each province shall publish reports. That information will be of use and of value to see the extent to which these powers are being used. For example: Are thousands of people being rounded up and forced to enter into these recognizances? If there are, why is this being done?

The information will allow a kind of public scrutiny of the manner in which these powers are exercised. I agree with you that it would be useful to have oversight by an independent body, institution or entity. I am not certain that you need to create a new body.

Senator Kelleher: I agree with you and the good senator on the other side on that point.

Senator Andreychuk: Mr. Monahan, you opened your remarks to us today by saying that there are no liberties without security. I must admit that I was somewhat surprised at that opening. Having worked, not extensively but somewhat, in the human rights field, I did not believe there was a hierarchy of

human rights. There is an interplay between human rights. To what extent do we infringe on liberties to gain some security?

As I understand Bill C-36, we do not have a degree of security in any way. We have a measure of more security, we hope, than that. To what extent are we trading off? I did not realize that you might have characterized this: that security trumps everything else in the human rights field. That certainly was a comment that some countries would use as their defence for not giving human rights a priority in their country. They would say, "But you see, we have a security issue, and so we need all these rights, police powers and control mechanisms. We cannot possibly give the measure of liberty and individual rights because we have a security issue."

Those who worked in the human rights field fought back to say that it is always a competing test between all of these rights and the right balance and proportionality, and to what extent one intrudes on human rights. It should be the least in order to get the most for security. Could you comment on why you characterize it so absolutely, although that has not been my understanding of our approach?

Mr. Monahan: Certainly. I did not mean to give the impression that security trumps all or that security always trumps liberty. I meant to say that security, however, is in some senses a pre-condition to liberty. What I mean by that is that it is not the case that by enhancing security, we necessarily take away from liberty. We could, but I am not saying that every time we want to enhance security we do not want to hear about liberty. I am saying that, if we do not have a minimum level of security in society, there is no liberty.

In other words, a free and democratic society -- a society dedicated to the rule of law -- assumes that citizens have a minimum level of security to go about their daily lives and to be free of terrorist attack. Civil society assumes that there is a basic protection and security of individuals such that terrorist activity, if it were allowed to go unpunished, would be a threat to liberty, not that by enhancing security we are necessarily taking away from liberty. That was my simple point.

I agree that, at some point, we can go too far in taking measures in the interests of security. We must also recognize that the failure to take measures to protect security can also involve a diminution of our liberty.

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I do not see any reason why taking measures to enhance human security can detract from liberty. It can reinforce the basis of a free and democratic society, which is necessary to have liberty.

Senator Andreychuk: Taking into account the *Oakes* case that everyone is quoting and the proportionality analysis, it seems that it is a constant struggle. We do not know what we are facing. The minister has said that there is a threat facing Canada. We have not had the direct assault, but we certainly know that we could have, after the events of September.

(1630 follows -- Sen. Andreychuk: This bill is coming forward.

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(Senator Andreychuk continuing)

This bill is coming forward with that in mind. We should protect ourselves and that will have some effect on some of our liberties as the bill is put into place.

Since we do not know what the threat it. We do not know, in your words "what the necessary tools" may be. It is still unknown. Perhaps the minister knows, we do not know, as to what we are facing. This is their best effort at this point to marry up the necessary tools with some changes into what we have known in some of our liberties.

This is very new and innovative. Would a sunset clause not be important because of that? Not, as you pointed out, from what the Supreme Court might say, but from the point of good public policy. It is reassurance to the people that we do not take this issue lightly, either the government or Parliament, and that we understand how significant this piece of legislation is and how it could erode our basic rights.

We should not be waiting until the court tells us whether it is the proper balance. Surely that is something that should be on our shoulders as parliamentarians constantly. The best way is to put our minds to it through a sunset clause and to review the entire concept. We are accustomed to the Emergencies Act, crisis and civil society. We are now saying that there will be an ongoing crisis, but we are not quite sure what kind.

Is this not, of all bills that we might ever have before us, showing the need to really snap Parliament's attention and keep the responsibility there?

Mr. Monahan: My question to you would simply be: What are the specific provisions in the bill that ought to be subject to a sunset clause? I cannot see that it is persuasive to say that this entire bill should be subject to a sunset clause.

