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THE SPECIAL COMMITTEE ON THE SUBJECT MATTER OF BILL C-36

EVIDENCE

OTTAWA, Monday, October 22, 2001

The Special Committee on the Subject Matter of Bill C-36 met this day at 9:00 a.m. to examine the subject matter of 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 and explore the protection of human rights and civil liberties in the application of this Act.

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

The Chairman: Honourable senators, I call this meeting to order. This is the first meeting with witnesses of the Special Senate Committee on the subject matter of Bill C-36, the Anti-terrorism Act. Before we start, it might be helpful if I said a few words about the nature of these committee hearings for those who may be watching television.

We are here with this legislation because of the tragic events in New York, in Washington, D.C., and a field in Pennsylvania on September 11 and all that has happened since. This bill deals with a wide-ranging Canadian response to those events. It is now before the Justice Committee of the House of Commons. When it passes all stages in that chamber, it will come to the Senate for formal Senate debate and hearings.

Because of the unusual importance of the legislation, the Senate today is beginning a special process rarely used called pre-study. This will enable us to hear witnesses and prepare advice and recommendations, in advance, to the House of Commons committee, which hopefully will be reflected in the legislation when it comes officially to the Senate. After senators debate the bill, our committee will see how well we did with our recommendations, fully examine the bill clause-by-clause and either recommend approval or further changes in our final report to the Senate.

Our hearings will be intensive in the days ahead. We begin this morning, with the minister who is responsible for this legislation, Justice Minister Anne McLellan, and officials from her department who have played a key role in

drafting the bill, Richard Mosley, Assistant Deputy Minister, and Donald Piragoff, Senior General Counsel, both representing the Criminal Law Policy Section of the Department of Justice.

The bill is complex, so we want to hear our witnesses fully and enable senators to ask their questions. To keep the ball rolling, our Deputy Chairman Senator Kelleher, himself a former Solicitor General, and I will not hesitate to remind each of you to be as concise as possible with both questions and answers. Please begin, Minister McLellan.

(0910 follows, Ms McLellan, in French) GM/October 22, 2001

(Take 0910 Begins with Ms McLellan continuing in French)

AD / 22-10-01

(après anglais)

L’honorable Anne McLellan, ministre de la Justice et procureur général du Canada: Bonjour mesdames et messieurs les sénateurs. Il me fait plaisir de comparaître ce matin pour entamer vos discussions sur le projet de loi C-36. Je voudrais d'abord vous remercier d'avoir pris ce projet de loi en mains de manière très sérieuse.

(Ms. McLellan: Since the introduction of the bill one week ago...)

(anglais suit)

(Following French -- Ms McLellan continuing)

Since the introduction of the bill one week ago, it has received considerable attention. The quality of the debate in the House and in the Senate speaks to the real concern that we all share about the threat of terrorism. Without being alarmist or dramatic, it is fair to say that September 11 was a turning point for all free and democratic nations. As with every other democratic nation, we were forced to re-examine the measures in place to protect our national security and, by extension, the security of each and every Canadian. We have recognized the critical importance of strengthening, in as directed a manner as possible, our legislative and law enforcement tools.

(French follows/ McLellan continuing)

(après anglais)(Mme McLellan)

Avant de commenter sur les mesures particulières, j'aimerais souligner l'engagement de ce gouvernement dans la lutte contre le terrorisme. Nous ne devons pas perdre de vue la nature très importante de notre objectif.

(Ms. McLellan: As such, Bill C-36 is intended to respond...)

(anglais suit)

(Following French/McLellan continuing)

As such, Bill C-36 is intended to respond to a serious threat to our society. Bill C-36 is one element of this government's anti-terrorism plan. The bill includes the following elements: A process for establishing a list of terrorist groups; a definition of terrorist activity; comprehensive new terrorism offences; circumscribed new tools, such as preventive arrest and investigative hearings; and new measures to deal with discrimination and hatred. There are also many other new measures, including amendments to the Official Secrets Act, the Canada Evidence Act, the Federal Court Act, and others. However, today I intend to focus on the central elements of Bill C-36.

Before I begin speaking specifically about the different elements of this bill, I would first like to discuss with you the justification for a bill like this one. As many honourable senators know, currently in the Criminal Code we have hijacking, sabotage and murder offences. While they remain available to us, terrorism is a special threat to our way of life, and it is with this in mind that Bill C-36 focuses on acts of terrorism. As the Prime Minister stated in the House:

> It has become clear that the scope of the threat that terror poses to our way of life has no parallel. We, in North America, have been extraordinarily fortunate to live in peace, untouched by attack. That has changed.

I believe honourable senators will agree that, when we are talking about people who would give up their own lives to kill thousands of innocent people, criminal sanctions may not be enough. However, for those who are involved in a network that assists terrorists to enable them to carry out their horrific acts, deterrence can be effective, and prevention is key. We must be able to detect terrorists and their supporters early. We must be able to break up terrorist organizations early. We must be able to stop their financing early.

Honourable senators, the way I describe this, which I believe is readily understandable by most Canadians, is that we must have laws, intelligence gathering and investigative tools that stop the terrorists from getting on the planes. If the terrorists get on the planes, it is too late. We have failed.

Therefore, the approach we have taken in this bill is directed at cutting off the terrorists from their financing and property, with a view to seriously impeding them from carrying out their intended acts. The approach we have taken in this bill

is a preventive one, because punishing terrorist crimes after they occur is simply not enough.

We must be able to disable organizations before they are able to put hijackers on planes, or threaten our sense of security, as we have seen in recent days with the scare of anthrax. We cannot wait for terrorists to strike before we begin investigations and make arrests where there is a reasonable suspicion that a terrorist act will take this. To wait would be irresponsible.

The anti-terrorism proposals included in this bill represent fair, measured, effective and, in some cases, aggressive improvement to our legislative framework to help combat terrorism. Let us now look at some of the key elements of Bill C-36.

A first step in disabling and dismantling terrorist groups is to identify them. Bill C-36 -- and I refer you in particular to clause 83.05 -- sets up a distinct procedure to enable the Governor in Council to create, by regulation, a list of entities that have carried out, attempted, participated in or facilitated terrorist activities, or who are acting on behalf of such entities, or at their direction or in association with them.

This list supports the application of other provisions in the bill, including the new anti-terrorism offences, the new offences relating to financing of terrorism and provisions relating to the freezing, seizure and forfeiture of terrorist properties. So that we do not sweep up perfectly legitimate groups and organizations, this listing procedure must be and has been carefully designed. The bill requires that the Governor in Council have reasonable grounds to believe that the group meets the criteria with respect to terrorist activity in order to be listed. It is important to keep in mind that being on the list does not itself constitute a criminal offence. Where offences are charged, each of the elements would still need to be proven beyond a reasonable doubt.

Madam Chairman, I know that my colleague, the Solicitor General, will be with you later today. The Solicitor General's plays an absolutely key role in the listing of designated group, and I know that he will talk to you in some detail this afternoon about the procedure outlined in the bill.

Another core element of the bill is the definition of terrorist activity. Many of the other elements of the proposed legislation are directly tied to the concept of terrorist activity, including the establishment of the list of terrorist groups and new

terrorism offences. There are significant legal consequences attached to terrorist activity, so it is important that we set out clearly what we mean by that term.

The definition in the bill is detailed. We have directly confronted the challenge of defining the target of this legal regime. Some parliamentarians, senators and the media have expressed some concern with the definition. While we believe the definition is appropriate, I urge this committee to consider it carefully.

The definition first makes reference to offences that are set out in the 12 international conventions relevant to terrorism. This is one form, and an important form of terrorist activity. However, a general definition is also provided. It covers acts that are committed in whole or in part for a political, religious or ideological purpose, objective or cause that are intended to intimidate the public or force governments to act, and which are intended to cause serious harm.

Harm includes causing death or serious bodily harm by the use of violence, endangering a person's life, causing a serious risk to the health and safety of the public, or causing substantial property damage likely to result in harm to persons. Thus there is a clear connection to acts of violence, especially threats to the Canadian public.

The intended harm can also include acts intended to cause serious interference with or serious disruption of an essential service, facility or system, but here it must be note that we have added an important safeguard. This definition of terrorist activity does not apply to lawful advocacy, protest or dissent, or stoppage of work that does not involve an activity that is intended to cause other types of harm, related to violence, which I have described earlier. Let me be clear, the definition targets terrorist organizations that intend to cause terror. Violent activity is not described or defined in this legislation; it is terrorist activity.

The bill goes on to establish comprehensive new terrorism offences under the Criminal Code. There are distinct offences of participating, facilitating, instructing and harbouring as well as extensive offences with respect to the financing of terrorist groups. For example, with respect to participating, it will be an offence to recruit an individual to receive training with a terrorist group.

I would like to observe as well, that various offences, including those relating to facilitation and instruction of terrorist activity are specifically defined to be crimes, regardless of whether the terrorist activity facilitated or instructed is finally carried

out. This return to my earlier point about the preventive focus of the legislation: We must stop the terrorists getting on the planes.

One of the elements of the bill that has received considerable attention is that of preventive arrest. Under this provision, if a police officer believes, on reasonable grounds, that a serious terrorist offence is about to take place, and suspects, again on reasonable grounds, that the arrest of a particular person would prevent it, then that person can be arrested, to be brought before a judge.

The object of bringing the person before the court is for the court to consider whether restrictions should be imposed on the person's movements and associations. The court may impose such conditions or may release the person without conditions. If the person refuses to accept conditions, the court may commit him to prison for up to 12 months.

Some have inappropriately likened this power to those of the former War Measures Act. I wish to assure the members of the committee, and all Canadians, that the preventive arrest measures we are proposing under this bill would be available only under strictly defined conditions and would subject to numerous procedural safeguards. Save for emergency circumstances, the consent of the Attorney General would be required as a prerequisite. The person must be brought before a provincial court judge within 24 hours, or as soon as possible, and a maximum further period in detention of 48 hours is allowed, following appearance before a judge, about only after appearance before a judge.

Under the War Measures Act, by way of comparison, a person could be detained for seven days, prior to being brought before a judge, and detention could continue for up to 21 days. Rather than being similar to provisions under the War Measures Act, the provisions of this bill are more accurately compared to existing provisions of the Criminal Code relating to arrest without a warrant of a person who is about to commit an offence and subsequent release without a recognizance. We are extending and expanding these concepts under the bill for the special purpose of preventing terrorism.

Honourable senators, other countries are looking at the preventive arrest mechanism or already have it. Our friends in the United Kingdom have a preventive arrest mechanism. The United States is proposing a preventive arrest mechanism under which they will be able to detain for up to seven days. The Australians are looking at a preventive arrest mechanism in their proposed legislation. This is by no means novel in the sense of other countries. We are all

working together to determine what is required to prevent terrorists and their horrific acts, such as those on September 11. Canada is working within the principles of the Charter of Rights and Freedoms along with the United States Constitution in the United States and the European Convention in the case of the U.K. We are working within that value structure to do that which we think is reasonable and fair to provide Canadians with the level of security and safety, that it is the obligation of any government to provide.

Another widely debated element of the bill has been the provisions on investigative hearings. There are concerns about the power to compel testimony in these hearings. I wish to assure the committee that, here again, we have included numerous limitations and safeguards. While a person may be ordered to provide evidence by the judge, privilege and other laws relating to non-disclosure would continue to apply, as would the right to counsel. Also, the evidence will not be used against the person in future criminal proceedings. It is important to note that there is an existing procedure under the Mutual Legal Assistance Act that already allows us to do this in Canada to gather evidence for other countries. The United States has investigative grand juries that perform evidence-gathering functions.

The power we are proposing is not unknown under the law of Canada or under the law of the United States. We are extending the law in this area for the special purpose of terrorist investigations and subject to appropriate safeguards and limitations.

