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THE SPECIAL SENATE COMMITTEE ON THE

SUBJECT MATTER OF BILL C-36

EVIDENCE

OTTAWA, Wednesday, October 24, 2001

The Special Senate Committee on the Subject Matter of Bill C-36 met this day at 8:30 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: Senators, and our guests, we are beginning our third day of hearings of the Special Senate Committee looking into the subject matter of Bill C-36, which is the government's response in its anti-terrorism legislation to the tragic events which took place on the September 11. We in the Senate are engaged now in a rarely used process called pre-study, which enables us to hear from witnesses and then make our suggestions and recommendations in a report to the House of Commons Justice Committee to have our views reflected in the legislation when it returns formally to the Senate, at which point, of course, it will be debated and also studied again clause-by-clause by this committee. We just want to get an advance shot at having our views reflected in the legislation before it comes to us.

We have been hearing a great number of witnesses on security and privacy and information. Today we begin with our panel on legal issues, and we have today with us Wayne MacKay from Mount Allison University. We have Joe Magnet, who is from the University of Ottawa, and a name well known to all of us, Alan Borovoy, who is in charge of Canadian Civil Liberties Association.

Gentlemen, you will find there are many questions being asked at these hearings, so if we could keep the opening remarks as concise as possible and my colleagues' questions as concise as possible, we will have a full exchange of views so all of you will have a full opportunity to get information from you. We thank

you very much for coming on such short notice. Mr. MacKay, will you please start?

Mr. Wayne MacKay, President, Mount Allison University: First, thank you very much for having me back to the Senate. I have appeared on other occasions and always find it stimulating and enjoyable. I appreciate that.

For those who might note that Mount Allison does not have a law school, I have only started there as of July, so you are quite right. I am now president of Mount Allison, but my prior life was as a law professor at Dalhousie Law School. I will try to make my introductory remarks brief. I will go through a brief statement of my approach.

First, the general title I put on this, Security at What Price, an Introduction, is how much is needed. There is certainly a general agreement that Canada, as part of the free world, needs to respond to terrorism, and in that sense, of course, the bill is understandable and appropriate. It is also generally agreed that terrorism networks are quite sophisticated and complicated, so that the ranges of responses need to focus on surveillance and prevention.

A third starting assumption is that many, if not most, Canadians are willing to accept some limits on rights, at least on a temporary, if not permanent basis, in light of the current context. The real question, of course, is how much? How many limits on rights? How do we balance civil liberties and order, this age old question?

The next point I would like to raise is the burden on the government. It is incumbent upon the government, in putting forward Bill C-36, to clearly demonstrate the need to limit these rights. In the structure of our charter, when reasonable limits are placed on rights, the government must demonstrate its justification. In following this reasonably closely, I do not feel totally comfortable that the government has fully established the need for these particular provisions, not the need for provisions generally.

In reviewing this last night, I did go through a few provisions of the Criminal Code because it would be helpful if the government could indicate in what ways the existing Criminal Code provisions are inadequate to respond to the current situation. From my review, I came up with a quick shopping list of things like high treason in section 46, acts intended to alarm Her Majesty or break public peace in section 49 -- not exactly having this in mind but it is there nonetheless --

intimidating Parliament or the legislature in section 51, sabotage in section 52, and conspiracy in sections 465 to 467.

I am not suggesting that those sections nor others that I missed in my quick review are adequate, but it would be interesting to know to what extent we need to go beyond the existing Criminal Code provisions to respond to the current situation.

My next point is one that has been much discussed -- the question of permanent or temporary laws. Do we need permanent changes or only temporary ones? This re-emphasizes my first point: Where the government is proposing a permanent shift in this legislation, there is an even higher burden to demonstrate the necessity for that shift. In the various "whereas" clauses at the beginning, it is very clear that a division of power is being triggered in the criminal law power but also peace, order and good government in its national dimension sense to which they actually refer. This is not emergency legislation. The War Measures Act has not been enacted even though we are at war against terrorism, nor have they enacted the notwithstanding clause to indicate that they are in fact setting aside Charter rights, because I gather it is their position that they are not. If that is to be upheld, the burden is on the government to show that these are reasonable limits in a free and democratic society.

The provision for a three-year parliamentary review is at least one step in recognizing the need to re-examine the bill, but that, to my mind, does not go far enough. I would certainly be of the view that at least some of the significant provisions, if not the whole bill, should have a sunset clause. The bill could be re-enacted without causing great administrative inconvenience if, after a set time, there was still a need for these kinds of measures. We cannot predict how long it will take to deal with the issue of terrorism; I accept that. To put this bill in as permanent legislation leaves the burden on someone else to challenge. It is ironic that if they had invoked the notwithstanding clause, it must be re-enacted after five years. By going this way, the act could become permanent and we should give that a lot of thought.

The definition of terrorism activity in clause 83.01 has attracted a great deal of attention, which is appropriate because the definition infuses the rest of the bill. It is very difficult to argue against, and I do not argue against, the clause 83.01(a) provisions implementing the UN conventions. That is reasonably non-controversial. As various people have pointed out, you can necessarily sunset those parts. Section (b) is more problematic. We are talking about political,

religious or ideological purposes which I would suggest most of us engage in all the time. Now they are tied into other things. I did just have a passing question: What does "ideological" add to "political?" Perhaps that is a semantic debate that we need not get into.

My main objection is to the section (b)(2(E) which is the one that tries to draw the line between the pursuit of lawful dissent in Canadian society and terrorism, and focusing on essential services, facilities and systems. That is quite a flawed provision. The clause does not, to my mind, adequately draw the important line between terrorist activity, which we do want to suppress, and lawful dissent or even dissent which borders on the unlawful in some ways. That is the key point.

This point has been made by other people: Often protest has at least elements of unlawfulness -- civil disobedience, trespass on land. In the Oka crisis, in the anti-globalization protests and others, clearly there were elements of unlawfulness implicit. I would be concerned. Though I am not impugning the attempt to be fair and reasonable in applying the law, our law must, on its face, be protective of rights and not simply protective if it is reasonably interpreted. That is a major problem. That also has a chilling effect on political expression.

There are rather unusual clauses adding to the hate propaganda provisions of the Criminal Code and adding the new crime in relation to damaging religious properties and churches and synagogues. Section 318 of the Criminal Code on hate propaganda, identifiable groups are referred to as identifiable by colour, race, religion or ethnic origin, not nationality.

The new provision adding to the mischief section 430 talks about those but also adds national origin. That is not in the hate propaganda provisions but it is in the mischief to religious property. That makes me question the purposes. I presume one of the purposes of adding the hate propaganda provisions, which strike me as a somewhat useful thing -- my colleague Mr. Borovoy will no doubt have some comments on that -- is that since September 11 certain groups of people have been targeted and now need protection. In that sense, there is certainly some value and the change may be justifiable. I wonder if the addition of "national origin" is not also tied to -- and maybe it should be -- vilifying Americans or vilifying nationalities. That is, again, something we want to look at, but it does raise interesting questions. Presumably it is all right for Mr. Bush or others to talk about Osama bin Laden as the personification of evil but what if he does that in relation to the Taliban? Is that hate propaganda? If he does that in relation to the people of Afghanistan, is that potentially hate propaganda? The provisions of the bill in

clauses 41 and 42 allow the deletion of this kind of material from computers and Web sites. That is a significant extension, so there are real questions about the possible chilling effect of the legislation.

This bill is massive. I have singled out only a few provisions. My main points are these: The government should be able to discharge their burden that the current terrorist threat demands in this extension of powers and, in particular, justifies this significant limitation on rights. It is a significant limitation on rights in many respects. In that regard, the definition of terrorist activity in my opinion is too broad. In particular, clause 83.01(b)(2)(*e*) should either be eliminated altogether. If it cannot be eliminated, it should be sunsetted in a significant way.

Second, the government has not proven, to my taste at least, a need for permanent legislation. Perhaps repeating legislation is needed but permanent legislation may not be.

Obviously it is important to ensure security and promote order, but if we do that at too high a price in terms of sacrificing civil liberties, the terrorists will have won in a different way. You can win this battle as well by taking away our freedoms and democratic rights as Canadians.

Mr. Alan Borovoy, General Counsel, Canadian Civil Liberties Association: No reasonable person can quarrel with the goal of this bill -- the eradication of terrorism. In fact, few historical developments have outraged the conscience of civilized people as have the calamities of September 11. However, the desirability of the goal does not necessarily legitimate the means.

The crux of the issue, in our view, is that the bill is too broad. At the heart of that is the definition of "terrorist activity." Everything flows from that definition. All the new powers and all the new offences are dependent on that definition. I would like to deal with the definition, and I will criticize it in two parts.

First, the part that deals with activity outside of Canada talks about exerting coercive pressures for political, religious or ideological purposes that is intended to cause death and the endangerment of life, serious harm, serious risks to health or safety. However, it makes no distinction between activities that are directed against democracies and activities directed against dictatorships.

As I read this, it would appear to me that it might well have been unlawful for Canadian citizens a number of years ago to raise money for Nelson Mandela's

African National Congress. It, after all, was engaged in violence against some of the instruments of the represssive apartheid state. Suppose Canadian citizens today wanted to raise money to help the Kurds in Iraq resist the encroachments perpetrated by Saddam Hussein, or if a new underground were to form in Cuba. I like to be even-handed with my examples. As I read this, even if those activities or violence were focused on instruments of the state, police, armed forces, and if it did not deliberately target innocent civilians, innocent non-combatants, it might well fit the definition in this bill.