The essence of the bill is to define terrorist activity. I regard terrorist activity as an assault on a free and democratic society. It is inherently inimitable to the liberty that we have in our society. It is appropriate, indeed necessary, to criminalize these activities. It is appropriate to not merely to criminalize them, but to put in place the measures to detect and prevent those activities from taking place.

I do not find persuasive the view that the entire bill should be subject to a sunset clause. I would rather say that one should take on a case-by-case basis the provisions of this bill. If we are particularly troubled or find that we are uncomfortable with particular provisions of the bill, then that would make a case that would be persuasive, potentially as to why a sunset clause would be appropriate.

The targeted sunset clause is appropriate. If there were other provision that were thought to be particularly troubling, then I would recommend that senators approach it in that way, and say that we will address these particular power to a sunset clause. I would not find a general sunset clause appropriate.

Senator Andreychuk: It is the accumulative effect of new provisions. All the provisions in this bill and the subsequent amendments in other acts are at issue. Perhaps, that has already hit a certain segment of our society.

Therefore, the harm that it could cause them and the fabric of our Canadian society could be rather pervasive.

We got the bill rather quickly for pre-study, and we did the best we could. I think it was a pretty laudable piece of work. Other issues have come up now that we have looked at the bill on a clause-by-clause basis.

We had lawyers as witnesses who said that we have defined terrorist activity to mean in whole or in part for a political, religious, or ideological objective or cause. You pointed out some of the things that the United States is doing now that cause us great concern on the military tribunals, et cetera. However, in their initial

legislation, they did not go to identify political, religious or ideological purposes as being part of what will be defined as terrorist activity. They fear that it would allow, particularly in these investigative hearings, great liberty to start questioning people about their religious beliefs, and that this is really not warranted.

Perhaps, we have put in an element into the crime that we should not have. We should have looked at the bill, not the religious belief. What do you think of that?

Mr. Monahan: I see that provision as a limiting provision. That is to say, it is an additional element of the offence that must be proven by the Crown. If that were not there, it would be easier to obtain a conviction or to take other action based on this definition.

People say is it should be deleted. There should be no requirement to prove that. I have no particular problem if that were done, but its presence makes it more difficult to prove the elements of the offence than would be the case otherwise. It puts a burden on the government and on the Crown that might be quite difficult for the crown to discharge.

In that sense, one can see that it will be an opportunity for defence lawyers to make arguments to avoid conviction. I would have thought it passing strange that defence lawyers who will be vigorously using this clause would be telling you that it should be taken out.

Senator Andreychuk: Their point is, and I understood what they were saying, is not so much a defence in court but in an investigative phase. If we believe in a pluralistic society and religious freedom, why should prosecutors have the right to ask, "Do you pray"? What is your religion"? How are we facilitated in curbing terrorist activity by going after religion or politics as opposed to the act of terrorism?

Mr. Monahan: The acts of terrorism that we have seen on September 11, and against which this bill is targeted, are activities that are somewhat different than activities that we might have seen in the past. That is to say, those acts seem to be motivated by these political, religious or ideological purposes. They seem to be motivated not to achieve some instrumental or tangible political objective, but rather to simply exact revenge or impose punishment on some other person who is seen as evil. That does seem to be a distinctive feature of the terrorist activity that we have seen in the recent past.

The argument could be made that that may be so, but we should not identify that because that may allow this inappropriate questioning. I am not sure what to make of that. The existence of this element of the offence makes it more difficult to prove the offence. When I appeared at the House committee, the questioning that was raised there is that this should be deleted because you would never be able to prove this. It would never stand up.

I do not have a strong view in favour of that particular element of the offence. It would be appropriate to have deleted it. However, neither do have I a strong view against its presence in the definition.

Senator Andreychuk: What troubles me is that if it is an element of an offence, and I may share the same beliefs and practices which are a part of an element, then innocent society doing exactly that element, that are not terrorists, are being tarred by the same brush.