Legislative changes would also be made under the bill to allow us to better address discrimination and the communication of hatred within Canada. I wish to emphasize the point made by the Prime Minister in the House of Commons last week that discrimination against persons of any religious, racial or ethnic background will not be tolerated.

Bill C-36 introduces amendments to the Criminal Code that will allow the courts to order the deletion of publicly available hate propaganda from computer systems such as an Internet site. The Canadian Human Rights Act will be amended to clarify that the communication of hate messages using new technology, such as the Internet, constitutes a discriminatory practice. Criminal Code amendments would create a new offence of mischief, motivated by bias, prejudice or hate, based on religion, race, colour, national or ethnic origin, committed against a place of religious worship or associated religious property. This is not about freedom of expression. It is about tolerance and what is appropriate and reasonable in a free and democratic society.

Some have suggested that the provisions of the bill are not strong enough. It has been suggested that we create an offence of membership in a terrorist group. As you know, we are not proposing to do this. As discussed during the he debate on Bill C-24, dealing with organized crime, it would be exceedingly difficult to define membership. Also, the Charter risks of criminalizing membership would be high. Moreover, we question the necessity of a membership offence, given the broad ambit of the participation offence that we have provided under this bill, similar to the approach that we took in Bill C-24 on organized crime.

I will now address the general question of respect for the Charter of Rights and Freedoms. I wish to assure this committee that this bill has been subject to a thorough review on Charter grounds, and that its measures have been designed so that they will respect the values embodied under the Charter, and survive legal challenges. We all know that there will be challenges; no one should be surprised or alarmed by that. These measures have been developed for a concern for what has been referred to as "human security."

My colleague in the House, Irwin Cotler, before becoming a Member of Parliament and noted constitutional scholar, spoke compellingly about the importance of human security and that one should not think that the Charter of Rights and Freedoms is in any way antithetical to the paramount objective of any government to provide human security. One cannot have human security without respect for rights and freedoms, or the key element of persons feeling safe and being reassured that their governments are doing all that they can to keep them safe and secure.

We have tailored specific measures to the objective of addressing terrorism and improving national security. We have taken into account international law, and the laws of other countries, such as the United States and the United Kingdom, and we have adopted safeguards within individual measures.

Finally, I would point out a provision at the end of this bill, concerning review of these measures. This issue has received some considerable attention, as you might imagine. Clause 145 of Bill C-36 requires that three years after this bill receives Royal Assent, that a comprehensive review be undertaken of its provisions and operation. A committee of the House of Commons, the Senate, or possibly a special joint committee, would have one year to complete this review.

Only after an appropriate period of time -- we think three years -- will we have some evidence of the effectiveness of these major new laws. Unfortunately, we

cannot expect that terrorism will have disappeared in only three years, and that must be emphasized. It would be wonderful if we knew definitively that by working together globally we could eradicate terrorism within a finite period of time such as three years. We all know that that will not be the case, in spite of the best efforts of this country and other countries working together.

Although terrorism will not be eradicated at the end of three years, I do think that three years will be sufficient time to see how this law and the laws of other countries are operating. A thorough review at the end of three years would be beneficial for everyone in order to take stock of whether there continue to be gaps in our laws and whether refinements can be made to the law.

We believe that a three-year review is the appropriate safeguard mechanism. I also understand that there has been much discussion here in the Senate and elsewhere about other mechanisms, such as a sunset clause for a few discrete sections of this legislation. The committee of the House of Commons raised that issue with me. I said that I would look forward to hearing their advice and recommendations on that issue, as I will look forward to hearing your advice and recommendations on review mechanisms and whether three years is appropriate or whether some other mechanism for limited sections of the bill might be appropriate.

I welcome the committee's review of this bill. Its provisions are worthy of close scrutiny and debate. I also welcome consideration of possible refinements of its provisions. We must ensure that the bill is the most fair and effective response possible.

In conclusion, two general principles or concepts guided the work of the committee on national security and that of my policy people and those of other departments, my Charter analysts and my drafters. We want every provision to effectively add to the arsenal of tools necessary to detect, break up, disturb, identify and root out those who committed the horrific acts of September 11 and those who support them. It must also be fair, and fairness includes the broad range of Canadian values as well as the rights guaranteed in the Charter of Rights and Freedoms. We must, however, keep in mind that none of those rights are absolute and that under section 1 of the Charter any limit that is demonstrably justified in a free and democratic society is in keeping with Canadian values.

With that, I will conclude. I am sure that you have many comments and questions about the challenge faced by the entire civilized world.

The Chairman: Thank you very much. Indeed, colleagues on both sides do have questions.

Senators, I will recognize senators for one question and a supplementary on a first round before proceeding to a second round in order to ensure that everyone has the opportunity to get the information they want.

Senator Kelleher: Madam Chairman, could you outline the procedure for questioning by people who are not members of the committee?

The Chairman: Certainly. I will offer those who are not members of the committee the opportunity to ask a question at the end of the first round. Depending upon the time available, the second round would be focused on members of this committee. I do welcome those who are not on the committee and certainly want to give them the opportunity to ask questions.

Senator Lynch-Staunton: Thank you, Minister, for your presentation. I want to emphasize, as did the chairman, that this is a pre-study and that the bill will be given the same thorough study as if we had not done a pre-study. It should not be assumed that we are accelerating the process by this unusual pre-study.

That being said, I was very disturbed to read in the *Gazette* this morning the headline, "No expiry date on anti-terror bill: PM". The story out of Shanghai reads:

> Prime Minister Jean Chrétien has put a quick end to Justice Minister Anne McLellan's musings that she might alter her sweeping anti-terrorism bill to include a provision that some of the harshest measures would have to be re-introduced after a certain period is still needed.

The story goes on to say that the Prime Minister will not hear of a sunset clause or its equivalent.

Does this put an end to the possibility of you carrying on with your musings?

Ms McLellan: No. I muse on a regular basis.

Senator Lynch-Staunton: You have been musing out loud on a very serious topic.

Ms McLellan: Yes. In fact, the Prime Minister himself has made it clear in the House of Commons that we both want to hear the advice and recommendations of both the House of Commons committee and the Senate committee. The Prime Minister himself in the House, in response to questions, has talked about the possibility of various kinds of review mechanisms, each of which will have to be considered very carefully.

I stand by what I said this morning, which is that we want to hear the advice and recommendations of both committees on whether you believe the appropriate review mechanism is in this legislation, whether it is for the appropriate period of time, and whether that mechanism should apply to all provisions, or whether you wish to offer us advice and recommendations in relation to general review of the legislation in its entirety or perhaps some other mechanism in relation to one or two discrete provisions. I offer that only as a suggestion.

However, the Prime Minister and I are both very open to hearing the advice and recommendations of the committee.

Senator Lynch-Staunton: You are speaking only of a review mechanism, not of an absolute deadline for one or more clauses in the bill.

Ms McLellan: We expect both committees to give us their best advice and recommendations in that regard. The Prime Minister, I, the committee on national security and the entire government are all open to carefully reviewing those recommendations. You will have heard from a wide variety of people, you will have thought about this long and hard, as the House committee will have. No one is suggesting that we do not want your best advice and recommendations in relation to all aspects of this legislation, both substantive and procedural.

Senator Lynch-Staunton: Is the Prime Minister's definite rejection of a sunset clause official government policy?

Ms McLellan: The Prime Minister and I have been absolutely clear that we want the best advice and recommendations from both committees.

Senator Lynch-Staunton: That does not answer the question. Is this headline accurate are not?

Ms McLellan: I have not read the paper. I do not know.

Senator Lynch-Staunton: You must have been in touch with the Prime Minister when you heard on the radio this weekend that he was contradicting you.

Ms McLellan: No. What I know is what the Prime Minister said in the House, that he is open to the advice and recommendations from both committees. I have not heard otherwise from the Prime Minister and I do not expect to hear otherwise from him.

Senator Lynch-Staunton: In the past, we have received a number of bills that have been immediately challenged for possible violations of the Charter. Such bills include the Pearson Airport bill, some tobacco bills and, more recently, the legislation regarding the Nisga'a treaty, which is being challenged in British Columbia. This bill, as you said earlier, will be challenged, and you welcome the challenge.

I disagree with you in that regard. It is onerous to ask Canadian citizens with limited resources to take the time and money to go through the various court stages to end up, years from now, with or without a favourable judgment. Why does the government, as it did on the separation reference, not itself refer this bill to the Supreme Court? It is a unique bill. Perhaps the word "draconian" is too strong, but after the War Measures Act this bill is one of the toughest bills we have as far as federal liberties go.

I would have thought the Supreme Court would be agreeable to setting aside, for a period of time, its business in order to assess this bill from a Charter point of view, and we could then take it from there with its opinion. Now you tell Canadians that you will pass this bill without any major changes, and that they can go ahead and challenge it. What will that prove? Why does the government not heed its own responsibilities and refer the bill to the Supreme Court first and then, depending on its opinion, act accordingly?

Ms McLellan: First, we believe everything in this bill is constitutional.

Senator Lynch-Staunton: Your view is not unanimous. There are competent people who disagree with you.

Ms McLellan: We live in a free and democratic society where, in fact, debate and disagreement are touchstones of that free and democratic society.

Senator Lynch-Staunton: If you are so sure of your position, why not ask the Supreme Court to confirm it?

Ms McLellan: The Supreme Court of Canada has made it absolutely plain that it does not want such matters deferred to it. Keep in mind that this is criminal law, which is fact-based. The Supreme Court does not want to consider the constitutionality of Criminal Code provisions outside a factual, concrete context, where, for example, there is a police officer who picks someone up under the preventive arrest decisions. The Court will have before it a transcript of what that police officer believed, whether his belief suspicions were reasonable, and the actions of the judge who followed therefrom.

Senator Lynch-Staunton: There is no comparison.

Ms McLellan: The Supreme Court has said over and over again that it should not be abused in terms of deciding questions in the abstract when, in fact, it is possible to have a concrete, factual basis. These are specific Criminal Code provisions. If there is a factual basis that arises, and if someone thinks that he or she has somehow had a right violated, such a person can, as now, along with counsel, challenge it.

However, we believe that this legislation is demonstrably justified in any free and democratic society that is concerned about the human security of the people who live in that society.

Senator Lynch-Staunton: I disagree.

(French follows: Senator Bacon: Je partage…)

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(après anglais)

Le sénateur Bacon: Je partage entièrement les objectifs du plan mis de l'avant par le gouvernement dans le but de sécuriser la population en cette période de crise qualifiée d'extraordinaire. Cela entraîne l'adoption de mesures qui sont, elles aussi, extraordinaires dans le sens qu'elles sont inhabituelles.

Lorsque j'entends que l'on s'apprête à adopter des mesures de détention préventives qui retirent le droit au silence, que l'on songe à accorder des pouvoirs accrus en matière d'écoute électronique et d'élaboration de listes d'entités terroristes, je ne vous cacherai pas que j'ai un peu froid dans le dos.

Je ne souhaite pas qu'il y ait un lien possible à faire entre les mesures comprises dans le projet de loi C-36 et la Loi sur les mesures de guerre d'octobre 1970. C'est une page de notre histoire qui doit nous servir de phare afin d'être plus vigilants et sur nos gardes pour éviter des abus et des erreurs potentielles.

Contrairement à 1970, les droits humains sont protégés par la Charte constitutionnelle et rien dans le projet de loi indique que ces droits sont suspendus.

D'une manière plus spécifique, j'aimerais vous entendre sur les garanties de protection, par exemple sur les abus qui pourraient découler d'un élargissement des pouvoirs accordés aux forces de l'ordre, dont celui de mener des interrogatoires pour chercher et découvrir des preuves d'infractions criminelles et terroristes sans qu'un acte criminel ait été constaté.