The bill is flawed in way it fails to distinguish democracies from dictatorships, and it fails to distinguish force and violence aimed at instruments of the state, force and violence that deliberately targets innocent non-combatants. There is nothing in the definition to address that.

The other part deals with domestic issues, Part E. This, as I read it, talks about unlawfully interfering with or disrupting essential services, facilities or systems. We had in Ontario a few years ago what may be an unlawful teachers' strike. It was waged against a bill. Now, that was unlawful, or at least arguably unlawful. It was so disruptive that the government decided that it had to end it -- disruptive of what one might say was an essential service, being education. What about native people blockading highways? What about the truckers who want to blockade some major highways? Are those serious disruptions of essential facilities or services?

I cannot guarantee how a court would ultimately rule, but I will suggest that the questions I am asking are reasonably arguable and that it is reasonably arguable that those would fit within the definition.

I noted that the Minister of Justice, when she appeared before the House committee, was asked something about this. She assured the committee that that would not be terrorism and that the bill is not aimed at that sort of thing. It is important, however, that we distinguish intent from effect. Whether or not that was the intent of the bill, the risk is that that might be the effect of the bill. On that basis, the question can be asked, why take the risk? What is there in that that engages what anyone would seriously call terrorism?

Having dealt with the definition, I can then say that there are a number of the powers and offences, were there an improved definition, which would lose their unacceptability. Some of them, even with an improved definition, would retain their unacceptability. Time constraints do not allow me to go into all of them. When I say "time constraints", I do not only mean the time here but the time we

have had since the bill was introduced to try to master that massive piece of legislation.

Let me take several examples. Consider the power to compel people to answer questions at investigative hearings. In view of the fact that the purpose is investigative, this would constitute a much less focused intrusion into people's lives than would a comparable need to talk at an adjudicative hearing where the issues are much more focused. It is for reasons like that that this kind of approach has long been rejected in our domestic criminal law system. In fact, even public inquiries now are told they must not tread in that area. They must not be used as instruments of gathering evidence for investigative purposes. On that basis, then, we would recommend that that power be removed, subject to one exception. In our view, imminent perils can often argue for the relaxation of safeguards. To the extent that the questions are asked not for investigative purposes but for preventive purposes, there might be an argument for it, that is, to whatever extent any of the harms anticipated in (A), (B) and (C) of the definition were reasonable grounds to believe they were imminent, there would then be an argument for requiring answers to questions designed not to solve a crime but to prevent a disaster. For those purposes, it might become acceptable.

I just mention one other example, but these are all important. Finally we are getting some kind of open regulations dealing with the Canadian security establishment, or attempting to control it. The problem here is that it provides for ministerial warrant to intrude on the private communications of Canadians with people in other countries. In our view, ministerial warrants are unacceptable in this area.

Cabinet ministers not only have national security interests, they also have political interests. At the very least, this would create an apprehension in the public that some of these powers may be used for questionable reasons. This, I insist, is not a commentary on the current incumbent in that role, but we do not know who the subsequent incumbents will be and, in any event, the Canadian people at large will not know each of the cabinet ministers as some people around this table might.

That being the case, this power ought to be exercised by judges, not by politicians. I would echo Mr. MacKay's remarks about the need for a sunset clause. If nothing else, it will help to win Canadian confidence that these measures are not a power grab and that you will not have a situation where inertia rather than necessity will determine how long these powers are allowed to linger on the books.

Finally, just one general remark, and that is we, too, are not satisfied that the government has made the case as to why the existing powers in the Criminal Code -- and I might add to what Mr. MacKay has said, the CSIS Act -- are not adequate. Indeed, I have long argued that the powers in the CSIS Act are excessive. They would permit all of the surveillance that can be anticipated, and the offences appear to be quite comprehensive.

That being the case, our view is we are not satisfied that this bill has made Canada significantly safer than it would be with the current powers and offences in the Criminal Code.

My remarks, Madam Chair, are, as always, respectfully submitted.

The Chairman: Thank you very much, Mr. Borovoy. I may say that your remarks are respectfully received.

Professor Joseph Magnet, University of Ottawa: Honourable senators, it is my honour and my privilege to appear before you to attempt to be of assistance. The fundamental principles of our criminal law are that the individual is not a means to an end, but that the individual is the end. This is the principle that has been hardened in the trench intellectual warfare that goes on in the criminal courts daily, and that is refined in the appellate courts and in the law schools by the best minds that the centuries have produced. It is this principle that undergirds our democracy and distinguishes it from the authoritarian regimes.

The principles of the criminal law are not immutable, they are not a suicide pact, but since the minister in her remarks before you focused on necessity for change, let me try to concentrate upon some of the rough edges that honourable senators may want soberly to reflect upon.

I will address these issues: Clause 83.01, the definition of terrorism, my friends have commented on that and I simply do not want to repeat but I will add some examples to what they have brought before you; clause 83.28, compulsory judicial examination; clause 83.3, preventative detention; and I will add my voice and analysis to the desirability for a sunset clause.

First, if we start with the definition of terrorism, particularly at 83.01(*b*), we have a very wide definition. Basically the ingredients are acts or omissions for political, religious, ideological purposes, with an intention to intimidate and an intention to cause some damage.

Honourable senators may remember in the 1980s that a tent was erected on Parliament Hill, which was the peace camp. Some young people camped there for some months to trumpet their message of peace. The government tolerated them were for some time, and then that peace camp was dismantled by the police with force. One of the peace campers was a little frustrated and took a sledgehammer to the Parliament buildings. He was charged with mischief, received probation, went to the University of Montreal subsequently, got a Ph.D., and now is a teacher in Montreal.

Senator Kenny is quite right. Under the definitions in this bill, this person is easily classifiable as a terrorist. Senator Andreychuk and I had this conversation before the committee hearing on Bill C-11: A 19-year-old student protester, who occupies the office of the president of a university, with an intention to trumpet some message, and an intention to trash that office, is easily classifiable as a terrorist under this definition. It is why honourable senators may want soberly to consider whether this definition needs to be trimmed by narrowing 83.01(1)(*b*).

Let me say something about the compulsory judicial examination. The minister has defended this by saying that there is no right to remain silent in our criminal law. Rather, there is a privilege against self-incrimination but not against testimonial compulsion. The person can be required to answer questions.

While this is generally true, I do not think that this captures the situation that is before you now. I disagree with her analysis because it seems to me that the powers under 83.28 are likely to be used in conjunction with the powers under 83.3, and this would be the result. The person would be picked up by the police and held in preventative detention. What do we do with a person while that person is in preventative detention? The likely scenario is that we would ask that person questions, and the person would not be charged but the person has to answer. Under the constitutional cases in the Supreme Court, the *Herbert* and *Lu* cases and their progeny, this person detained, forced to answer, has the right to silence violated. I believe the minister's answer is palpably wrong. Her analysis is palpably wrong on that.

There is a violation of the right to silence, not under section 11(*c*) of the Charter, but under section 7 of the Charter as the Supreme Court has made its interpretation. The Supreme Court's language is pretty clear about this. The state is not entitled to use its superior power to override the suspect's will and negate his choice to speak to the authority or remain silent.

I would say in this situation the violation of the right to silence is palpable and, of course, honourable senators have to consider now whether this violation is justified and necessary. That is the balance that honourable senators are asked to consider in examining this bill.

We might consider why there is a right to silence. It is society's distaste for conscripting a suspect to be an investigative tool. The body of the suspect is held sacrosanct. The police are not allowed to be sloppy in their work. They must do their work not by conscripting suspects but by doing their work in finding evidence.

Then there is the slippery slope. Once we can compel testimony, supposing the person refuses to answer, then what is justified? Then what do we do?

I will now move to clause 83.3, and the preventative detention problems. What will happen with suspected terrorists when the police pick them up? Forty-eight hours go by and someone receives a credible threat that some mass destruction is about to take place at the Congress Centre, that a nuclear bomb is there. What will we do with the person we have in detention? We are having a debate in our media, as in the other democracies, about the use of physical pressure to extract information. All democracies are condemned to wander to and fro, to wonder what they can do to individuals to protect society. This condition is fine as long as the balance between civil liberty and security is maintained.

The Israelis have had this debate, too. Their security services use physical means to extract information. Gripping reading is the decision of Chief Justice Barak of the Israeli Supreme Court in the torture decision, which is a landmark of world legal literature. Chief Justice Barak and the court required that the Knesset authorize the use of physical means, which it had not done.

In our debate, I have seen the police say that the use of physical means would be justified by necessity, without parliamentary authorization. That is something that is rejected by the Israelis.

The difficulty is that a person will be picked up, held in preventative detention. The population will be frightened. The person will be asked questions, forced to answer or refuse and physical means will be applied and that will be legal. I disagree with that, at least without a serious showing of justification beyond the fear that we all share.

We face a credible threat of mass destruction. That is what has happened to us. That is the meaning of the events of September 11. Our population is frightened. This fear is spiralling into the convictions with which we hold our cherished beliefs. Our problem is that we lack adequate intelligence. I believe that without the intelligence necessary to strike the balance between security and liberty, we are overreacting into upsetting that balance. I believe that this bill overreacts.