(Take 1630 Follows in French - Senator Poulin: D'une part, vous avez parlé des mesures…)

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(après anglais)

Le sénateur Poulin: D'une part, vous avez parlé des mesures pour protéger les libertés de toutes les collectivités au Canada. D'autre part, vous avez parlé des mesures qui doivent être prises pour prévenir les actes de terrorisme. Lorsque la ministre de la Justice, Mme McLellan, est venue témoigner devant le comité, elle a utilisé deux mots pour résumer l'objectif de ce projet de loi: «effectiveness» et «fairness». Vous avez très bien dit que le monde entier a été chaviré le 11 septembre. Les choix étaient difficiles à faire et notre gouvernement, tout en voulant être prudent, a été très efficace. Il a présenté un projet de loi extrêmement important pour s'assurer qu'au Canada, ces événements ne se produiraient pas.

On a parlé de l'importance des rapports qui seront faits au Parlement, à chaque année, par les agences responsables des questions de sécurité, de vie privée et de droits de la personne. Dans trois ans, il y aura un examen du projet de loi C-36. Il peut se passer beaucoup de choses hors de notre contrôle d'ici là. Quels seraient les principaux éléments sur lesquels nous devrons nous pencher, en tant que législateurs, lorsqu'on étudiera les rapports annuels et qu'on effectuera cet examen afin de s'assurer que l'esprit du projet de loi C-36 a été respecté?

(Mr. Monahan: What will be important is not so much...)

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(Following French)

Mr. Monahan: What will be important is not so much the terms of the statute itself, but the manner in which it is being implemented. That is the information in those reports that will be tabled by the attorneys general and the solicitors general, and that will provide us with the raw material to make an assessment. The essence of the question, or the inquiry, is: Has the bill been administered in accordance with its objectives, which is truly aimed at terrorist activity and the elimination of terrorist activity? Or, as Senator Andreychuk said a moment ago: Have the authorities abused or utilized those powers in ways that were not intended, for example as a mechanism to target particular minority groups or to discriminate against particular Canadians or groups of Canadians?

As well, an important element of this will not only be the human rights perspective, but the security perspective itself. Minister McLellan said that the objective is to counteract terrorist activity. What evidence is there of the legislation achieving that objective? What evidence is there of that terrorist activity? We know there has been terrorist activity occurring in this country, although not necessarily targeted here. Some of it has been targeted here, but the nature of its occurrence here has been to plan activities that will occur elsewhere.

An important element of the three-year review will be the nature and extent of terrorist activity that has been occurring in Canada, and the effectiveness of these tools in actually identifying and preventing terrorist activity.

I would have thought that, in looking at the two issues -- effectiveness and fairness -- we would want to know that they have done what they were intended to do. As well, we would want to know to what extent we can say that we are dealing effectively with this terrorist threat. I believe it is a credible and real threat.

The Chairman: Senators, we do not have to wait for three years to have that review. If we see from an annual report that there are disturbing numbers of arrests, hearings or disturbing circumstances surrounding them, we can, as a Senate committee, begin that review as quickly as those issues would warrant. That is another part of the parliamentary oversight.

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Senator Joyal: Mr. Monahan, I wish to bring to your attention that, even though the administration of justice is under the jurisdiction of the provinces, there are ways and means to invite provinces to ensure that a minimum of control over the implementation of the Criminal Code provisions, especially, or other federal statutes can be maintained. This afternoon in the chamber, we adopted two amendments to the anti-gang legislation submitting the authorization for the designation of public officers to commit acts that would be otherwise criminal, subject to civilian oversight; and inviting the Lieutenant Governor in Council in any province to designate a body or person that could act as civilian oversight to review the conduct of public officers would be committing an act that would be otherwise a crime. There are ways to address that issue. I wanted to bring that to your attention, because it is so recent.