Quelles sont les garanties que ces mesures seront utilisées de façon à éviter les abus dont plusieurs craignent?

(Mme McLellan: Let me say, first, that your point is well taken...)

(anglais suit)

(Following French)

Ms McLellan: Let me say, first, that your point is well-taken. Those who would make any comparison between this and the War Measures Act are very irresponsible. Such comparisons, in substance and in other ways, are unfortunate and need to be dealt with quickly to help Canadians and those who would make such ill-informed comparisons understand the differences in our society since then, including the Charter, but also to understand the key distinctions in the substance of this legislation.

In terms of specific safeguards, let us look at, if you want, the two areas that have created the most discussion. We knew that they would, of course. Preventive arrest and investigative hearings are not new. Investigative hearings are not new to our law; we carry them out for other countries. Preventive arrest is not new in other countries, although we have not had a similar provision in this country. However, those are the two areas that have stimulated the most discussion to date.

Investigative hearings deal with someone whom, for lack of a better expression, we would describe as a material witness. Anyone who wishes to bring someone before a judge must have my consent or the consent of the Attorney General to begin the process. The peace officer has to go before a judge, who will assess, first, whether he or she believes that there are reasonable grounds to believe that this would-be witness either has information in relation to a terrorist act that has been committed and that his or her evidence would lead to the identification of those involved in that act; or that a terrorist act will be committed and the individual in question has material evidence that would prevent that terrorist act from occurring.

A judge will make this determination. It is only after a judge has assessed the information provided to him or her by the peace officer that the judge could require a person be brought before him or her and be asked to testify.

In relation to that provision, we have ensured that the individual has the right to counsel throughout the entire proceeding. We have also ensured that there is protection against self-incrimination.

Keep in mind, senators, that there is no protection in our law against compellability. You can be compelled to testify. There is no fifth amendment in our constitutional jurisprudence. The constitutional jurisprudence speaks to the

right to be protected against self-incrimination, not compellability. Those are two profoundly different concepts in our law. The protection against self-incrimination continues and it is specifically set out in this legislation.

In relation to preventive arrest, again, any peace officer who wishes to exercise the power would first have to have a reasonable belief -- which is, of course, a standard well known in criminal law -- that a specific terrorist act was going to take place; not could take place, but was going to take place. The peace officer must then have a reasonable suspicion that the preventive arrest of the very individual involved is necessary to prevent that terrorist act from taking place.

Again, the officer requires, in most circumstances, the consent of the Attorney General to proceed with preventive arrest. In fact, the person will be brought before a judge within 24 hours. The judge, after hearing the evidence of the peace officer, can determine whether there is any necessity to hold the person for another 48 hours, for a total of 72 hours, whereupon, either at the end of 24 or 72 hours, the person will either be charged or released; and, if released, it will be with or without conditions, on his or her own recognizance, a concept well known in our law.

(French follows-- **Le sénateur Bacon:** Il semble qu'il soit nécessaire de nommer des)

(après anglais)

Le sénateur Bacon: Il semble qu'il soit nécessaire de nommer des juges additionnels. Vous parlez beaucoup de la responsabilité des juges aux fins de l'application de la loi. Pourquoi ne pas saisir cette occasion et faire comme en France ou ailleurs en Europe, et mettre sur pied un tribunal spécialisé pour les crimes terroristes? La création d'un tel tribunal contribuerait à éviter des excès et à accroître l'efficacité de la loi en plus de limiter à certains juges, l'utilisation de l'application de pouvoirs qui pourraient porter atteinte aux libertés fondamentales. Pourquoi ne pas faire une révision annuelle de cette loi plutôt que trois ans comme le prévoit le projet de loi C-36? Vous avez parlé tantôt de trois ans et de cinq ans et cela me dérange un peu. C'est une loi d'urgence et une telle loi ne doit pas durer trois ou cinq ans. Si nous pouvions considérer la clause crépusculaire ce serait véritablement une loi d'urgence.

(Mme McLellan: First, the basis of this legislation…)

(anglais suit)

(Following French)

Ms McLellan: First, the basis of this legislation is not an emergency. The basis of this legislation is the threat of ongoing terrorism. We saw a new and profoundly ugly face of terrorism on September 11. From that horrible event we have all learned some things about how we as societies need to move forward in terms of working domestically and with our allies to detect early terrorist activity, to break it up and to stop it.

The basis of this legislation is not emergency. The basis of this legislation is the criminal law power of the federal government. It is important for people to remember that we are not dealing with an emergency in the sense of some brief finite period of time -- if only that were the case. I know that Canadians, Americans, and others, would be very reassured by that. In fact, we know that the fight against terrorism has been a long one to date. It will continue to be a long fight for all of us. I do not think it would be fair to suggest to Canadians that it will be a short fight. That is why the Prime Minister indicated in his comments in the House that this will be a long fight. However, he also said it is a fight that, with our allies, we will win.

You talked about the possibility of a specialized tribunal, senator. We discussed that idea in the House of Commons committee last week. We are increasing the number of judges. We are opening the door to the possibility that the Federal Court could see the number of judges it presently has both in trial and in appeal increased to deal with the possibility of an increased workload. Whether or not that increased workload comes about, we do not know. Keep in mind that, at this point, no one has any way of knowing how many cases will be taken up in the coming months and years after this legislation is passed. What we have done is taken a preventive step in terms of the size of the Federal Court. We will change, in the act, the number of possible judges. Whether new judges are appointed and, if so, how many, clearly remains to be seen.

Most of the jurisdiction in this legislation is concurrent. Therefore, in most circumstances, you can have either a prosecution undertaken by the provincial attorney general or the federal attorney general. Generally, our courts are well seized with criminal jurisdiction. Generally, they are well equipped to deal with the criminal law.

Having said that, the challenges of terrorism are unique. I hope that within both provincial superior courts and especially in the Federal Court Trial Division, that there would develop, as there has with organized crime in the provincial superior courts, a cadre of judges who understand the complexity of these trials, the complexity of multi-parties and are able to deal with them efficiently and effectively.

If people would like us to look at the possibility of a specialized tribunal, I am not opposed to looking at that idea. Therefore, I am interested in hearing your views. As I mentioned to the House of Commons committee, if you think this would make the law more timely and more effective, then please let me have that advice. At this point, we do not have plans to move toward a specialized tribunal; but it has been raised by both committees and I am interested in your input.

The discussion has taken place, although again at a cursory level, as to whether in the context of immigration matters one would have a specialized tribunal within the Federal Court to deal with immigration and refugee issues. The discussion is out there in terms of whether one would want specialized units, if you like, within the existing courts, be they the provincial superior courts or the Federal Court. That is something I would be interested in hearing your advice on.

Senator Murray: Minister, with regard to the ministerial consents that are required under preventive detention and investigative hearings, I cannot resist asking you whether a peace officer in one of the provinces, say Manitoba or New Brunswick, might have that consent denied by the federal attorney general and then go down the street to the provincial attorney general and obtain it. Is that conceivable?

Ms McLellan: I will let Mr. Mosley respond. It is a highly unlikely scenario, but it is one which is important to consider. The issue of the inter-relationship of federal and provincial attorneys general has been raised in other contexts.

As attorneys general, it is fair to say that we work very well together. We do not fall over each other and we do not contradict each other in key elements, although we may on issues related to policy. In terms of the administration of the criminal law, we do not.

Mr. Mosley: In those circumstances, it would likely be considered an abuse of the process of the court to go forum-shopping, in a sense, to find an attorney general that might support the action.

Senator Murray: We will leave it at that. We have discussed sunset clauses. I would like to have a word with you about Parliamentary oversight in general. When we passed the Emergencies Act in 1988, we took some satisfaction in inserting quite explicit provisions with regard to parliamentary control of orders and regulations. This was in contrast to the War Measures Act, which the Emergencies Act replaced.

We had some help from Liberal senators who had a majority in the house at the time. All orders and regulations made under the act would have to be laid before each house within two sitting days of being made.

The parliamentary review committee would consider, in private, orders and regulations referred to it under section 61(1). If within 30 days of an order or regulation being referred to the committee, a motion amending or revoking that statutory instrument is adopted, then if not less than ten members of the Senate or twenty members of the House of Commons move that an order or regulation brought before Parliament be revoked, such a motion must be taken up and debated.

You gift the drift of what was done under the Emergencies Act. Under this bill, Bill C-36, I suppose it is not so much a question of orders and regulations as it is of the exercise by individual ministers or their officials or the Governor in Council, of authorities that, as Senator Bacon said, are somewhat extraordinary. What would you say, in principle, to the idea of Parliament inserting into this bill a provision analogous to what is in the Emergencies Act that would allow parliamentary oversight of the specific exercise of ministerial and governmental authorities that you propose to grant by this bill?

Ms McLellan: We would need to be careful. I would want to consider case by case. Do you have an example?

Senator Murray: That is what we would want to do.

Ms McLellan: If you have an example for me this morning in terms of an area where the Attorney General, be it provincial or federal, would be exercising his or her power where you think oversight might be appropriate, I would be willing to engage in that specific discussion.

Senator Murray: There are other ministers, of course.

Ms McLellan: Yes, the Solicitor General and the Minister of National Defence all have key responsibilities in this legislation, and one would have to have looked at each exercise of that power.

I cannot generalize in terms of the various exercises of ministerial power because they are different, and in thinking about oversight mechanisms, one might want to think about different possibilities in relation to the nature of the power being exercised by a given minister, whether it is the Minister of National Defence, in relation to the securities establishment, whether it is the Solicitor General, in terms of designating organizations to a list, or whether it is myself, for example, in terms of issuing a certificate to preclude the disclosure of certain information in a court that deals with international relations or national security issues.

One cannot lump those things together and say that one oversight mechanism is necessarily appropriate for each exercise of that power. One would need to look at them closely, determine what each is about, and what, if any, additional oversight mechanism was necessary. Of course, as you are all aware, ultimate political accountability will lie with each of those ministers, including myself or the Attorney General of Canada.

Ultimately, that political accountability to the Parliament of Canada and to the people of Canada does exist, but, having said that, I understand that you might like to look at whether some other specific and discrete oversight mechanism might be appropriate.

I want to clarify that the basis of this legislation is not emergency. This legislation is ongoing criminal law that will help us fight and prevent terrorism and terrorist activity. It is important for people to understand that.

Senator Murray: I understand that, minister, and I take your point that the oversight mechanism might be different depending upon the power being exercised. It may be an interesting exercise for us, Madam Chairman, to look at the provisions of this bill and decide amongst ourselves which of them ought to have extra oversight by Parliament, identify those, and perhaps come up with a formula.

I thank this minister. I want to take the opportunity to say there are some other ministers that we ought to consider calling. In particular, I note that we do not seem to have scheduled the Minister of Citizenship and Immigration. There are a number of questions that we would want to put to her.

Senator Kenny: Welcome, minister. I will stay with the question of parliamentary review and sunset clause. It is fundamental to the approach that parliamentarians and this committee, in particular, will take with the bill. It affects the time and the level of scrutiny we want to put into the bill, knowing how it will be dealt with later on. You are acting promptly, as you should, with respect to these terrible acts of terrorism. No one expects terror to go away, but we are also acting in a time of high anxiety. Everyone is feeling stressed right now, and history has shown that governments often overreact to acts of terror and to periods of stress like this.

Would you describe to the committee the advantages and disadvantages of a sunset clause versus parliamentary review, from your perspective?

Ms McLellan: Keep in mind that parts of this legislation, most of it, in my opinion, would not be appropriate for a sunset clause to be applied against them. For example, large parts of this legislation implement our obligations in relation to the UN conventions in relation to the suppression of terrorist bombings and the suppression of terrorist financing. Those two conventions were signed and we have to implement them. You do not put a sunset on compliance with UN conventions because you are then in violation of those conventions, and a whole set of other issues flow from that.