On the necessity of a sunset clause, the minister has said the basis of the bill is not an emergency, however, her officials have put forth a semantic nuance. They referred before you to the grave nature of the threat posed by terrorism. This is simply semantic fiddling. The basis is a perceived emergency: September 11 and the fear of mass destruction. As the basis of the bill is emergency, the constitutional limits are that the legislation must be temporary. The principles underlying those limits argue for a sunset clause.

Senator Andreychuk sat on the Special Committee on Security and Intelligence that produced an excellent report two years ago. The committee produced 33 recommendations. One recommendation was that the government consider immediately reducing vulnerabilities in critical infrastructure. This has not been acted on. Another recommendation was that the government support the training of first responders to nuclear, biological or chemical attack and that the equipment be in place. As we see from the interesting conversations of the Minister of Health, this has not been acted on. A further recommendation was that the government ensure adequate and appropriate resources to enhance the strategic collection of foreign intelligence. This has not been acted on. Mr. Elcock appeared before you and told you of the resource problem that he has in operating outside of Canada.

The Security and Intelligence Committee had the right responses to the problem that we face. That committee suggested long-term, resource-intensive and require preparedness. Mr. Elcock told you that even if you gave him resources now, he could not absorb those resources because it takes time to train to get ready.

These are the right responses. They include better intelligence, better preparedness and a better understanding of the threat that we fear but do not understand. Then we can strike the appropriate balance between security and liberty.

These are some of the factors honourable senators will need to consider in this important equation. I hope my remarks have been helpful to you. It is always my pleasure to try to assist you.

Senator Beaudoin: The first question we asked the Minister of Justice was whether this is an emergency bill or not. That is fundamental and is the starting point. This proposed legislation is either an emergency bill or it is not. The minister said that this is not an emergency bill. A court may infer from the bill that it is like an emergency bill, but there is no declaration of emergency. There is no notwithstanding clause that is used. The bill is destined to be a landmark bill, but it is not an emergency measure.

Some witnesses who appeared after the minister took the opposite thesis. They said, look at the bill, it is an emergency bill. My suggestion is that we hear again from the Minister of Justice and ask the question whether or not this is intended to be an emergency bill. If this is an emergency bill, it is transient, exceptional and will not go on for years. That is fundamental. I agree with you that in a case like this one we must make a choice at the beginning.

If this is not an emergency bill, it is to a great extent a criminal law bill and the question is whether it is falls against the Charter or not. I would like to have your views.

This also relates to my question to Professor Borovoy. The right to silence is at the basis of our criminal law and democratic system. Your recommendation of removal, except for prevention purposes, is a good one. I agree when you say that the ministerial warrant should be set aside. This is the first time I see in a bill that instead of going to a court of law, we go to the minister. We should have a more neutral arbiter and follow the system that we have. We should address ourselves to the judges instead of to the minister.

As Mr. Magnet has said, this bill overreacts in the sense that we do not know at first whether it is an emergency bill or not. My question to you, Mr. MacKay, is: Are you inclined to think that, from the wording of that bill, that this is an emergency bill?

Mr. MacKay: I agree, Senator Beaudoin. I think it is ultimately emergency legislation. As you would be well aware, in the "whereases" they talk the language of criminal law and national dimensions. That does not preclude the Supreme Court of Canada from ultimately concluding that this is emergency legislation.

While you were speaking, I was thinking of the anti-inflation case in 1975. I am pretty sure that in the anti-inflation case the drafters targeted the bill as national dimensions. That was what the whereas clauses and the preamble suggested. However, to the surprise of many, the majority of the Supreme Court of Canada did not buy that it was national dimensions but did accept that it was crisis or emergency legislation. In follow-up cases like *Crown Zellerbach* they have taken the view that there certainly can be peacetime crises. It is unclear whether we are currently in peacetime or wartime.

Therefore, quite apart from what the drafters, the Minister of Justice and others are claiming, it is certainly open to be considered emergency legislation. It also seems to me that it is difficult for the government to say, on the one hand, that this is not emergency legislation but that, on the other hand, we must move with amazing speed on this very complicated legislation because we need it right away.

Another troubling aspect is that the government may be saying that this is a permanent emergency. This is an interesting area, not only with respect to the Charter, to which I will come in a minute, but in division of powers. What are the powers of the federal government to respond to an ongoing or permanent crisis? The only rational defence that I can see to saying that it is not an emergency in the traditional sense is the government saying that it is a permanent emergency, that we will likely always face terrorism in the foreseeable future so we need this extensive preventive emergency legislation on an ongoing basis. That certainly flies in face of the traditional position under peace, order and good government that emergency, by definition, is limited in time and that if it is not limited in time it must to be justified by a much stricter test as being a matter of national dimensions or an extended version of criminal law or some other power.

That is a very big issue, not only in relation to the Charter, but also even in relation to the division of powers, although it is kind of tucked away there.

In relation to the Charter aspect of your question, there are many sections of this bill that violate the first part of the Charter test. There are violations, as Professor Magnet said, of section 7 with regard to preventive detention, the compelling of evidence, listing terrorists in the way in which that is done, certificates on privacy, the definition of free speech in terms of defining dissent and limiting dissent and freedom of association. There are a host of possible Charter violations. It all comes back to section 1.

The question to which, presumably, the government has addressed its mind is whether they justify all of those first level violations as reasonable limits in a free and democratic society. That will ultimately be a decision made by the courts, but in a pre-emptive way I understand that they have addressed their minds to that and have tried to suggest that that reasonable limits test would be met.

That links back to my first point on emergency. To the extent that they can succeed on the reasonable limits test, I think it is because there is an emergency. It is because there are unusual circumstances that justify limitations we would not otherwise accept.

Therefore, I agree with your point that it all comes back to the emergency nature of the legislation.

Senator Beaudoin: If it is an emergency measure, of course it is transitory. If it is transitory, we will apply section 1 of the Charter. Is that necessary in a free and democratic society? If the measure is permanent, it is more difficult, because it is mainly, although not exclusively, criminal law. If it is an emergency measure, it changes aspects of it. We cannot go against the Charter, but in the case of emergency the court may be more lenient about restrictions on rights and freedoms, but not entirely.

This is why, in my opinion, the government should be invited to make a choice: Is it transitory or is it permanent? I agree that it is very important, but it may be permanent or it may be transitory. The choice must be made.

Mr. MacKay: It would be interesting to compare the War Measures Act with the provisions of this bill. Which of the two would be more intrusive of rights? I do not know the answer, but it would be interesting to know. My guess is that the War Measures Act, at least in some parts, would be more protective of rights. Therefore, we again have the rather ironic situation that by not treating it as an emergency, by not treating it as a situation of war or akin to war, we are more free to limit rights than we would be in a wartime situation.

I have not done that analysis but it would be an interesting to compare the War Measures Act to this bill.

(French follows: Senator Bacon)

(après anglais)

Le sénateur Bacon: Vous êtes certainement des experts sur les questions des droits de la personne. Il nous faut se pencher sur la délicate tâche, non seulement de combattre le terrorisme, mais aussi de maintenir bien vivantes les bases mêmes de la démocratie, c'est-à-dire les droits et libertés civils.

La ministre de la Justice et le gouvernement estiment que cet équilibre fragile est préservé par le projet de loi C-36. Étonnamment, les plus vives critiques que nous avons entendues ne touchent pas les restrictions aux libertés civiles contre la mesure d'arrestation et d'interrogation préventive, l'érosion du droit au silence et même, la facilitation du recours à l'écoute électronique des conversations privées.

Le procureur général se donne le droit aux articles 87, 103 et 104, de délivrer un certificat afin de retirer des informations qui autrement seraient accessibles par la Loi sur l'accès à l'information ou par la Loi sur la protection des renseignements personnels et les documents électroniques. Le commissaire à la vie privée estime que ce pouvoir que se donne le procureur général est encore plus grave en ce qui a trait à la Loi sur la protection de la vie privée que pour la Loi sur l'accès à l'information puisque le droit à la vie privée est un droit constitutionnel. Le procureur général pourrait retirer la possibilité d'invoquer la Loi sur la protection des renseignements personnels lorsqu'il estime que des renseignements liés à une personne ne peuvent être dévoilés au risque de mettre en danger la sécurité nationale. Croyez-vous que c'est une mesure nécessaire à la sécurité nationale ou au contraire, que cela restreint trop le droit à la vie privée sans relation avec l'objectif recherché? En d'autres mots, est-ce une mesure qui rejoint le critère d'un juste équilibre entre la lutte au terrorisme et le respect de nos libertés civiles?

Également, il semble qu'il n'y ait pas de possibilité d'en appeler de la décision du procureur général de délivrer un certificat qui interdit la divulgation de renseignements. Est-ce que cette décision peut être révisée par nos tribunaux?

(Mr. MacKay: I understand that you had the Privacy Commissioner...)

(anglais suit)

(Following French)

Mr. MacKay: I understand that you had the Privacy Commissioner and others speaking to you so I did not focus much on that part of the bill. However, my general view, having read the bill several times, is that the proper balance is not struck. Going back to my first point, it seems to me that the burden is on the government to justify why these kinds of measures are needed and why it has to be through ministerial offices and in ways that we have not traditionally accepted. If they can convince me of that, then perhaps this is the kind of measure we need to respond to the current situation. However, that is not implicit in the bill and it is not what I have heard to date. If I were trying to predict where I would see the balance, it seems to me that the balance is a bit too intrusive of rights at this point.