Going back to a point raised by Senator Bryden and others, I would like to bring the question of the Parliament of Canada's role in the implementation of the objectives of this bill. You wrote last October, and I quote your article:

P6xSome critics, particularly in recent years, have argued the Charter transfers too much power from elected politicians into the hands of unelected judges. In fact, however, the Charter has represented a very modest check on the power of governments. Canada's parliamentary system lacks the political checks and balances found elsewhere, since a majority government has virtually complete control of the legislature. End quote

That statement, or judgment, is very encompassing. You are a law professor and so you can certainly draw your own conclusions. You also took part in our discussion two years ago on the clarity bill. Now, reading what is in the bill, which is a laudable initiative of the government to introduce some kind of check on the use of those extraordinary and exorbitant powers, are they not missing the mark on the kind of checks and balances that you claim do not exist in our system? In other words, because clause 83.31 deals only with the investigative hearings, preventive detention and recognitions with conditions, those are the only three elements of the bill where statistical information is provided. Should we not follow along the lines of Ms Weinrib's article that suggests developing a model after the Emergencies Act whereby there is a specific scope to the parliamentary review; a mechanism that is clearly spelled out; and the provision of officers of Parliament, such as the human rights commissioner. In that way, perhaps we may not need to appoint another officer for this.

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(1650 follows -- Sen. Joyal continuing: We might need to beef up...)

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(Senator Joyal continuing)

We might need to beef up one that is already there. I am left concerned considering your perception of what is the Canadian parliamentary system of checks and balances and what we find in this bill.

Mr. Monahan: Those comments were directed generally at the operation of government and the relationship between the executive and the legislature, and not directed particularly at this bill. I do not think we can try to deal with those larger issues in the context of this bill.

Senator Joyal: This is an example.

Mr. Monahan: With the greatest of respect for Ms Weinrib, I understand the true that there needs to be enhanced review. I think that is generally important and appropriate. I am not sure that the mechanisms for review in the Emergencies Act are appropriate here.

A mechanism should include that there are annual reports or reviews undertaken with all the information supplied by the government. I agree that some kind of review mechanism by independent officers of Parliament, such as the Privacy Commissioner, would be an important addition.

I am not sure that the sort of ongoing review mechanisms in the Emergencies Act are really appropriate here because we need to allow the police forces to go about their business. We must ensure that they are, from time to time, reporting to us and letting us know what is happening. I am not sure that it is practical, frankly, to have the sort of ongoing types of mechanisms that you would have in the Emergencies Act, which, after all, is, meant to deal with very short- term situations. It is meant to deal with extreme crisis situations in which it is appropriate to have that kind of intensive review. I am not certain that it is appropriate in this particular instance.

Senator Joyal: I did not say we should borrow directly from that act. I said that there is a model there with some lessons. It shows that because there are

exceptional powers, there is a situation that needs to be addressed. We are going beyond and above what traditionally we have been doing in Canada.

Considering, as you said, the lack of political checks and balance in a system that is tightly controlled by the majority government -- and I am not saying it is bad in itself, it is a different system -- should we not then be more cautious to make sure that Parliament is assisted with the necessary information and capacity to investigate and review any proper context power that is to a point shock the intelligence of Canadians who are concerned with human rights?

We now live under the apprehended threat of a terrorist attack. We know the media are pretty good to maintain that aura. One day we will find out, as we did in 1970 or in the last world war, that that might not have been that important. History will be written in the future. We might wake up and say, "What have we been doing to the Canadian system of government in terms of criminal power vested in the hands of the national defence minister, Solicitor General and Minister of Justice?"

That is essentially what I think is the proper way of addressing, in a political system of checks and balances, to maintain the kind of proportionality that the Chief Justice of the Ontario Court mentioned this week. That is the characteristic of our system of government.

Mr. Monahan: I hope that you are right that we will all wake up one day and say that this is not as serious as we thought it was. I agree in substance with your view. I do not disagree. I think Senator Bryden and Senator Andreychuk made excellent points. Some effective mechanism of oversight through officers of Parliament or other independent officers, review mechanisms that already exist can be utilized.

My point is that I am not sure that we need to create an entirely new body. I am not sure that I fully understand the example to which you just referred to me. It involves the lieutenant Governor in Council of the province establishing its own mechanism. It would not an officer of this Parliament, but an officer or body in the province. We can build on existing institutions or modify slightly existing institutions to do that.

In substance, senator, I agree with you. I think that this would be an additional element that would be a benefit to Canadians.

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Senator Joyal: Thank you Mr. Monahan. I hope that you will continue to write about the Parliament of Canada.

The Chairman: Honourable senators, this brings to an end a full and useful day of discussion. I thank you Mr. Monahan for taking the trouble to come here. You are always welcome. Have a good trip home.

The committee adjourned.