To consider the prospect of a sunset, you have to carefully analyze the provisions where you might want to look at that.

A sunset clause is an extreme measure used very rarely in Canadian federal or provincial parliamentary process. The reason such clauses are used infrequently is one runs the risk of creating a legislative lacuna or vacuum. In our fight against terrorism, we do not want to run the risk of not having effective laws in place for some period of time.

Furthermore, if law enforcement authorities know a provision will automatically have a sunset, they will start to ramp down in anticipation of that. If the sunset clause is of a nature where, as of a certain date, the law is not existent, one could be in the middle of court proceedings and investigations and run the risk of losing valuable work. To prevent that, law enforcement agencies will start to ramp down early. That would be unfortunate because we need our most vigorous intelligence gathering and law enforcement at work to deal with the scourge of terrorism.

We can look at this in different ways.

The Senate and the House of Representatives in the U.S. have taken different approaches on this.

Mr. Mosley: The Senate bill had a sunset clause.

Ms McLellan: The House of Representatives did not have a sunset clause. Obviously, the discussion we are having is also taking place in other countries at the same time.

Mr. Mosley: They have now agreed on a four-year sunset clause.

Ms McLellan: The Americans were discussing the prospect of a sunset clause, but the President could choose to exercise executive authority to extend the effective time of that legislation for a period of time over and above the sunset. Therefore, you would not run into the problem of freezing court cases and investigations with the application of that sunset clause.

There are different mechanisms. Everybody is grappling with the same problems and trying to figure out the best ways to strike the right balance. Sunset clauses have the kinds of problems that I have just described. It is a pre-emptory weapon or oversight mechanism that may be hard to nuance, although I would not for a minute suggest it is impossible.

The review process provides the opportunity for parliamentarians, senators and members of the House of Commons, either sitting together or separately, to review the application of the legislation at a reasonable time. A review after one or even two years probably would not provide much of a track record for the process. We deliberately chose three years, because, of course, upon the passage of a law, it takes time to ramp down, and so it takes time to ramp up, in terms of investigations, judicial proceedings and other activities.

We felt that, at the end of three years, there would be a record that would provide parliamentarians an opportunity to determine whether the provisions are hitting the mark and helping to increase the effectiveness of intelligence gathering agencies or law enforcement agencies; whether the courts have the powers they need; or whether we need to supplement or fine tune. However, you do need a record. You cannot review on the basis of one, two or even a handful of situations. A fulsome record would be useful to obtain a full sense of whether the legislation is being used and whether it is hitting the mark.

Senator Lynch-Staunton: I have a supplemental theory. Clause 145.1 will be reviewed in three years not after three years. They could do the review within one year.

Ms McLellan: Our recommendation is at the end of three years.

Senator Lynch-Staunton: That is not what the bill says.

Senator Kenny: Thank you, with Senator Lynch-Staunton's permission, I have a question.

Do you favour the executive extension you have described to us, minister? Could you outline the disadvantages of parliamentary review?

Ms McLellan: In fact, the legislation anticipates a parliamentary review and our suggestion is that it be at the end of three years. I do not see a problem with that oversight process.

Senator Kenny: Are there no disadvantages?

Ms McLellan: I do not see any disadvantages. Within our respective departments, we review legislation an ongoing basis as cases or other matters highlight either inefficiencies or unintended consequences in the law. It is quite appropriate and that is why we have it in the bill -- that a fulsome review, at the end of three years, would be appropriate. Let us see whether we are starting to win the war against terrorism.

What evidence do we have of that, both here and with our allies? If we are, that is good. Do we need additional tools or if not, why do we not?

Senator Kenny: What is your response to my question about whether you favour the executive extension?

Ms McLellan: That is something that was discussed in the U.S. My first impression is that I would not see that as the best approach for Canada and our parliamentary democracy.

Certainly, I would suggest that you look at all the possible mechanisms and give us your best advice and recommendations. However, the discussion around review is an important one. That is our preferred option. There is also, as I have indicated, much discussion around the mechanism of sunset. We would need to be

careful in terms of any kind of executive extension, whether that would be done by the Governor in Council and on what terms. Again, that is something that you might want to take a look at. I would be very interested in your views.

Senator Beaudoin: I have two preliminary remarks. First, there is no notwithstanding clause in this bill.

Ms McLellan: No, there is not.

Senator Beaudoin: Thank you very much and congratulations. Second, there is no declaration of emergency.

Ms McLellan: No, there is not.

Senator Beaudoin: The main problem concerns criminal law and the Charter of Rights and Freedoms. There are many laws, of course, but the dominant factors are criminal law and the Charter. There are three relevant points: preventive detention, the right to silence and the mandate, or warrant, accorded not by the judicial branch of the state, but by the minister. This is my main question, because obviously we will talk about…

(French follows -- Sen. Beaudoin continuing: …la prévention préventive…)

(après anglais)(Sén. Beaudoin)

... la prévention préventive. On va en parler toute la semaine, de même que le droit au silence.

Le mandat pour les conversations privées suscite mon intérêt parce que nous avons plusieurs arrêts sur cette question. Nous avons l'arrêt *Duarte*, *Thompson*, *Garofoli*, et cetera. Pourquoi sentez-vous le besoin de donner à un membre de l'exécutif le mandat d'épier des conversations privées? C'est évident qu'il faut le faire, mais pourquoi alors que nous avons, depuis des années, des lois fédérales qui disent clairement qu'à chaque fois qu'on veut épier une conversation, on s'adresse au pouvoir judiciaire et non pas au pouvoir exécutif? C'est un changement. Je ne suis pas contre le changement, mais j'aimerais bien un arbitre neutre. Dans notre système, l'arbitre neutre par excellence est la cour de justice. Je suis d'accord que tout est dans l'article 1.

(Sen. Beaudoin: It is true that no right is absolute....)

(anglais suit)

(Following French -- Sen. Beaudoin continuing)

It is true that no right is absolute. Rights may be restricted in a free and democratic society, but the burden of evidence is on the legislator when it is challenged in court. That is my main objection. Obviously, there are many arguments in favour of preventive detention or the right to silence.

Everything depends on clause 1, and we will hear pros and cons. The last one is particularly important because there is a shift for the first time, from the judicial to the executive. As a parliamentarian, I am not too sure that we are going in the right direction.

Is there a necessity to do that?

Ms McLellan: Senator Beaudoin, I think that you are referring to the Communications Security Establishment, and in particular, section 273.65 of this legislation that states: "The minister may, for the sole purpose of obtaining foreign intelligence, authorize the Communications Security Establishment in writing to intercept communications in relation to an activity or class of activities in the authorization.

Senator Beaudoin: I refer to that clause.

Ms McLellan: Yes, that is it.

Senator Beaudoin: "The minister may, for the sole purpose of obtaining foreign intelligence," etc. Why is it shifted from the traditional warrant issued by the judicial branch of our state to the executive branch? Is it a question of necessity?

Ms McLellan: We are dealing with issues around national security. The courts themselves, including the Supreme Court of Canada, have indicated that different tests might well apply and different approaches might be appropriate if one is dealing with issues around national security.

Having said that, Mr. Mosley or Mr. Piragoff will talk specifically about that because you suggest that there is a shift from that which was traditionally done in this area in relation to the CSE and with what we are doing now. However, before we talk about that, I would say, that if you look at sub clause 2 of this section, the power of the minister to authorize under sub clause 1 is carefully circumscribed.

Keep in mind that when one is talking about the interception of private communications, the CSE's interceptive capabilities are directed at foreign targets. The Minister of National Defence wanted us to clarify that matter. He will be coming here and certainly you should take up these issues with the minister who is responsible for this agency.

In this context, the target is foreign. I will give you the following example.

We wanted to clarify the existing authority of the CSE, and we wanted to ensure that, for example, if Osama bin Laden was phoning from somewhere in Afghanistan to a supporter somewhere in Canada, that simply because that transmission ended in Canada, we did not want an inability to pick up that transition. You can realize how ludicrous that would be.

You have Osama bin Laden phoning a supporter in Canada, and because of the present restrictions on the CSE with a termination point in Canada, you cannot intercept that private communication. We are clarifying the mandate of the CSE.

The minister would authorize intercept only as it is focused on a foreign target. It might be a supporter in Canada calling Osama bin Laden. We want to be able to intercept that conversation for obvious reasons. However, the target is foreign. In addition to that, the restrictions on the minister are further set out in subsection 2, but Mr. Mosley or Mr. Piragoff may want to add to that.

Mr. Mosley: This is an area, Senator Beaudoin, where Canadian courts have never played a role. The interception of these communications has been done with for many years with ministerial authorization. This is the first occasion on which a legislative base will be set out in a Canadian statute.

I would also say that this is the norm in each of the countries of the Anglo-American common law world with which we compare ourselves, such as the United Kingdom, United States, New Zealand, Australia. They are our partners in the intelligence that is gathered by the Communications Security Establishment and the agencies of a similar nature in those countries. They all do it by ministerial authorization.

I would also point out that in the United Kingdom, for example, all electronic surveillance under their 1985 legislation, which is now repealed, and their 2000 legislation is done under a ministerial authorization. We are not suggesting that that would be appropriate where the target is in Canada. Clearly, where the target

is in Canada, the investigative agencies must obtain a judicial warrant, either under the Criminal Code, if it is a criminal matter, or under a section 16 of the CSIS Act, if it is a matter relating to national security.

However, in this case, the bill would clarify that in the course of intercepting the communication of a foreign target, where no warrant is required under our law and one end of that communication may be in Canada, that the employees of the CSE do not incur criminal liability for making that interception. Oftentimes it is not clear whether that one end of the communication is in Canada or in the United States, but it is in North America somewhere.

Senator Beaudoin: In the internal sphere, the law will remain what it is now

Ms McLellan: Yes.

Senator Beaudoin: I am not against warrants. On the contrary, we have to protect society. Until now, it was the domain of the judiciary. This will remain. This refers only to the international situation.

Ms McLellan: Yes, foreign targets. As Mr. Mosley points out, the existing law continues as it relates to domestic interception.

Senator Beaudoin: That is the best system so far for internal communications. There is no doubt about that.

Ms McLellan: Absolutely. That is why we are not changing it. It remains exactly the same.

Senator Beaudoin: As I said, the entire from the Charter is that rights are restricted. We understand that.

It is under clause 1 that the debate will last. I will come back to this, but that question was surprising.

The Chairman: I understand that the minister can remain until 10:45?

Ms McLellan: I could remain for 15 minutes or 20 minutes more. Actually, colleagues will be meeting this morning. We obviously want to look at the new provisions that the home secretary is providing in the United Kingdom to supplement their anti-terrorism legislation of 2000. I obviously want to take up that meeting because working with our allies in this context is so important.

Senator Fraser: Minister, since you asked, I will give you a tentative answer. You talked about review and oversight mechanisms for the issuance of certificates. I would be interested in having a look at the establishment of some kind of independent review or oversight panel, consisting perhaps a judge, privy councillor who is no longer in active politics or maybe a journalist who could report annually to Parliament on the appropriateness of the decisions of that minister.

My questions deal with definitions, particularly the definition of "terrorist activity." I agree the bill has been carefully drawn. At least as applied to acts or omissions in Canada it is pretty watertight, I think. However, I have difficulty with the portion of the definition of terrorist activity that talks about acts or omissions that are intended to cause serious interference with or disruption of an essential service, et cetera, other than as a result of lawful advocacy, protest, dissent or stoppage of work.

In Canada, I believe that is clear. We understand lawful protest and strikes. However, there are countries where protests or strikes, or indeed labour organization of any kind, are illegal. Therefore, such acts occurring in those countries would not be lawful. I am sure you did not mean to say that if the Canadian Labour Congress is trying to help Chinese workers organize that that is a terrorist activity, although I understand that labour unions and strikes are not lawful in China under Chinese law.