Mr. Magnet: Senator, I did read the remarks of the Information Commissioner, and there was of course quite an atmosphere surrounding those comments. He has an ongoing court case. The suggestion was made that, perhaps, the powers were pasted in here in a way in which they were not really necessary to deal with some other controversies in which the commissioner was involved.

It is difficult to see that the ministerial certificate is really necessary. We have no evidence that the Office of the Information Commissioner has ever created threats to national security. It takes a very lively imagination to see how the work of that office could do that and why the ordinary prudence that is in that legislation is not sufficient and why it needs to be stiffened with what is quite a draconian process of ministerial interdiction of information without judicial oversight and without accountability or consideration in advance. Thus, I did find those quite disturbing remarks, and I myself was moved by the passion with which the Information Commissioner defended the powers he currently has.

(French follows: Senator Bacon: Au niveau de la détention préventive, croyez-vous ...)

(après anglais)

Le sénateur Bacon: Au niveau de la détention préventive, croyez-vous que le pouvoir d'arrestation préventive sans mandat ainsi que le pouvoir d'interroger une personne sans qu'un acte criminel ait été constaté, soit justifiable dans une société démocratique? Est-ce que ces deux mesures pourraient passer le test de l'article 1 de la Charte canadienne des droits et libertés?

(M. Borovoy: You may recall, senator, that in my opening remarks I said…)

(anglais suit)

(Following French)

Mr. Borovoy: You may recall, senator, that in my opening remarks I said "in our view", that is, the Canadian Civil Liberties Association, “this was not compatible with the Charter.” There is no demonstration before us that I know of that existing powers are inadequate to deal with the situation. In any event, I suggested there might be an area here to make an exception, and that is to distinguish those compulsory questions, if you like, that you ask for investigative purposes and those which you ask for preventive purposes. Given an imminent peril to life or limb, there may be an argument to relax safeguards we otherwise insist upon. Beyond that, it would be our view that there is no demonstrated justification to go that far.

Senator Andreychuk: I would like to go back to the question of whether or not this is an "emergency" bill. Two things trouble me. One has to do with the report of the special Senate committee chaired by Senator Kelly. The aspects that are being dealt with in this bill were aspects we knew about long before September 11. Would the court take that into account in assessing whether it is advisable and necessary to change the criminal law of the land in such a fundamental way and with such haste, given all the aspects the government is trying to change by this bill, if they were known before September 11 and signalled by the appropriate authorities?

I am not asking a legal question. I am asking how a court might look at the facts at the time.

Mr. Magnet: Speaking as a lawyer who would attack it, the fundamental question to be asked in an analysis of the necessity of these means is: What alternative measures were and are available to the government? That is the fundamental question. Thus, the recommendations made in 1999 in the Kelly report, as well as those set out in the two earlier reports going back to 1989, outlined the threat. It is not as if this is new. The Rand Corporation studied this. I have its report here. They predicted exactly this event in exactly those buildings. They suggested preventive measures that could be taken. It had various models, such as a war model and a preventive justice model, and some things were done.

Of course, we cannot protect ourselves from everything. We cannot hermetically seal yourselves from violence and terrorists. However, a court would ask: What was available? The first thing that a lawyer would produce would be

the Kelly report. He would say, "Here are 33 recommendations. Which of them were acted on? Very few. What were the nature of those recommendations and what likely would have happened?" Those were very far-reaching recommendations and they would have increased the prophylaxis against these events without certainty. Are we convinced, or has it been demonstrated, that these additional police tools would increase our security? I say police tools are as opposed to intelligence tools because the intelligence powers are left totally undisturbed. An honest answer to that question is: "We do not know."

The bottom-line answer to your question, senator, is that that would be very relevant in a court, as it is here, because this body is also an interpreter of the Constitution. This body also has a responsibility to underline our fundamental constitutional values. You have to ask, as a court would ask: Have the right things been done at the right time and is the right balance maintained?

Mr. MacKay: I think that is correct, but it brings us back to your beginning, I think. If it is an emergency, then the events of September 11 and thereafter may justify doing something then that, perhaps, they should have known but they did not know or did not take seriously before. However, if it is billed as an ongoing, permanent thing, to deal with the general issue of terrorism in society, then that earlier evidence that the information was available and not acted on certainly takes away from some of their argument for the justification of the bill.

Again, I think they are caught in a situation where it is much easier to defend, assuming they can produce the evidence, that there is now an emergency or an unusual situation that has emerged or at least been brought to people's attention since September 11 that was not there before. I think it does bring us very much back to that permanent-temporary debate.

Senator Andreychuk: Would the conclusion be that if we had means that we should have tested and did not -- because it is an ongoing terrorist measure -- that perhaps now we have to put ourselves in a preventive mode, as opposed to an ongoing mode, that would justify emergency measures because we need to sort the situation out quickly in a preventive mode? Surely, that would not lead to saying, "It is ongoing and therefore does not that give one more reason why a sunset clause is desirable and necessary?

Mr. MacKay: I would think so. I think it is correct to say that the prevention focus has been underscored by the events of September 11. Obviously, we would prefer not to be acting after the fact. The whole point of investigation and

surveillance is to prevent. While it has issues, it is not so much the problem, but it is for how long and in what circumstances.

Senator Fraser: Gentlemen, obviously what you say is fascinating. I have difficulty with remarks, basically from all of you, on the definition of terrorist activity insofar as it touches domestic lawful advocacy, protest, dissent or strikes.

I cannot see that this definition as written would apply to the examples you cited, Mr. Magnet, because this clause specifically says that lawful advocacy, protest, dissent or strikes can only be considered terrorist activity if they are intended to result in death or serious bodily harm to a person by the use of violence. Being trampled by a mob does not count. Further the violence must be intended to result in endangering a person's life or intended to cause a serious risk to the health or safety of the public.

Property damage does not count. Property damage is not one of the available grounds. Taking a sledgehammer to the Parliament buildings, much as I love them, would not qualify.

Mr. Magnet: It is in clause 83.01(ii)(D).

Senator Fraser: Paragraph D is not included. Your intent must result in those mentioned in (A) to (C).

Mr. Borovoy: No, if I may say so, I think the clause at the end --

Senator Fraser: That is the one I am reading.

Mr. Borovoy: …to which you refer, modifies lawful dissent, protest, et cetera. It does not modify what comes earlier.

I said, "If it was an unlawful interference with disruption of an essential service." I am saying an unlawful one. Unlawful disruptions of essential services often include civil disobedience of various kinds.

I am not suggesting that that unlawful activity acquire a legal immunity, but I am suggesting that it should not be treated as though it were terrorist.

Senator Fraser: I guess we have a serious disagreement here. I understand what you are saying, but I have another question.

Mr. Borovoy: Is our disagreement as to how do interpret the section?

Senator Fraser: Yes.

Mr. Borovoy: It is? Are you suggesting then that the clause at the end does not modify only what comes before it, but modifies the entire bill?

Senator Fraser: I am suggesting that 83.01(ii)(E), which is what we are talking about here, would exempt from the definition of terrorist activity almost everything in Canada except things like this that were actually intended to result in death or physical harm.

Mr. Borovoy: That is only if it is otherwise lawful, not if it is unlawful. If my interpretation is not correct, I would suggest to you that the exemption for lawful activity would have been put at the very end.

Mr. Magnet: Perhaps I could be allowed to respond to your identification of my example as absurd.

Senator Fraser: I did not say that it was absurd. It was the kind of thing many people would be worried about, but I do not think it will come to that.

Mr. Magnet: I believe that there is a one-word answer to it, senator. It is the word "or", and the word "or" occurs in paragraph (D). It is any of (A), (B), (C), (D) or (E).

You were saying that there must be a conjunctive attachment. It is not conjunctive, senator. It is disjunctive, and paragraph (D) stands on its own. Substantial property damage does not gauge the section and everything follows from that

Senator Fraser: Your example of the young man with the sledgehammer was not at that point trying to intimidate the public or compel anyone to do anything. He what was furious and claiming that it was the wrong way to run a railway.

Mr. Magnet: Senator, that is a very interesting literary interpretation of that act. Perhaps you will forgive me for pointing out that there are other literary interpretations of those acts as well, which are less benign.

Senator Fraser: I do have another question that I want you to answer.

Mr. Borovoy: May I just suggest one thing about all this. Often reasonable people have disagreements as to interpretation. In view of this reasonable disagreement, would not the sensible thing be to amend the section so as to make it

abundantly clear that the kind of activity we are talking about would not get covered by this bill?

Senator Fraser: Certainly. I think we are hoping to have the Minister of Justice and officials back. I am sure that we will be raising this with them again.

My next question is on compelling evidence. Again, I think this goes to Professor Magnet, because it is a very disturbing concept to think you could be brought up under preventive detention, and that what you were required to say in an investigative hearing might end up being used against you.

Clause 83.28(10), which is about investigative hearings, states that you must answer questions. Then it says that none of your evidence shall be used or received against you in any criminal proceedings against you nor can any evidence derived from the evidence that you were compelled to give be used against you. The criminal proceeding would include the hearing before a judge for preventive detention, would it not?

Mr. Magnet: My friend is asking me if the question is addressed to him or to me, but I believe you were asking me.

Senator Fraser: Under my notes it was you who raised this conjunction, Professor Magnet.

Mr. Magnet: Senator Fraser, I believe that clause is when the minister came said that we are not interfering with the right to self-incrimination. You made that your basis in your remarks. It is quite true that the testimonial compulsion is not the fundamental constitutional principle. It is the right to silence in the situation where a person is detained.

Who is normally detained? It is a person charged with an offence. This bill changes that because the person detained is a person who might have some information. The person may be detained under clause 83.3.

My feeling is that the person would be questioned and not merely put in a cell. The person would be questioned. It is at that point that the problem arises with the right to silence. The right to silence would apply in that situation, and I have referred to the Supreme Court cases.

The conclusion that I have reached is, with all due respect for my admired friend, the Minister of Justice, that she is not correct that there is no violation here.

There is a violation, and honourable senators then have to consider whether they think that this is reasonable.

The proper way, in my respectful submission, to consider it is to think of the person detained in a cell being asked questions by the police for a period of time. What is likely to happen? Are honourable senators satisfied that the right balance is struck there?

Mr. MacKay: Could I add a quick point? I now your agenda is tight. I want to say that I have some sympathy with Senator Fraser's views on the last two points, not totally, I think Mr. Borovoy's point about the need for clarity is the critical one.

Going back to your definition, it is very clear that the exempted lawful activity is modified only by (A) to (C). It is what it before that, the unlawful activity and other things, whether that is modified only by (A) to (C), because that is referred to in that section, or whether it is modified by (A) to (D) that comes above it.

That is the legalistic, semantic debate. There is not only a literary debate, but there is a legal debate about that. At the end of the day I would come down on the side of clarity. If there is doubt about it, and reasonable people can differ. Given the importance we should change it.

On your second point about some of the protections against self-incrimination, it is important, in responding to this bill, not to suggest that every part of it is negative and that there has been no attempt to strike a balance. There have been attempts to strike a balance, and in some cases, they do a reasonable job of that, if the whole bill were not tainted by the overly broad definition of "terrorism." I have some sympathy for your views and it would not be fair to suggest that each and every part of the bill was wrong.

Senator Kenny: Welcome, gentlemen. I have been following the discussion this morning, and it seems to turn on two things: the question of the sunset clause, perhaps exempting the UN conventions and the definition of "terrorism." Would you be as concerned about the definition of "terrorism" if you knew for certain there was a sunset clause to provide us the chance to review it at a later date in a calmer environment. I have heard all three of you say, essentially, that you want to trim the definition of "terrorism."

You said that you do not want to gut the definition, but you have not come forward with a better definition. Given that it is tough to come up with a good definition, would you be testifying in the same way if the bill had a sunset clause written into it?

Mr. Borovoy: Speaking for myself, senator, I would nevertheless be attacking what I thought was a needlessly, and I stress that word, overbroad section. The fact that we have not shot an alternative at you does not mean that an alternative is inconceivable. Surely alternatives are conceivable. I would still attack what I regard as a needless bit of dangerous over breadth.

Of course, if there were a sunset clause that would somewhat reduce the unhappiness level, but that may be like asking whether you prefer syphilis to cancer. One has to answer by saying, "Do not put me on the horns of a nonexistent dilemma."

Mr. MacKay: I think it would certainly be easier to accept if there were a sunset clause, but I guess my submission was that (E) of 83.01 (1)(*b*)(ii) is problematic. There is still a significant definition of "terrorism." If you removed (E), you would still have (A) to (D) in that definition beyond the UN conventions. Thus, it is not just restricting it to the UN conventions if you actually eliminated the controversial (E). That would be a trimmed version of the definition of "terrorist activity, " but still quite a substantial version. I would be open to persuading why you needed the additional one, but it has not been clearly made. In a sense, I am proposing a reworked definition by eliminating that part only as one step in the right direction, and failing that, at least a sunset clause on that provision.

Mr. Magnet: Senator, the definition of "terrorist activity" that is before you is a copy of section 1 of the Terrorist Act of the United Kingdom. It also copies the United Kingdom's mechanism of prescribing certain groups. I see that honourable senators were asking what groups would be put in. If you would like know, there is a list of 40 groups that the British have already included under their act. So this is not a new concept.

Granted it is short, but the United Kingdom's Terrorism Act of 2000 has operated for a bit, and we can see that it has not made a difference, yet. We can see that there is considerable concern there about the definition in that act.

In response to your question about whether I would be less anxious if there were a sunset clause, my answer is yes, but I would still have concerns.

Senator Kenny: I accept the point that was made earlier that the onus is on the government. One of the dilemmas facing these folks is that they are in trouble. They are also worried and afraid that something will happen on their watch. They know that Canadians are upset and edgy, and to come before us and to say, "We do not know what is going on; we do not have much in the way of tools; we cannot find these guys; we are not sure how to find these guys; and we do not have any way of going about it." Realistically speaking, we are all in the deep blue here. The government has come to us and said that they make no promises or guarantees for success. They are casting a very wide net and they want to take a run with it so they do not have another problem on their watch.

Is that a reasonable proposition to make, given what happened on the 11th and given what is happening every day since? The situation seems to be worsening, given that we know these folks will be around for a while longer. I have already indicated my bias for a sunset clause. How would this panel recommend developing such a clause that would differ from the government's approach?

Mr. MacKay: First, on the burden point --

The Chairman: May I just say that it is a broad question and I would encourage you to be reasonably cryptic in your answer.

Senator Kenny: Not cryptic, but short, please.

Mr. Borovoy: Wrong question with a narrow answer.

Mr. MacKay: The critical question comes back to the burden of proof. You may have this before you, but I think it would be useful in dealing with your dilemma to have an analysis of the shortcomings of the current legal provisions, and perhaps you have that, as well as some demonstration of that. Have in front of you the current provisions under the existing CSIS Act, the Criminal Code and others, as well as the shortcomings of those acts. Second, have information on what the bill does to increase our possibilities of pursuing terrorism. If that evidence were before you or before me, then I would have much more sympathy.

Mr. Borovoy: In response to that, I would also invite you to consider something else. Since you say that prevention is the name of the game, remember the CSIS Act that, in order to monitor what that act calls "activities directed toward or in support of acts of serious violence for the purpose of achieving a political objective, " they are entitled to engage in surreptitious searches, electronic

bugging, mail opening, invasion of confidential records and the targeting of informants of people. That is on a pretty broad basis that they can do that.

Now, if prevention is the name of the game, it really has to be asked: why is that not adequate? Indeed, I think even that is capable of targeting people beyond terrorists, but surely, it is at least capable of targeting terrorists.

Mr. Magnet: The security services told you they know that there are 350 people here whom they are watching. This bill will not affect the intelligence powers at all, but it will affect the status of those 350 individuals and that they are liable now to deeper police intrusion.

Your question is: what would we do beyond this approach? I would resource intelligence much deeper, because that was very comforting information to know that that was there; and I would increase the capability to watch these 350 people to do more. I do not think it is necessary to sweep up these 350 and subject them to these means.

Senator Kinsella: Last night, honourable senators heard testimony from Commissioner Zaccardelli of the RCMP. I asked him if he would prefer to have additions to the bill and he said that he was very satisfied with the package of new tools that it provide to him.

I then asked him what he thought of the idea of setting in place some type of oversight mechanism. He did not like that idea. So on the one hand the senior police officer of the land is satisfied with these new tools. I have been concerned about us thinking outside of the box and coming up with a new model of dealing with this encroachment on civil liberties and human rights.

On the question of whether this will be transitory or whether it will be here for a long time, the Minister of Justice is very clear. That is why she is using language like this is really an amendment to the Criminal Code. She is not want to look at this as an emergency measure. If it is encroaching on human rights -- and everyone seems to be admitting there is an encroachment; whether there is a derogation remains to be seen -- would you not agree that the test of this encroachment or derogation must be all the more closely scrutinized by us than had it been transitory?

If this is not transitory, then the duty before us to examine this carefully from a human rights perspective is greater.

Anti-Terrorism - 38355 0830– 30

Professor MacKay, I read your references to different models of oversight. You made reference to a panel of retired judges or something like that. I thought that when we had a debate something like this, when the CSIS legislation was being brought in, we did come up with a model. That was the Canadian Intelligence Review Committee, which provides not micro-management but rather oversight.

I would like to advance this proposition and get your views. If this bill is passed with some minor modifications, which I expect from the majority in Parliament, can we at least include a mechanism like the mechanism in the CSIS arena so that a parliamentary commission of members of the Privy Council would provide oversight of these encroached rights.

What are your views on those two points?

Mr. MacKay: I did in a very preliminary way address that question. That is a very important question, even if there is a sunset clause, and it is important how this is dealt with. This bill contains very broad powers. There is a lot of room for interpretation. Undoubtedly, there will be some inappropriate application, not from ill will, not because people necessarily plan that, but there will be some. How do we respond to that?

The parliamentary committee is a useful mechanism but there could be other ways to feed into that. I am not familiar with the details of the CSIS model but it sounds like a useful one as well.

From my obvious bias, I had some attraction to using retired judges who have spent their lives balancing rights and order. In our post-charter society, our judges are experts in that area. In that sense, we will have shifted the jurisdiction a bit. It is still, in the broad sense, a parliamentary jurisdiction but that piece is not there at the moment. I would be happier if there were some agency with that kind of input. There may be other organizations with input, such as the CBA and human rights organization,.

We can think creatively about other ways to oversee this legislation, if necessary, to minimize the intrusions on rights. That is an important area to pursue..

Mr. Borovoy: Your suggestion actually coincides with a long-time position of the Canadian Civil Liberties Association. We suggest an agency independent of government, of any of the key constituencies, of the police, with ongoing access to

records, facilities and personnel, no decision-making power, simply a power to audit, to disclose and propose, to hold everything up that needs to be held up to public scrutiny.