Could we think about adjusting this to include, in the permitted acts, acts that are lawful in Canada, or if committed in Canada would be lawful? Do you see where I am going?

Ms McLellan: It is actually an interesting point that you raise. While obviously one would presume that in this context, if this matter came before a judge, he or she would be assessing the conduct through the filter of Canadian law in spite of the fact the activity may have taken place outside Canada. I have no objection to looking at that possible small clarification that you have pointed out. I would not want to agree to it today, obviously, and I do not think it is required as such. However, if perhaps it provided some higher degree of certainty or clarification, let us take a look at that.

Senator Fraser: Thank you. Similarly, further in, when we get into the official secrets area, there is the definition of a foreign power. You will recall that the definition of foreign entity includes a foreign power, so it is fairly broad category that we are talking about here. A foreign power includes a political

faction or party operating within a foreign state, whose stated purpose is to assume the role of government of a foreign state.

That surely would apply to the British Conservative Party or the Democratic Party in the United States. Should we not specify there that we are talking about assuming the role of government of a foreign state by unlawful or undemocratic means?

Ms McLellan: Again, this is a definitional section and obviously they are important. However, this would be interpreted in the context of the substantive offence provision. You cannot look at definition of foreign power separate from the substantive offence in which the expression "foreign power" or even "foreign entity" or "foreign economic entity" occurs. Again, that provides the context in which a court would be looking at defining the matter and working within that context.

My concern in relation to this would not be particularly great, but having said that, I believe either Mr. Piragoff or Mr. Mosley might want to add something to that.

Senator Fraser: My concern is that this section is all about information. While I am sure we all understand the need to control the distribution of sensitive information to undesirable people, we must be very careful about the lines we draw here.

Ms McLellan: I agree.

Mr. Donald Piragoff, A/Senior General Counsel, Criminal Law Policy Section, Department of Justice: As the minister indicated, these definitions must be read in conjunction with the offences. The honourable senator indicated the example about a particular political parliament of an allied state. What a particular ally may do domestically in terms of their change of government is their own business. Their own political parties, while they may have a right to change the government democratically, do not have a right to spy on Canada or to seek information from Canada that is of a sensitive nature. That is the example.

For example, there are offences that talk about disclosing special operations information, things like our targets and our means of surveillance. Even our allies have no right to know what our own national security measures are. Even though we are allies, we still are sovereign state and still keep protection from our allies.

Therefore, it would be an offence for a political party of an allied state to spy on Canada. These offences are directed at protecting Canadians, protecting the security of Canadians and our nationality sovereignty from outside threats, whether those threats be from countries that are enemies or even countries that are allies.

Senator Fraser: This clause of the bill is not only about operational information. It also has what looks to me like a much broader category of information that the government is trying to safeguard. We all know that the government tries to safeguard a great deal of information. Huge amounts of quite mundane information are kept secret by administrative decision.

Given the heavy penalties here for communicating that information -- life imprisonment -- I feel we should be very narrow in how we draw up our definitions.

Mr. Piragoff: Senator Fraser, you are right that there are more offences than simply offences concerning special operations information. However, if one looks closely at the other offences, there is a specific intent that is also required in that the activity is done for a purpose detrimental to Canada. Even though it may cover other types of information, which is not simply special operations information, the disclosure of the information or the acquisition of the information for the benefit of a foreign state is done with the purpose of hurting Canadian interests. There is a harms test involved. It is not just simply leaking information, it is leaking information where that would cause harm to Canadian interests and to Canadian sovereignty.

Those kinds of guarantees were built in and we looked at that in terms of looking at this legislation in terms of the Charter guarantees to ensure that we were not simply capturing, or restricting information flow, and denying Canadians the right to know, but we were trying to protect Canadians from espionage or from harmful activities within the country that are calculated to harm Canada.

Senator Kelleher: Since September 11 one of the major issues raised in discussions as to how to prevent a re-occurrence of this tragedy is to deal in a rigorous way with our refugee and immigration policy. There is nothing that I can find in this bill that deals with our immigration or refugee problem. Do you agree with that?

Ms McLellan: Provisions like preventative arrest might apply to individuals who have asserted a refugee claim or to landed immigrants. However, you are

right, there is nothing in this legislation that specifically deals with immigration and refugee issues. Honourable senators still have before you Bill C-11 where those issues are being taken up.

Senator Kelleher: Bill C-11 was drawn up long before the events of September 11. We have also been told and it has been led in evidence in the other place that Bill C-11 will probably not take effect, due to a lack of regulations, until next summer. I am concerned that there is nothing that addresses the concerns that have arisen with respect to the immigration and refugee problem since September 11. There will be somewhat of a hiatus. I am surprised that nothing has occurred in this bill to address that problem. Did Justice, in looking at this problem, deliberately decide that we would not address it? Why was that decision made? New concerns have arisen since September 11. My concern is that those are not being addressed. Could you help us out in that area?

Ms McLellan: The national security committee, of which my colleague John Manley is the chair, began a review in the context of that committee's deliberations as to those gaps in existing law or possible enhancements in existing law to help us, especially on the preventative side, of dealing with terrorism.

We believe that Bill C-11, although developed before the horrible events of September 11, provide the requisite tools if the resources are provided to the Minister of Immigration to deal with the enhanced sense of concern and urgency around issues surrounding who gets into this country, on what terms they get in, who claims refugee status, and so on.

If honourable senators feel that more is needed to deal with the aftermath of September 11, I would say that my Minister Manley and I would both be interested in your recommendations in that regard and we would ensure that they would be dealt with in a fulsome fashion by the committee on national security.

I take your point, that there may be some additional perspectives on this issue, after September 11. The Minister of Immigration has said that she believes she has the tools necessary if the resources are provided. However, there is no harm in reassuring ourselves that those tools are in place.

To some extent we are dealing with an issue of resources if Bill C-11 is proclaimed in force. I was as alarmed as anyone when I heard that due to drafting of the regulations the law might not be enforced until next July. I took that up

right away with my drafters and with the Minister of Immigration. We hope to be able to move on that more quickly.

Senator, you raise an important point.

Senator Kelleher: Perhaps I will quit while I am ahead, minister. Who knows, we may come forward with a few suggestions for you, thank you.

Senator Jaffer: Minister, I have one comment and one clarification. Over the weekend, I met with a number of religious leaders. Their feeling is that you were very inclusive when you sent out the strong message that acts of racism are condemned. As you know, two mosques were bombed in Ontario this weekend. One could have been a bad fire and involved gas pipes.

On page 43, clause 12 amends the act by adding a new section 420(4.1) and relates to those who commit mischief in relation to religious property. The concern, minister, is that the word "mischief," for people who are affected, they feel it is more than mischief. I understand that there is a criminal connotation about the word "mischief." However, the people with whom I have spoken recently felt that judges might interpret that as just a mere mischief charge. I assured them, as much as I could, that that is not how the government views this. The government views it as a serious matter when religious properties are attacked. Perhaps, with your expertise, you may wish to look at that wording.

Ms McLellan: Thank you, that is a good suggestion.

Senator Jaffer: At page 34 of the bill, clause 83.28(10) under the investigative powers reads:

> No person shall be excused from answering a question or producing a thing under subsection (8) on the ground that the answer or thing may tend to incriminate.

You said that was still in tact. I see that as not being intact. Could you clarify that, perhaps?

Ms McLellan: Is your point that you do not believe that we are protecting the right against self-incrimination?

Senator Jaffer: I understood you to express that. The bill, in this clause, seems to say that even if the response or information incriminates you, you are forced to answer. I wanted you to clarify that.

Ms McLellan: You are forced to answer because the concept of compellability and protection against self-incrimination are different concepts in our law. We have no equivalent of invoking the Fifth Amendment. Our law never has and it does not today. The Charter protects against self-incrimination. That means that you need to ensure, as we have in sub (10), that we are putting in a mechanism whereby any evidence provided in an investigative hearing cannot be used against that individual in a criminal proceeding, nor can any evidence derived from that evidence, derivative evidence, be used in the proceedings which is (10)(*b*). However, that is a different issue than compellability where you can be compelled to testify, under Canadian law. The investigative hearing is an example of compellability, but with the absolutely key protection against self-incrimination.

Mr. Mosely points out that subclause (8) is also relevant to our understanding of this provision.

Senator Tkachuk: Minister, the bill gives rather sweeping powers to the government. To most Canadians, that would mean that we have a problem within our country.

I heard you speak in the House of Commons committee studying Bill C-36 and you spoke eloquently about the need for security. To a conservative, hearing that from a liberal was quite gratifying. I am also of the view, that because I equate our security as a nation to sovereignty; there is no sovereignty if we are not secure. September 11 was not only a wake-up call, but it is having a tremendous effect on our economy.

To me, the sooner we deal with and solve these problems, the sooner we move along and make people believe that we are dealing with these problems, the better it will be for the economy itself. I assume we are putting this bill forward because we fear there may be terrorists within our country. Otherwise, why put the bill forward at all? The purpose is to seek out terrorists in our country. Have we identified a list of terrorist organizations inside our borders? Have we evidence of where they came from and how they got into our country?

Ms McLellan: You raise an interesting point. It would be naive in the utmost for us to believe that we do not have terrorists, accurately defined, and those who

support them in our country. It is our obligation, not only to Canadians but to our allies to deal with that reality in an effective way. Not to dodge the rest of your question, but the minister best able to answer that would be the Solicitor General who is responsible for CSIS. I obviously have no role in intelligence-gathering. I have only a role as a member of the Governor in Council in terms of listing designated organizations as terrorist entities.

The Solicitor General is responsible for CSIS and the RCMP, and is in fact the person who would receive information on which he would then make recommendations to the Governor in Council as it relates to alleged terrorist entities either inside or outside Canada. It is probably better if you direct that question to him because he could give you a much more informed answer than I can.

Senator Tkachuk: I am not sure he can or cannot. It just seems, Minister, that you are the lead minister on this. People must have come to you and said, we have a problem here. You must have asked the question: What is the problem? It seems you cannot answer what the problem is, i.e., are there terrorists in this country and who are they and how did they get here? You say some other minister can give us a better answer. I want to know your views on it. I will ask him, too, but I want to know what you think about it.

Ms McLellan: My view is clear. As I said, it would be naive to believe there are, in this country, no terrorists nor people who support them.

Senator Tkachuk: We will assume that there are then. Are the Tamil Tigers considered a terrorist group? Do you believe they are a terrorist group?

Ms McLellan: You are now truly getting to a question best directed to CSIS and the Solicitor General. Keep in mind, I have no role in relation to CSIS as the Attorney General or Minister of Justice, nor would you probably want me to have a role.

I do, however, have a role as member of the Governor in Council. If my colleague the Solicitor General, on the basis of information from CSIS, the RCMP or some other investigative agency, recommends that a group be designated as a terrorist entity, the council would then consider that information and determine whether there are reasonable grounds for such a designation.

To this point, CSIS has not brought that information forward to the Solicitor General, nor has the Solicitor General come forward to the Governor in Council.

Senator Tkachuk: This bill applies to everyone in Canada. We have no state of emergency. We have no state of war. We are passing this bill because we believe there are terrorists in Canada. I believe there are terrorists in Canada. Let me ask one more question and perhaps I can get an answer. Do you believe the terrorists are citizens of this country? Do you believe they are refugees who have come to this country and have undertaken terrorist activity?

Ms McLellan: I cannot answer that question.

Senator Tkachuk: We do not know?

Ms McLellan: What I know is that if the government seeks extradition of an individual, in my capacity as Attorney General I can authorize my department to issue a provisional arrest warrant if there is sufficient information under Canadian law to do that. Upon arrest, the department lawyers identify whether that person is a Canadian citizen or a landed immigrant or a refugee. However, we deal with such extradition requests, the request does not vary nor do we necessarily approach it differently. The Extradition Act speaks to the extradition of someone who also makes a refugee claim.

It is only in the context of me and my lawyers making the provisional arrest that we would know if the accused is a refugee or a Canadian or a citizen of some other country. The Americans or British or French may want to extradite him or her for specific reasons. In a federal criminal prosecution, after charges have been laid, the accused person obviously is identified and we will come to know their category in the sense of citizenship or refugee status or landed immigrant status. Beyond that, I do not want to speculate. Perhaps representatives of CSIS or perhaps even my colleague the Solicitor General can engage you in that discussion.

Senator Tkachuk: Judging by what you told me, why do we have this bill?

Ms McLellan: As I said, it would be naive to believe there are no terrorists or terrorist supporters in this country. The citizenship categories of those people is a completely different and separate issue. Others, including CSIS, could more fully engage with you in that discussion and pursuit of facts.

The Chairman: The minister must leave. We will hearing from her again before we conclude our pre-study.

Ms McLellan: Thank you, honourable senators. I have appreciated this opportunity to speak about this extremely important work. It goes to the heart of our ability, all of us as parliamentarians, to reassure Canadians about their safety and security. It goes to the heart of our ability to work with our allies. I thank you in advance for the serious deliberation and consideration that you will give to this legislation.

I look forward to your advice and recommendations which, I reassure you, will be considered very seriously by myself and by the Committee on National Security. Thank you.

The Chairman: Mr. Mosely must attend with the minister. Thank you both for your assistance.

Senators, we now have with us officials from the Department of Justice, Donald Piragoff and Stanley Cohen.

Senator Fraser: Gentlemen, under "Interpretation" the section on facilitation says:

For the purposes of this Part, a terrorist activity is facilitated whether or not

> (a) the facilitator knows that a particular terrorist activity is facilitated;

To a layperson like myself, that sounds as if a little old lady who unknowingly rents her basement to a young man who turns out to be a terrorist has facilitated terrorism. As I went through the bill, all the references to facilitation that I noticed talked about knowingly facilitating something, which seems reasonable. If you knowingly facilitate terrorism, you are not a good guy. I wonder what I am missing here. Why does this section say that it does not matter whether you know?

Mr. Piragoff: Senator, there is an offence of facilitating a terrorist activity that is located on page 28, clause 83.19. It does provide everyone who knowingly facilitates a terrorist activity is guilty of an indictable offence. There are other offences such as contributing to or participating in a terrorist group for the purposes of enhancing the capability of a terrorist group to carry out or to facilitate a terrorist activity. There is a definition at the beginning which applies to the word "facilitate" wherever it is used, whether it is used as the principal offence where the person actually facilitates, or whether it is the ultimate object where one contributes and provides aid to the group for the purpose of enhancing its

capability to facilitate or carry out a terrorist action. Examples would be training people, providing flying lessons or providing false documents in order to help a terrorist group facilitate or carry out its terrorist activities.

The senator pointed out that a terrorist activity may be facilitated whether or not the facilitator knows that a particular terrorist activity is facilitated or whether the terrorist activity was actually carried out. That is meant to resolve a problem in the current Criminal Code in the existing offences of aiding and abetting where you have to actually know of the specific offence that you are aiding and abetting. This particular provision is trying to capture the situation where a person knows that it is assisting a terrorist group by providing false documents, but they do not know that on September 11 the World Trade Center will be bombed and that these documents they are providing are for the purposes of getting people into the United States illegally, for example. That is the notion of facilitating. You know you are helping them. You do not know exactly what particular crime is going to be committed but you know they are going to do something bad. That is why the definition says that you do not have to know the particular terrorist activity that will occur.

Senator Fraser: In that case, might I ask my French speaking colleagues to later look at the French version. The French version seems to me to be a little more vague than zeroing in on a specific activity. When I went to that for guidance, I got really confused.

The Chairman: What is the number of the clause?

Senator Fraser: It is on page 15, clause 83.01 (2).

The Chairman: Senators, it seems that we have two different versions of the bill. The page numbering seems to be slightly off. Until we can rectify that, perhaps we could refer to the clauses rather than the pages.

Senator Lynch-Staunton: First, I apologize to Senator Kenny for having rudely interrupted him, but I thought it important to point out that the minister was taking us down the wrong track when she kept saying that the review would take place after three years. In fact, the bill quite clearly calls for a review within three years. A review could start within six months or within one year. I do not know why that impression was being left on the table. Parliament certainly has the right, should this bill be passed as it is, with the review clause unchanged, to start a review three weeks after Royal Assent.

That being said, I do have a number of questions for information, rather than debate, because I do not believe in debating with officials.

There are no regulatory provisions in this bill as such, that is, I found nothing that says that regulations will flow. However, there are a number of laws presently on the books and bills before Parliament which are being amended and which contain their own regulatory provisions.

Is it expected that this bill, when and if passed in its present form, will require regulations before going into effect?

Mr. Piragoff: Senator Lynch-Staunton is right that no regulations are required to be promulgated under this legislation. There are cross-references to other acts, but most of those cross-references are consequential amendments changing a word or changing a section number as a consequence. Some of the other acts may have regulation powers, but I am not aware that any of the amendments that have been proposed in this bill would require that regulations be promulgated under those acts in order to give force or effect to any amendments put forward here.

Although not really a regulation, there is in this bill the order of the Governor in Council designating a list of entities that are terrorist groups.

Senator Lynch-Staunton: Could you double check that? Our feeling about regulations is that sometimes they are passed without Parliamentary scrutiny and not necessarily reflecting Parliament's intentions.

Have the UN conventions that were mentioned earlier, which are being sanctioned in this bill, been verified to ensure that they are Charter proof?

Mr. Stanley Cohen, Senior General Counsel, Human Rights Law Section, Department of Justice: There has been an examination of the work done with respect to the UN convention. That work was regulatory in nature and the framework of them will be subject to the more specific statutory provisions that are coming into effect here in due course with respect to designation, listing and the like. The regulations were a means of moving swiftly initially, but ultimately it is a statutory framework that should essentially govern.

Senator Lynch-Staunton: Having not read the conventions, I have no idea what is in them except for their titles. Are we satisfied that they are not in contravention, either directly or indirectly, with any provisions of the Charter?

Mr. Cohen: Yes, there has been Charter analysis and opinions have been given in that respect.

Senator Lynch-Staunton: Everyone is satisfied that they stand the test?

Mr. Cohen: Yes.

Senator Lynch-Staunton: Is it correct that clause 96, the amendment to the Firearms Act, is to allow armed air marshals from outside of Canada to arrive here?

Mr. Piragoff: The provision is broad enough to permit that.

Senator Lynch-Staunton: What else does it allow?

Mr. Piragoff: It also re-enacts a provision concerning the right of the provincial minister to exempt certain classes of employees. Essentially, we are looking at individuals who may have to carry a firearm as a requirement of their employment. For example, Brink's guards have to have special exemptions under the law to be armed when they get out of the truck and on to the street. This is the type of power that is permitted. This bill would clarify that the federal government also has the right to grant those exemptions.

Senator Lynch-Staunton: What kind of individual are you thinking of other than Brink's guards, who already have the right to bear arms or to carry a revolver?

Mr. Piragoff: The Brink's guards have it because they have been exempted.

Senator Lynch-Staunton: Are you widening the exemptions?

Mr. Piragoff: The law would give the federal government, and not just the provincial Chief Firearms Examiner, the power to give exemptions as well.

Senator Lynch-Staunton: That would include sky marshals?

Mr. Piragoff: It could, yes.

Senator Lynch-Staunton: I understand that there are sky marshals on Air Canada flights going to Washington, in order to be allowed to land at Dulles Airport. Do the Americans have any problems with that? Do we have a reciprocal agreement? Will there be the same generosity from Americans in allowing

Canadians to land in the United States as we will display in allowing Americans to hand here?

Mr. Piragoff: I am not aware of the exact details of the agreements between the U.S. and Canadian authorities. That might be a question to ask the Solicitor General.

Before I leave that, returning to your first question to me, one of my colleagues did mention that there is a regulation power in the act. Just to bring it to your attention, in the version that I have it is page 86, section 38.16. It is an amendment to the Canada Evidence Act. It would provide for the Governor in Council to make regulations to carry into effect sections concerning protecting national security information and judicial proceedings; for example, regulations respecting notices, time periods for notices, certificates, et cetera.

There might also be some regulations, not in this act but consequential regulations, that would result in Part 4, that is, amendments to the Proceeds of Crime (Money Laundering) Act, the FinTRAC. They might have to adopt some regulations to address the new mandate that this act gives them. Their current mandate is to deal with money laundering in respect of organized crime. This bill would give them a mandate to monitor money laundering situations concerning terrorist activity. They might need some regulations, but the regulatory powers are already in the act.

Senator Lynch-Staunton: It is in the existing act?

Mr. Piragoff: It is in Bill C-22, adopted by Parliament last year. I can check some others if you want and can give you a note.

Senator Lynch-Staunton: I would appreciate that. Thank you.

Senator Beaudoin: I should like to go back to the question raised by Senator Murray. The minister has said that there is no declaration of emergency in the act. My question is a bit technical, but I think we have to solve it. If we go back to the Anti-inflation Act case in 1976, two judges said that if there is an emergency, it should be declared in the bill; of course, it was were only two judges, Jean Beetz and de Grandpré. All the others said that emergency may be inferred from an act. I would like your opinion.

This act is so important and does so many things that we are inclined to think that it is a kind of emergency act, or that it may be inferred by a court to be an

emergency act. However, this is not the position taken by the Department of Justice.

Mr. Cohen: As an initial observation with respect to your question, the preamble to the bill certainly underlines the nature of the grave threat that is facing the nation. Certainly, if one wishes to talk about situations that are akin to emergency without using an emergency justification for this legislation, the preamble speaks of acts of terrorism, threatening Canada's political institutions, the stability of Canada and the general welfare of the state, which underlies the gravity of the situation and would support arguments of that nature.

Certainly this is legislation is in the nature of promoting the peace, order and good government of this country as well. Without wishing to debate whether or not an emergency exists or whether this rests on an emergency power, there is within the structure of the legislation a basis for establishing the ability of the government to act in the way that it is acting in enacting this legislation and addressing the pressing and substantial nature of the issues being addressed by the legislation. That would take us into the area of the section 1 Charter justification, the pressing and substantial nature of the issue we are dealing with.

Senator Beaudoin: That is my question. No right is absolute. When we legislate, we may restrict rights to a certain extent. We do. Obviously, this act does so in some areas. The problem does not end there. The problem is whether it is justified under section 1 of the Charter.

In my opinion, some restrictions are justified by section 1 of the Charter because the objective is important. It is urgent. It complies with the *Oakes* case, in my view, in many areas. The detention, the right to silence, and the private conversations are the three aspects where we may have a discussion under the Charter, because we have to interpret section 1. Are we restricting too much, or are we restricting with regard to the circumstances? If it is not an emergency measure, then of course the interpretation under section 1 of the Charter is different. That is the purpose of my question.

Mr. Cohen: I would agree with your observation in that regard. Nevertheless, I would suggest that the grave nature of the threat that is posed by terrorism and the necessity to respond in an ongoing way to that threat is capable of being justified under section 1. One would have to come to each and every measure and determine whether or not the steps that are outlined in the legislation are reasonable and proportionate. That is a large portion of what your discussion here

is about. You are creating, in essence, the part of the section 1 record that courts will have to look at, and they will be examining how these measures will play out in the future.