In our view, such an agency should be established without a sunset clause. That is something I would like to see linger in the law.

Senator Jaffer: I have a question for you, Mr. Borovoy, on the issue of in and outside Canada. That is of great concern to me as a daughter of a freedom-fighter against the British Raj. If someone from outside Canada comes here to speak here -- is he a freedom-fighter or is he a terrorist?

You gave the example of ANC and the Kurds. Have you had any time to think about how to improve this definition in a democratic system compared to a non-democratic system?

Mr. Borovoy: The definition ought to treat activities against democracies different from activities against dictatorships. I think it ought to draw a distinction between targeting instruments of the state, even in a dictatorship, and deliberately targeting innocent non-combatants or civilians for serious violence.

In my view, the definition, insofar as it would make Canadians responsible or culpable, for supporting activities in foreign lands, ought to make those distinctions.

Senator Jaffer: You may not be able to do that now, but I ask your help in how we could finetune that? What kind of wording should we would use?

Mr. Borovoy: I cannot draft it on the spot, but I could suggest ways of tightening it for those purposes.

Senator Murray: If this issue has been canvassed already, someone will say so and we can move on. Can the witnesses address the question of whether we need a list of terrorists to be published in the *Canada Gazette*. It seems some of the offences and some of the powers in this bill would depend on the existence of such a list. If we are to have such a list, how can we have it without the potential denial of natural justice and the total lack of due process implied in this bill.

This list of terrorists will be compiled by the Solicitor General on the advice of the police and security agencies. It will be brought by the Solicitor General to cabinet and that is it. The cabinet, when it meets, meets for a couple of hours a

week. It is inconceivable that 25 or 30 ministers could take the time, go over the list and demand to see the justification for various names being on the list, would summon the heads of the security agencies and ask to see the evidence, and so on. The Solicitor General will bring in the list and the cabinet will accept the recommendation of their colleague. That will be the end of and the list will be published.

What are we going to do about that? The judicial process contemplated in the bill comes after the fact, after you have been named as a terrorist. I toyed yesterday, when SIRC was here, with the idea of inserting them into the process but it does not seem to be practical.

The Emergencies Act, which replaced the War Measures Act in 1988 or 1989, has quite explicit provisions for parliamentary oversight, and I wonder whether the creation of some kind of parliamentary review body might do the trick in this case.

I ask you to address the question of whether we need a list and, if we do need it, how we can do this in a way that preserves some semblance of natural justice and due process.

Mr. MacKay: An important additional area of concern in the bill is that of being listed as a terrorist a group, as well as parallel concerns under the Charities and Income Tax Act. Added to the very legitimate points you made is the difficulty of getting off that list. It is easier to get on the list than to get off it, or at least it takes a longer time. It would obviously be damaging once it is published that you are a terrorist organization. I had similar concerns.

While there is some effort to build in an after-the-fact review, given the consequences of being listed in that way, I would like to see strong evidence for why that was necessary in the first place, and I am not sure that is present. Assuming it is, then it seems absolutely vital that there be some more independent mechanism to assess whether those people should be on the list, and that assessment should occur before you are published as terrorist entity, with all the damage that goes with that, in perpetuity, I would suggest. Even if you came off the list as being a terrorist organization, I cannot imagine life would go on as before.

Mr. Borovoy: Another possibility might be to think in terms of narrowing the consequences that flow from being on the list. For example, if you talk about participating in activity or anything of that kind, restrict that to participating in

activity that is designed to help terrorist activity properly defined rather than helping certain groups. That might be one way of handling this so that you narrow the consequences that flow from being listed and go after the behaviour you are worried about more than going after supporting or not supporting named groups.

Mr. Magnet: I do not oppose the concept of a list, but I do share your concerns, because we have seen this before. There is the suspected child abuser list with the same kind of thing. You go on it, and there are all sorts of social consequences. The administrative proceedings to get you off have proven to be not all that satisfactory.

We could have a screen of a judicial type, prior to going on the list, showing there was some prima facie reason before a judicial officer as to why government thinks this is a proscribed organization. It might be helpful and not difficult to show, with respect to al-Qaeda, some of the 40 groups on the British terrorism list, that they belong there. Your concerns, which I share, about over-zealous use of this power might be tempered by that kind of pre-clear mechanism.

Senator Joyal: My first question is simple. It has been mentioned that the opportunity to create a specialized tribunal should be one option to limit the extraordinary power that given to the ministers and to various agencies under this bill. Would you care to comment about that suggestion?

My second question is linked to an aspect of the bill that you did not mention, but it is of great concern to me, and this is the dynamics of that bill. This bill is aimed at combatting terrorism, and it starts with opening statements. It refers to international conventions and instruments and so on. It then goes on to define a "terrorist activity". When you move through the bill, you realize that in fact you are excluding from review and monitoring a large segment of activities that were previously under the scrutiny of the court, and I refer to the definition of the certificate of the ministers for the purpose of international relations, national defence, or security.

The word "security", in fact, relates to everything. It relates not only to terrorist activities; it relates to absolutely everything. It does not even say "national security". It is simply "security." It could even be police monitoring traffic in the street. That is security. It could be anything related to human activities.

I am concerned that, in this very encompassing and worthwhile objective of maintaining safety of Canadians, we are in fact widening so much under the

discretion of the minister, outside any judicial review, that we have included in our system of government and our law of governance and legislation in Canada a concept that is totally against the culture of rights that we claim that we live under since the Charter of 1981. I would be interested to hear your views on that aspect of the bill.

Mr. Borovoy: A friend of mine once said that in a society like ours, no one should be the umpire of his own ball game. That has to apply to cabinet ministers as well as everyone else, and perhaps in some respects even more so. Since they have political as well as security interests, we have to acknowledge the possibility that at least they will be perceived or could be perceived. There is an increased risk of them being perceived as exercising those kinds of powers for the wrong reasons. Therefore, in our view, the exercise of such powers should be subject to some kind of independent review.

I must say that when people talk about the competing risks of improper disclosures, leaks from political or judicial sources, I would like to add up the number that have come from political sources as opposed to judicial sources. I think that might help to make the argument.

Senator Joyal: Does anyone have a comment on the specialized tribunal to deal with terrorism?

Mr. MacKay: I am not entirely clear. Do you mean as an oversight agency or dealing with the threat of terrorism as an administrative agency?

Senator Joyal: More as an administrative agencies.

Mr. MacKay: I have not thought much about that, but that would have some appeal to me, similar to my thoughts about the oversight. If you take it out of the political realm and move it into a more independent realm where you could have judicial as well as political and other input, it seem to me a more appropriate kind of agency to deal with the wide range of issues that would arise under this legislation. I personally find that an attractive model and one that would cause less concern in terms of applying these broad powers.

Senator Finestone: My first question is with respect to the Privacy Act. What type of modification or change might you see needed in clause 70.1 different from the Access to Information clause and the Bill C-6 clause? The language is identical for the three bills, and I wondered whether or not you feel there should be

some particular language there, or possibly the removal of the Privacy Act from the weight of this particular bill.

My second question has to do with the oversight committee. Do you think that CIRC could enlarge their mandate to include the oversight? We have seen three or four oversight groups in here already. I wondered whether one of them might be appropriate to do oversight or whether we need another new oversight operation?

Mr. Magnet: I would be happy to deal with the second question, Senator.

I am not opposed to oversight. This issue of oversight of some of these new powers has come up now through several different streams.

Senator Joyal made an interesting point. I am not sure that I fully understood whether or not he was thinking there should be an agency that would not only oversee but that might also be a blend of coordinating intelligence activity, and that within that agency there might be some structured checks on the power. If that were the suggestion, it might be an alternative to the American model, where there is a concentrated effort at security. The suggestion is that it could be a hybrid type of agency that would coordinate our activities; in other words, that we would actually respond to the security gap, to the intelligence gap, and at the same time build into that effort some structuring of power in some check and balance, and review and oversight. This would be an interesting model to develop to try to accomplish our purposes.

It may be the appropriate model for us, as opposed to the American, as a middle power with somewhat different concerns.

Senator Finestone: Is there any structure of that nature in France, Britain or any other country?

Mr. Magnet: There is not, to my knowledge, no.

Senator Finestone: Do any of those countries allow the terrorist who is about to go on a list to be advised before his or her name is put on the list or before it goes to cabinet?

Mr. Magnet: That is not in the British act, no.

Senator Finestone: Do you have some comments on the privacy issue, Mr. Borovoy?

Mr. Borovoy: I am sorry, my memory is somewhat faulty.

Senator Finestone: My question was whether there needs to be modification of the Privacy Act restrictions that are in this bill as opposed to the fact that we have three major acts, Access to Information Act, Personal Information Act, and the Privacy Act, that all have the same language.

Mr. Borovoy: To the extent that it would allow a ministerial fiat to overrule or trump the whole privacy process or any independent review, it ought to be changed. If you want to say that for some purposes go straight to a court and not to one of the commissioners, I for one would not go to the barricades over that distinction. What I think might be more of a barricades issue is that the ministerial judgment ought to be subject to independent review.

Senator Andreychuk: My question is short, but the answer will likely be long. I would ask that the panellists reflect on what I ask and submit their comments in writing.