The future context will, of course, condition how the courts regard that. If the threat of terrorism does, as we all hope, recede and the measures are used in a way that seems disproportionate, a court may be called upon to determine whether that is a proper application of the bill.

We do not suppose, in the construction of the legislation that has taken place this far, that it is necessarily going to be something that results in invalidation, but it may affect the way the bill is construed or applied.

It is our view that there is a national security justification here which, in essence, is somewhat different in a jurisprudential sense than the criminal law justification. This national security justification can essentially serve to rationalize the kinds of departures from standards that we have become accustomed to up to this point in our history.

Senator Beaudoin: I heard talk this morning about the War Measures Act, but there is no such thing now. If I am not mistaken, we changed the whole system of emergency in our country in 1988. When we compare this statute with the War Measures Act we see that it is very different from the War Measures Act of 1914 and 1939, as well as the one used in 1970. There is no comparison now with a statute like this one and the War Measures Act of the First and Second World Wars. For the purpose of the record, I wished to say that. I would like to have your reaction to it.

Mr. Cohen: One reaction is that this legislation is subject to the Charter. The War Measures Act was enacted in different circumstances and at a different time. Of course, when it was invoked in 1970 it was prior to introduction of the Charter. I think that is a substantial change in circumstances that would put this statute on an entirely different plane to begin with. This legislation allows Canadians who feel there has been, in some sense, manipulation, abuse or disproportionality in the substantive measures to question that in court. That is a safeguard for everyone.

Senator Andreychuk: As I recall, in terms of international obligations, there are some 11 conventions or treaties that have some impact on our national security and/or terrorism issues. Have we ratified all those conventions? Are you treating

this piece of legislation as the enabling legislation in particular for terrorism and financing issues?

Mr. Piragoff: There are 12 conventions which countries consider to be conventions specifically or primarily directed toward terrorist activities. Canada has signed and ratified 10 of the 12. The two which we have not ratified but have signed are the International Convention for the Suppression of the Financing of Terrorism and the International Convention for the Suppression of Terrorist Bombing. Once enacted, this legislation would enable Canada to ratify those two remaining conventions.

Senator Andreychuk: If this is not emergency legislation, why did we not proceed earlier to put in place enabling legislation on those two conventions?

Mr. Piragoff: The terrorist financing convention was only concluded in 1999. To date, only four countries have ratified that convention. We are actually well ahead of the pack.

Senator Andreychuk: Since enabling legislation was not called for immediately, can I take it that you did not deem it to be an emergency situation when those were signed?

Mr. Piragoff: I am not sure I understand the question.

Senator Andreychuk: We took two years to ratify the terrorist financing convention. We are moving from September 11 to this legislation rather quickly. I know the strain it has put on the Department of Justice to do that. We did not foresee two years ago the need to have enabling legislation put in place quickly; is that correct?

Mr. Piragoff: No, senator. With regard to the terrorist bombing convention, the government has been working on draft legislation for over a year, if not longer. With regard to the terrorist financing convention, there have been discussions over the last year among the various government departments with respect to that issue. At the same time, the department was dealing with the money laundering legislation. There were a number of issues with that legislation which had to be resolved. It was just a question of logical progression, first to set up the FinTRAC process and then to move on to the next issue which would have been the terrorist financing convention.

Senator Andreychuk: Are you satisfied that this piece of legislation will give full force and effect to those two conventions?

Mr. Piragoff: The intent of this bill is to give us the legislative basis such that we could ratify those two conventions.

Senator Andreychuk: I wish to turn to the issue of charitable organizations. When I sat on the Special Senate Committee on Security and Intelligence there was a great deal of discussion as to how to deregister any charitable organization that may be involved in some terrorist activity. At that time, there were two concerns. The first was that any deregistration process should not be in the hands of those who may be investigating terrorism. In other words, we wanted a neutral analysis of whether the evidence and the actions taken by CSIS or RCMP in terms of national security warranted removal of a charity's registration. This act seems to have gone the other way. Could you comment, please?

Mr. Piragoff: I will defer to the Solicitor General on that question. Many of the provisions of this bill which deal with charities and their registration were taken from what was formerly Bill C-16 which only proceeded to committee stage in the House of Commons. Those questions might be better answered by the Solicitor General and his officials.

Senator Andreychuk: There is no appeal provision for a charity. There is the first application into the court, which would be followed by a judge's decision, but there is no appeal from that process. Why is that?

Mr. Piragoff: That is a question of policy. You should ask the Solicitor General as to why an appeal process was not chosen.

Senator Jaffer: Since we have you here, Mr. Cohen, could you comment on the definition of terrorist activity in the bill, please? It states that there has to be an intention and not an act committed. I have some concerns about that. Perhaps I am not reading the provision correctly. Could you comment, please?

Mr. Piragoff: The issue of intention is important for one primary reason, that is, we do not want to classify activities as being terrorist simply because harmful conduct has occurred. For example, let us say that a peaceful demonstration turns into a riot and death or buildings are burned down, but there was no intent at the beginning or during the protest that that should occur. It is important that we focus

on the intent of the demonstration or the protest as opposed to simply the consequences.

With respect to whether intent alone is enough, the provision which talks about intent has to also be read in conjunction with the opening words of the definition.

The opening words of paragraph (b), page 13, line 30 of my draft in English, say, "an act or omission in or outside Canada that is committed." It does presuppose that an act is committed. In addition to that act being committed, a number of purposes or intentions are required that would characterize that act or omission as being a terrorist activity.

(French follows, Senator Bacon: Il a été déclaré ...)

(après anglais)

Le sénateur Bacon: Il a été déclaré que les droits et les libertés restent protégés entre autres par l'application de la Charte canadienne des droits et libertés. Cependant, n'y a-t-il pas une menace à nos libertés civiles? Est-il vrai de dire qu'à compter de maintenant, il sera difficile et périlleux pour des organismes qui luttent contre la mondialisation de tenir des manifestations contre les positions du gouvernement? Est-il vrai qu'à compter de l'adoption de ce projet de loi, nous nous retrouverons dans une situation où tous seront susceptibles de se faire arrêter sans mandat, de se faire interroger sans qu'aucun acte criminel ne soit reproché ou d'être détenus de manière préventive et de figurer sur une liste de terroristes sans même le savoir?

(Mr. Cohen: There is no doubt that the Bill does...)

(anglais suit)

(Following French)

Mr. Cohen: There is no doubt that the bill does pose a challenge to our notions of liberty. We are living in an age now where our accepted notions of what constitutes freedom in society have been affected.

On the other hand, the need for the legislation, at this point in time, is manifest. The task of Parliament is to determine whether what is here is reasonable and proportional in terms of what has been done. When one speaks of preventative arrest, one has to examine whether the power that is given contains sufficient safeguards to ensure it does not become an instrument of oppression or abuse. The time limitations that might be at play with respect to that power, what happens to individuals, whether they can be held incommunicado or whether they have to be taken before a judicial officer, and what happens to individuals once they are taken before the judicial officer are all tremendously important.

The preventative arrest example is a process for bringing an individual before a judicial officer to determine whether it is appropriate to impose conditions on that individual. Presumably, it is meant to be a way of identifying an individual and considering the danger the individual may pose, and also a way of indicating that there is some state awareness of what that individual may be up to. Once that individual is brought before a judge, the legislation does provide a mechanism for imposing conditions on that individual that may restrict his or her freedom of movement or affect his or her freedom of association, but it is done in order to identify a threat and alleviate that threat at the same time. Whether the exact mechanism is regarded as reasonable and proportional will depend upon the context in which it is used. Ultimately, if it is being employed in the context of a terrorist threat, the power to make that arrest will, in our estimation, survive a constitutional scrutiny.

With respect to the example of compelling people to answer questions, it is not done and will not be done as a general matter in the criminal law of Canada after this legislation comes into force. It is restricted to the area of investigating terrorist activity. It is not a general aid to law enforcement. The purpose and the restriction upon the use are important.

The questioning itself, as far as the individual's exposure to liability is subjected to safeguards. We have to examine what the individual is exposed to. The individual is not at personal risk with respect to the answers that the individual

may be giving. There is no possibility under the terms of the legislation itself that the individual will have the evidence that he or she gives used against him or her in another criminal proceeding. There is no possibility that any evidence that is derived from the evidence that they have given can be used against him or her in another proceeding. That is indicative of the kind of balancing that has been attempted in the legislation, and it does go to the reasonableness and proportionality of the exercise.

The difficult issue of protest and dissent is one where the balance has been attempted through the use of the phrase "other than as a result of lawful advocacy, protest, dissent or stoppage of work" that does not result in the particular kinds of significant, serious harms that are discussed in paragraphs (a) to (c) in that provision, which involve death or serious bodily injury, endangering a person's life or causing a serious risk to the health or safety of the public. A genuine effort has been made to strike a balance that is consistent with life in a free and democratic society that does encounter protest and dissent. We can expect to see that, for example, in protests involving globalization. The effort is to recognize the difference between protest and dissent carried out in a lawful manner, consistent with Canadian norms and values, and activities that go beyond that and involve danger to life, health and safety. There has been an attempt to layer in safeguards and to make the legislation reasonable and proportional given the nature of the threat it is designed to counter.

Mr. Piragoff: With respect to what has been called "preventative arrest," the bill does not use that term at all. In fact, the heading of clause 83(3) is Recognizance with Conditions. The purpose of the provision is not to arrest a person but to put a person under judicial supervision for the purposes of preventing the carrying out of the activity. It is similar to a provision which already exists in the Criminal Code in section 810.1, whereby one person, who fears another person may commit a violence against him or her, can ask the court to put that person under judicial supervision. For example, it is used often in domestic violence situations where a person can go to the court and ask the court to impose conditions on another person because there is a legitimate, reasonable fear that that person may commit an offence.

This provision builds on existing provisions in the Criminal Code. There is precedent. It is not something new. If one looks at the total scheme of recognizance with conditions, there is very much a presumption that the person will be released. The presumption is not that a person will be arrested and remain

arrested. Arrest is there for when it is necessary to get the person before the court, not when the person can be brought to the court by way of a summons. However, if it is an emergency, and the person, for example, is on his or her way to the airport, then that person would be arrested.

The whole scheme is designed to get the person before a judge, have the judge evaluate the situation and decide whether it would be useful to impose conditions on this person: do not leave town, report every day to a police officer, et cetera. The purpose of preventive arrest is not the arrest. It is just a means to get the person before a court for the purpose of judicial supervision. We have such provisions elsewhere in the code: the bail provisions, for example, and also section 810 of the Criminal Code, which does not involve arrest. However, this provision would involve arrest. I wanted to create the focus.

(French follows -- Senator Bacon: N'est-il pas vrai...)

(après anglais)

Le sénateur Bacon: N'est-il pas vrai que la détention préventive, telle que libellée à l'article 83.3(4), ouvre la porte à des arrestations et des détentions abusives? Vous semblez élargir les possibilités d’arrestations basées sur des soupçons des policiers, par rapport au motif raisonnable qui est un critère plus exigeant que celui relevant des soupçons. Quelles balises guideront les forces policières pour éviter des abus, notamment dans l'usage du pouvoir d'arrestation et de détention préventive, étant donné que le libellé de l'article fait référence à des soupçons plutôt qu'à des motifs raisonnables?

(M. Cohen: The police officers still have to base...)

(anglais suit)

(Following French -- Mr. Piragoff)

Mr. Piragoff: The police officers still have to base their suspicions on reasonable grounds, not create them out of thin air. Whether it is reasonable grounds to believe or whether it is reasonable grounds to suspect, there must be a basis that can be reviewed.

Why is there a standard for reasonable suspicion as opposed to reasonable grounds to believe? If there were reasonable grounds to believe that an offence will be committed, which is the first test, and if there were reasonable grounds to believe that this particular individual would commit that offence, then at that point, one would have grounds to actually arrest the individual and charge them with an offence.

This particular provision will address the situation where the authorities have reasonable grounds to believe that an offence will occur. As a result of intelligence sources, they know that, for example, a particular ambassador will be a target of an assassination attempt in Canada, or that a particular bombing will be undertaken during a particular demonstration, not by the demonstrators but by others who might want to benefit by exploiting the demonstration. The police know -- they have reasonable grounds to believe -- that an offence will be carried out, but they do not have the reasonable grounds to know who the actual perpetrators are, although they have grounds to suspect individuals in particular. It is not just a pure suspicion; there are reasons to suspect these individuals. These individuals may have contributed to or been associated with certain elements, but the police do not yet have the grounds to arrest them and to charge them, despite their serious suspicions that the individuals are involved somehow. This serves to ensure that they are arrested, brought before a judge and put on judicial supervision in efforts to prevent any type of offence actually occurring.

Senator Tkachuk: My questions concern information as well. I was reading an article in *The Globe and Mail* on Friday, October 19, and it seems that Canada's Privacy Commissioner, Mr. George Radwanski, had some very serious concerns about Bill C-36 and its effect on privacy legislation. Part 5, Amendments to Other Acts, clause 87 to amend section 69 of the Access to Information Act states:

> The Attorney General of Canada may at any time personally issue a certificate that prohibits the disclosure of information for the purpose of protecting international relations or national defence or security.

Under what definition would you or the Attorney General define "security?"

Mr. Piragoff: This amendment is in the Canada Evidence Act, or parallels an amendment in the Canada Evident Act. I do not have the actual section number for you, but I believe it is in those amendments.

Senator Tkachuk: What is in those amendments?

Mr. Piragoff: The definition of "national security," for example. There are definitions of "prejudicial to Canada's interests" in the Security of Information Act, the former Official Secrets Act.

Senator Tkachuk: Are there multiple definitions of "national security" in different acts?

Mr. Piragoff: The prohibition certificate is in 38.13 of the Canada Evidence Act. The provision to which you referred in respect of the Access Commissioner is essentially the same certificate as that which would be issued under the Canada Evidence Act.

Senator Tkachuk: Why do you need this, then?

Mr. Piragoff: The Canada Evidence Act applies to judicial proceedings or administrative proceedings that are undertaken. In respect of the actions of the Privacy Commissioner or the Access Commissioner, there may not be any proceedings undertaken at that time.

Senator Tkachuk: I want to get this straight. I am not a lawyer and I am trying to understand it the way any citizen in Canada would understand it. I believe that the Attorney General can issue a certificate and use national security as a reason to deny the media or anyone else a request for information. Is that how this would apply? Is that what the Attorney General would do, in layman's terms?

Mr. Piragoff: The provision is a last resort for the Attorney General to ensure that information critical to national security is not disclosed in judicial proceedings, to which the Canada Evidence Act applies or through other government processes. This power exists with our allies who have a procedure whereby a minister is able to issue a certificate to block the disclosure. In the United States, there are different levels of certificates. Some come from the President and others come from the Attorney General of the United States. The

U.K. has a certificate system as well and, I believe, New Zealand and Australia also have such a system.

Senator Tkachuk: I am not trying to be argumentative. I am just trying to figure out what this means. I am not really concerned about the certificate being used to protect national security, but I am concerned about ministers using national security as an excuse to prevent information from getting out that legitimately should get out. Under what definition of "national security" would this exist? Is there more than one definition? There must be definitions in the law. The Attorney General would be able to say, Because of this, I will not let you see that.

Mr. Piragoff: There is no explicit definition in the Canada Evidence Act. There is a power which exists under the Canada Evidence Act to protect information that relates to national security. There is a procedure whereby a person can object to the disclosure. The existing law is a black and white situation. If a judge in the Federal Court finds that the information relates to national security, then that is the end of the matter, and nothing is released.

This bill tries to create a scheme very similar to what exists in the United States in order that we give as much information as possible. Even if the judge says that the information relates to national security, the judge can order that it be released in the form of sanitized summaries or possibly permit the government to admit facts.

For example, if the other side wants to allege that a certain fact exists, and they want the documents to prove that certain fact, the judge could determine to not give out the documents, but for the purpose of this trial, allow the assumption that that certain fact exists. The state would have lost on that factual issue.

That is the basic philosophy behind the legislation. It is to promote more disclosure of information. By promoting more disclosure of information, it also leaves to the government a last resort safeguard. If all these other measures to permit the flow of information cannot protect the information, ultimately the government has to protect sensitive information and information that our allies gives to us. That is the reason for this certificate.

Senator Tkachuk: Can the certificate be reviewed? If the minister says no, you cannot have that under the basis of national security.

If I were asking for information, and I am prevented from getting it on the basis of national security, what could I do? Let's say that I do not believe the minister, what could I do?

Mr. Piragoff: There is no review of the certificate of the Attorney General.

Senator Tkachuk: You use the American example. The Americans have a division of power. You know that. Here, we are in a parliamentary system. If the executive says something, no one else can do anything. In the states you have oversight committees and you have the CIA reporting to committees in the Senate and the House of Representatives. There are ways to get around one person doing something that is bad.

In Canada, it seems that they can just do that. We do not have a definition. To me, it means that it can be used for purposes that are not necessarily meant as to the intent of the bill. Do we have definitions of threats to security? If we do not have definitions of national security, do we have definitions of threats to security? Is there a way that we define that a person or organization is a threat to the security of the country? Do we have that?

Mr. Piragoff: The Attorney General, in exercising these powers, is exercising them in a quasi-judicial role. She must exercise them as if she were a tribunal or judge. She does not constitute a judge or a tribunal, but has a quasi-judicial power that she is exercising.

The minister has indicated in the other place that with respect to the proposed amendments to the Privacy Commissioner and the Access Commissioner, that she is interested in hearing the views of members of Parliament and senators as to whether there could be any type of accountability or transparency mechanism included with respect to the use of certificates in the context of the Privacy Commissioner or the Access Commissioner. She is reviewing that matter.

Senator Andreychuk: Could I ask a quick supplementary? He asked as a non-lawyer, and I am a lawyer. Are you saying that when the judge indicates that something could be released on a qualified basis, that the minister could sign a certificate not allowing it to be released?

Mr. Piragoff: There is a mechanism to try to sanitize the information so that it could be released. In the end, the Attorney General has the discretion to issue the

certificate to say that even after sanitizing the information would harm our national security.

Senator Andreychuk: If the judge sanitizes something, the minister has the final say whether anything goes out under this bill?

Mr. Piragoff: Yes, that is the safeguard.

Senator Andreychuk: That is what I thought that I had read.

Mr. Piragoff: The safeguard is necessary because some of the information that may be held may not be our information. It may be information that is given to us by a foreign country.

Senator Andreychuk: I wanted to clarify the legality of it. Basically, the minister has the final say.

Mr. Piragoff: That is right.

Senator Kelleher: I am advised that this act provides protection for sensitive information under the Canada Evidence Act. Is that correct?

Mr. Piragoff: Correct.

Senator Kelleher: I had a situation a few years back dealing with a warrant. The CSIS officials were in court. They were giving evidence against the people we had charged. There were four of them. We believed that those four people were the ones that bombed Air India, but we did not have the evidence in the Air India case.

However, we had this other case going against them dealing with an attempt to bomb an Air Canada flight to New York. Part way through the case, the CSIS officials referred to their sources. The defence lawyers made a motion to the judge for us to produce their sources so that they could cross-exam them, which was utter nonsense.

If we were to produce our sources, we might as well have packed up and gone home. You cannot run a spy service if you have to reveal your sources. Since we would not reveal our sources, the judge dismissed the case. He just dismissed the case.

As I say, I think we had the suspects in Air India. Those were the people involved. We lost that.

I would have not that that is very sensitive information. Surely we cannot be forced to produce sources. Will any of these amendments prevent what happened in that case?

Mr. Piragoff: Yes. The certificate issued by the Attorney General, which other senators have asked about, would be the ultimate guarantee that information such as source of information and names of informers would not be made public.

Senator Kelleher: We could use that?

Mr. Piragoff: Yes.

Senator Kelleher: We would not be hit by the judge? That is my concern.

Mr. Piragoff: The legislation recognizes that if the Attorney General exercises the power to withhold information, that the trial judge could assess the impact of not having that information upon his or her trial. That could involve dismissing the case.

Other amendments try to get as much information to that trial judge as possible. The Federal Court judge will try, for example, to make an edited copy or indicate that for the purposes of this trial, certain facts may be assumed to exist. This would be undertaken to attempt to keep the trial alive, but it is up to the trial judge in the provincial court who is conducting a murder trial, to finally say or not say whether the person could have a fair trial without the information. That is at that judge's discretion, not at the Federal Court's discretion.

Senator Kelleher: That is what troubles me.

Mr. Piragoff: We are now balancing two issues. We are balancing the interests of the state to protect information and the interests of the accused to have a fair trial, which is protected by the Charter. There may be some situations where both of those cannot be reconciled, and it then becomes a question of whether the prosecution of the individual or the protection of the information is more important in a particular situation.

That is a difficult choice, but a stark choice that may have to be made sometimes.

Senator Kelleher: There is not any protection against the trial judge.

Mr. Cohen: Ultimately, this has to be regarded as a safeguard in the legislation -- that the judge has a power to protect the fairness of the trial against the accused person.

If this were not in the legislation and if there were not some recognition of the ultimate ability of the trial judge to control the process in that way, you could still run the same risk. We could become mired in constitutional adjudication in respect of whether the legislation adequately protects the fair trial interests. Therefore, it is better to have it included.

Senator Kelleher: This was, I believe, in the national interests. I just do not think the trial judge really was prepared to give it much weight. Thank you.

Senator Fraser: Gentlemen, on preventive detention, again, we can all understand why there would be a need to be able to bring people in, if there is reasonable suspicion. I have difficulty with the provision to imprison them for up to one year if they refuse to accept the judge's conditions. If these are real terrorists and crooks, of course they should be accepting conditions. However, is not unheard of for the police to bring in the wrong person. In the past month, we have been made aware of some cases of mistaken identity. You can see an innocent person refusing to accept conditions that would be reasonable if he were a terrorist, but otherwise they are not reasonable and that person would be sent away for one year. Is one year not an excessive term? Does that not parallel "cruel and unusual?" Could we not have a shorter term and still accomplish the essential objectives of the bill?

Mr. Piragoff: The one year period to which you refer is the same period that exists in section 810 of the Criminal Code dealing with the situation of domestic violence, for example. If the spouse -- the abuser -- refuses to enter into conditions, then that spouse can be put in jail for as long as one year.

Senator Fraser: That is if he is a known abuser.

Mr. Piragoff: No, it is based on fear. In fact, the test in section 810 is a lower standard than what is in the preventive arrest. I invite senators to compare the two. Section 810 of the Criminal Code mentions "reasonable fear," not "reasonable grounds to believe" or "reasonable suspicion." The test in the code is based on a fear test, which I think is lower.

Mr. Cohen: I have one other word on that. The one year is a maximum length of time. It is not any kind of mandatory term that is being imposed in the circumstance. If the person is not abiding by terms of the recognizance is a form of disobedience of a court order akin to contempt of court.

You used the words "cruel and unusual," obviously thinking of the Charter's admonitions against cruel and unusual punishment or treatment, given the fact that there is no mandatory aspect to this -- that judicial discretion is involved and what can be involved is a rather serious aspect of disobedience in a terrorist context. I do not think it would be bound to outrage community standards or standards of decency. It is likely that this kind of penalty provision, given the range of discretion that does exist, would be found to be consistent with the Charter.

The Chairman: On behalf of the committee, I thank all of the witnesses today from the Department of Justice.

The committee adjourned.