I am concerned that there are tools put into the bill that the Royal Canadian Mounted Police or CSIS have previously requested and were turned down, as an inappropriate balance in the issue of protection versus freedom. This bill now seems to have slipped in many things that we were not prepared to accept when we had an anti-gang crisis or when we had other crises in our criminal law system. Have any of you studied how many of those matters have now seen the light very quickly in this bill when they were not put into other acts over the last two or three years?

Mr. MacKay: I cannot answer that in detail, but I think your general presentation is correct. Again, it takes us back to the special nature of this legislation. There are a number of provisions here that have been resisted even before going to courts in the past that are now put in here and we are told do not violate the Charter. Presumably, the only reason that that can be true is that there are new circumstances that justify limits that were not justified prior to that; or that people have changed their minds and were wrong the first time. It would be one of those two choices. It seems to me there are many things here that would not be accepted in ordinary times.

Mr. Borovoy: Whatever the reality, this would help to fuel the perception that it is a power grab and that some people may be exploiting an opportunity, and that strengthens the argument for a sunset clause.

Senator Beaudoin: According to my notes, all three are in favour of a sunset clause. I want to be sure that that is the case.

Thank you.

The Chairman: Gentlemen, it has been a pleasure to have you here. I am sure that Senator Andreychuk will be in touch with you if she wants to pursue her issues.

Honourables senators, we are facing another formidable panel of witnesses, and I know that, once again, we will have a great number of questions. I should indicate that two members of our panel, Professor Bayefsky and Professor Wilkinson, have to return to New York and will need to leave by 12:15. David Matas is able to stay for the remainder of the session, so I ask honourable senators to consider that in formulating your questions so that our witnesses will have the opportunity to answer.

Ms Bayefsky is no stranger to our committees, nor is Mr. Matas. For you, Professor Wilkinson, I say thank you very much for making a special effort to come up here to engage in this discussion. Your remarks are very important to us at this time.

Professor Anne F. Bayefsky: Honourable senators, I appreciate your invitation and I am conscious of the fact that this is an occasion of special importance to Canada.

I was in New York on September 11. I saw the smoke rising almost immediately. I walked home with those who walked miles and miles from downtown because there were no subways or any other kind of other transportation. I have attended one funeral for the father of a classmate of one of my children. I have witnessed the trauma of New Yorkers since that day.

Yesterday, at the university, I had an unsolicited envelope that was opened with gloves on, as is now the practice in our mailroom. Every day seems to bring a new sense of trauma. It is the kind of trauma that is so deep that when the likes of Paul McCartney sing "Freedom" on a Saturday night, people all over New York have tears in their eyes.

At the risk of being simplistic, freedom is what it is all about. For Canadians to claim at this time that somehow freedom or civil liberties are on the opposite side of a fight against terrorism is wrong and irresponsible. We have always been

active participants in multilateralism and in support of the United Nations. This is not the time to become insular and fixated on ourselves, or to invoke or put in place limitations that would inhibit our contribution to the global community's effort here.

The Security Council resolution 1373 is far reaching and, in fact, it stands as a beacon to so many years of stalled efforts to energize the UN in doing something concrete and dramatic about terrorism. The resolution calls upon parties to do a series of specific things and it is mandatory. It calls it a breach of the UN charter and decides that all states shall and lists a series of things that are now Canadian responsibilities. In any oversight of the process of the Bill C-36, we must look carefully at what is required by the Security Council resolution and ensure that our action goes as far as it can to ensure that we implement all of the mandatory requirements.

Canada has an obligation, in view of its forthcoming ratification of the two remaining conventions on financing terrorism and terrorist bombings, to review our laws to ensure their conformity with those instruments. To ensure compliance before ratification is the responsible thing to do. We are required to take specific action and this bill does that.

Canada has an obligation to take a leadership role in another sense. It is not enough to assume that terrorism has external repercussions. We must bring the matter home, and recognize that there are domestic implications. We have legal obligations to suppress terrorism in Canada. This is not a neutral obligation; there is no neutrality. In the words of various speakers of the general assembly debate, neutrality spells collaboration in the legal obligation to suppress terrorism.

It is important at the outset to state something explicitly about terrorism versus protecting human rights. Terrorism is an extreme violation of human rights. That violation of human rights is our problem as Canadians. There is an apt saying that evil triumphs when good people do nothing. Our responsibility is to defend human rights and to do so by taking the kinds of actions that are in this bill.

In terms of the definition of terrorism, it is important to ensure that those who would claim that somehow there are root causes of terrorism and that the focus of our attention must be on the "whys," I think there can be no misunderstanding that this is a euphemism for excuses. Again, as was said by a number of speakers in the general assembly debate, terrorism is done by what one does not by what one does it for. Our definitions of terrorism must be sure not to excuse. I do not think they

do, but we must be careful when we talk about purposes to ensure that the definition of terrorism is not turned on its head by providing a rationale by which the end justifies the means.

I shall now turn to specific clauses in the bill, in no particular order. In regard to the clause relating to those who commit mischief in relation to religious property, I note that the commission of the mischief must be motivated by bias, prejudice or hate based on religion, race, colour or national or ethnic origin, I wish to ask why that list does not include sex. If we talk about the Taliban and its treatment of women, it seems that bias, prejudice or hate can be based on gender. I cannot see any logical reason for omitting sex from that list.

The covenant on civil and political rights, article 18, to which Canada is a party, states that the freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and as are necessary to protect public safety, the fundamental rights and freedoms of others.

Similarly, the right to freedom of expression and to seek, receive and impart information, regardless of frontiers is subject to special duties and responsibilities, including the protection of national security and public order.

In contrast to those who may say that the international human rights standards inhibit action against terrorism, they do not. They support limitations on freedoms insofar as they are necessary and reasonable.

In Canada, we have the capacity for judicial review to ensure that Charter rights are limited to the extent that they are reasonable and justified in a free and democratic society. That remains and will remain in the context of this bill. That cannot be underestimated.

Lastly, I would urge honourable senators to be conscious of new international developments in your proceedings. I understand that this Friday, there will be a deciding moment in the sixth committee of the General Assembly on whether there will be the adoption of another convention on terrorism. There is debate about what the definition of terrorism is. Many Arab states, specifically, have said that actions taken in pursuit of self-determination and against occupation do not count as terrorism. This is a position that Canada does not share and neither do most other countries in the debate. Whether that definition prevails in terms of an exception clause remains to be seen. There will be potentially a vote and divisive continuity of the debate.

The reports of the Security Council resolution 1373 requires the setting up of an implementation mechanism and reports from states as to what they are doing in pursuit of those obligations. These reports will become part of the context of the expectations of the international community. Therefore, we must remain cognizant of that.

Resolution 1373 may also elaborate further potential obligations that Canada may take in the future. Our responsibilities are not over. Our full participation in the international community's effort to find that terrorism violates everything that we stand for as a democracy and a protector of human rights is something that Canada should fully participate in. I commend the government for its early and broad ranging response.

Mr. David Matas: Honourable senators, thank you for inviting me again. I have circulated my written presentation, and I shall be referring to it.

In my view, the bill has some strong provisions, some weak provisions and some missing provisions. In some respects, it is just right.

I commend the government for introducing the strengthened anti-hate provisions. Clause 88 amends the Canadian Human Rights Act. Clause 12 deals with mischief relating to religious property. I concur with the amendment proposed by Anne Bayefsky for the addition of sex.

These sorts of changes are long overdue and should be a permanent part of our legislative structure, no matter what the level of the threat of terrorism. There has been some talk of a sunset clause, which I would endorse, but it should not apply to these sorts of provisions. There is much in the bill that should be in place even if the threat of terrorism disappears completely.

There are aspects of the bill that go too far in constraining civil liberties. You have heard about some of those problems from the Canadian Civil Liberties Association and you will hear more from the Canadian Bar Association. I share many of those concerns.

In my view, there are aspects of the bill that do not go far enough toward combating terrorism, and I wish to turn to those now. I have five specific suggestions to make. One is the need for a non-discrimination clause in the bill comparable to the non-discrimination clause in the Immigration Act. In my written material I have quoted the non-discrimination clause in the Immigration Act,

basically saying that the non-discrimination standard in the Canadian Charter of Rights and Freedoms should apply to the Immigration Act.

I am worried that there is a possible discriminatory application of the anti-terrorism bill, particularly the provision that allows the Governor in Council to place on a list entities that the Governor in Council is satisfied there are reasonable grounds to believe have carried out, attempted to carry out, participated in or facilitated a terrorist activity.

We have already seen plenty of discriminatory discourse distinguishing between the September 11 terrorists and other terrorists, particularly those killing innocents in Israel. In my view, that sort of discrimination is unconscionable and ends up excusing terrorism. The Canadian law must be applied in a non-discriminatory way so that other terrorists fall under its sway as much as anti-American terrorists. A terrorist is a terrorist is a terrorist. One person's terrorist should be every person's terrorist. Hamas, the Islamic Jihad or Hezbollah must be listed along with Al-Qaeda. It would be unacceptable to say that terrorism against Americans generally is legal but that terrorism against Jews in particular is legal.

The case of *Rand* in the Supreme Court reminds us that the Charter guarantee of equality can be violated by omissions in legislation as much as by inclusions in legislation. The purpose of anti-terrorism legislation is to protect the victims of terrorism. If we prohibit some terrorist organizations and not others, we offer protection to some victims of terrorism and not others.

I have drafted a proposed anti-discrimination clause which says that it is hereby declared that Canadian anti-terrorism policy and rules and regulations made under this act shall be designed and administered in such a manner as to ensure that the listing of any entity or the failure to list any entity under the relevant section does not discriminate in a manner inconsistent with the Canadian Charter of Rights and Freedoms.

The second strengthening provision I would propose is that the Criminal Code provisions in the bill that create new offences should have a retrospectivity clause. A person should be liable for prosecution for any of the offences created under the bill, even if the person committed the offence before the present bill became law, as long as the act was an offence at international law or according to the general principles of law recognized by the community of nations at the time the act was committed.

I remind you of the relevant section in the Canadian Charter of Rights and Freedoms, 11(*g*), which more or less says that. It says:

> Any person charged with an offence has the right...
>
> *g*) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations.

What I am proposing would be in conformity with the Canadian Charter of Rights and Freedoms and also consistent with our present Crimes Against Humanity and War Crimes Act which enacts the same principle. Its offences are retrospective.

Some of the perpetrators of the September 11 crimes would be caught by present Canadian legislation, because we already have some universal jurisdiction offences in the Criminal Code that would apply to the acts, but not all of them would be caught. If any of those terrorists should end up on Canadian soil, we should be able to prosecute them in a situation where they are not extraditable. Canada should not become a haven for the September 11 terrorists and we need a retrospectivity provision if the present law is to prevent that from happening.

My third suggestion relates to something I have said to the Senate before. We need an integrated approach on the fight against terrorism. This is a problem that I raise with regard to many pieces of legislation. Our fight against international crimes is compartmentalized and segmented. Each piece of legislation deals with only part of the problem. Here we have an anti-terrorism bill that leaves out a whole swath of measures to deal with anti-terrorism.

I am speaking in particular about immigration and citizenship concerns. Long before September 11, the government proposed changes to the Immigration Act and the Citizenship Act that do not address this problem adequately. I have in mind first the problem of removing people without even investigating whether they committed an offence -- in this case, a terrorism offence. Of course, these amendments could be made in the Citizenship Act or the Immigration Act in the separate bills that are wending their way through Parliament, but it makes sense to deal with all aspects of terrorism in an anti-terrorism bill, including the immigration and citizenship aspects.

There is nothing to prevent the removal of terrorists before the police even investigate whether the person could be prosecuted. In fact, the law compels it. The Immigration Act says the person should be removed as soon as reasonably practicable and that a criminal investigation cannot stay that removal.

The Immigration Act should provide for the referral by the Minister of Citizenship and Immigration of every person subject to removal as a terrorist to the Attorney General for possible prosecution for the offences set out in this bill. The Minister of Citizenship and Immigration should have the power to stay removal until that investigation is complete and a decision is made whether or not to lay a charge for one of the offences set out in the anti-terrorism bill.

The problem I am addressing here puts us in direct contravention of the anti-terrorism conventions. I have quoted article 9.2 of the Convention for the Suppression of the Financing of Terrorism, which reads:

> 2. Upon being satisfied that the circumstances so warrant, the State Party in whose territory the offender or alleged offender is present shall take the appropriate measures under its domestic law so as to ensure that person's presence for the purpose of prosecution or extradition.

We must ensure that people are here for prosecution, and we do not. In fact, we do just the opposite. Our law says they must be removed.

I propose that the Immigration Act be amended to say that a removal order shall not be executed where the presence in Canada of the person against whom the order was made is required for the purpose of an investigation by the Attorney General into charges of participating in, facilitating, instructing or harbouring terrorist activity under the relevant provisions of the Criminal Code and the minister stays the execution of the order pending the completion of the investigation.

The point here is that deportation is not punishment but a merely a relocation of the terrorist. In many cases, that relocation may be no more than an inconvenience. It would rarely be a deterrent to entry. To discourage attempts at entry, our laws and practices must warn terrorists that they will be subject to prosecution should they enter, and not just a request to move on.

My fourth suggestion is that we incorporate the definition of terrorism in Bill C-36 into Bill C-11. The Canadian Bar Association has made some suggestions of

amendment to that definition, with which I concur. As I indicated previously, I much prefer the definition that is in the Convention for the Suppression of the Financing of Terrorism, a convention that Canada has signed and ratified. The definition in the bill adds a couple of unnecessary items that are not in the convention and just create problems.

Be that as it may, there is no excuse, now that the government has defined terrorism in this bill, to leave it undefined in the other bill, and there should be a uniform definition.

My final suggestion is that we consolidate proceedings and change the Citizenship Act so that a person can lose their citizenship for participating in facilitating or instructing terrorist activity. Right now, the only way somebody can lose citizenship is if they obtained it through fraud, false representation or knowingly concealing material circumstances. It may well be that someone hid their terrorist past and, because they hid their terrorist past, they became a citizen. They can lose their citizenship for that fraud. However, because the actual proceedings is a fraud proceeding, when it comes to immigration their participation in terrorist activity has to be proved all over again. Thus, we end up having a double proceeding, proving the same thing twice and consuming time and resources unnecessarily, and that should not be so.

Those are my suggestions for strengthening the bill. Thank you.

The Chairman: Thank you, Mr. Matas.

We will turn to our final witness who is Professor Paul Wilkinson. I should tell honourable senators that Professor Wilkinson is from the United Kingdom. He is the Chair of the University of St. Andrew's Centre for the Study of Terrorism and Political Violence. He has had a great deal of experience on this issue.

Please proceed, sir.

Professor Paul Wilkinson, Chairman of University of St. Andrews' Centre for the Study of Terrorism and Political Violence: Thank you, Madam Chairman and members of the committee. It is a great privilege to be able to participate in your discussion of Bill C-36. Clearly, it is a subject of enormous importance to the Canadian public, as well as to the international community, because what the events of September 11 have brought home to all of us is that terrorism is no longer to be adequately understood as a law and order threat or a

minor law and order problem within particular states. It has become a strategic threat to the well-being of the international community and to the human rights of large numbers of people. It is worth reminding ourselves that the mass terrorism of the atrocities in New York and Washington on September 11 killed more people in one day than have been killed by terrorism in the whole of Western Europe in the last 35 years. That includes the Northern Ireland terrorism by Loyalist and Republican terrorists. It includes the Basque terrorist attacks, Corsica, the actions of groups such as the Red Brigade in Italy in the 1970s and early 1980s, the Red Army Faction in Germany, the Direct Action Group in France, and the neo-fascist groups that became particularly active in terrorism in the early 1980s and which continue in many countries to be a terrorist threat.

We are dealing with the crossing of a watershed to a level of terrorism which we have not experienced before except, of course, in the form of state terror. Historically, state terror under regimes like Hitler, in Germany, and Stalin's Soviet Union were responsible for killing people on a far vaster scale than any substate group practising terror has accomplished.

As an example of substate terrorism, the attacks in America are the worst cases of mass terrorism we have experienced in the modern history of terrorism. I therefore think we do need to review our policies and our measures, both nationally and internationally, and in common with Professor Bayefsky, I greatly support the United Nations efforts in this area. I welcome the UN Security Council's strong resolution and the setting up of the UN Office for the Prevention of Terrorism, which operates from the UN office in Vienna and which is doing excellent work.

Members of the committee may be interested to know that my centre, which is an independent academic centre at St. Andrews, is doing the first research contract issued by the United Nations in the field of terrorism studies which was six case studies on the relationship between terrorist groups and international organized crime. We have almost completed that six case study program.

I welcome the work of the United Nations. I believe it has become far more important in the light of recent events and that the comments of my colleague on the need for Canada, which has such a strong reputation as an international citizen of the global community, should be taking a leading role in supporting those positions. It is absolutely right. I have always regarded Canada as a very strong voice in supporting international cooperation.

If ever there was a situation in which we needed strong cooperation, I think this clearly is a dramatic example because, clearly, this kind of terrorist activity that we are now seeing so tragically demonstrated does reflect the globalization of terrorism to a degree we have not seen before. That is to say, networks of activists supported by support networks in many different countries can plan a deadly attack thousands of miles away from the country where the headquarters or the base of the terrorist organization is situated, where the main theatre of conflict that the terrorist group is concerned with is located.

We have seen the way in which the openness of our societies in Western Europe and throughout North America have been exploited by terrorist organizations. In a curious paradox, our democracies have a very strong immunity system against the strategic objectives of the terrorists, that is, to undermine our democracies and to topple the democratic systems. Fortunately, they have never come within an ace of doing that. However, they do exploit the freedoms of our societies which we value so greatly in order to carry out attacks within those free societies. Above all, they do this to set up support networks which can fuel policies of terrorism in other parts of the world.

Because I share the view of my colleagues that this is essentially and ultimately a human rights problem, for terrorism of all kinds involves an attack on the most basic human right of all, we need to recognize that we need to act in a consistent way, internationally, to ensure that the method of terrorism is regarded as an unacceptable method of achieving political, social, religious or ideological objectives in the modern age, just in the same way that war crimes have become viewed as unacceptable as a means of waging armed conflict in times of war. We must take the same consistent view of the use of the bombing of public places, the taking of hostages, the hijacking of civilian airliners and so on, other manifestations of terrorism. We must take the same view, I believe, that this is unacceptable in this day and age.

The way in which the support networks operate is of great importance in a country such as Canada because you have very well established freedoms and, under your Charter of Rights and Freedoms, there are many provisions which work to the great benefit of groups which are operating lawfully and peacefully to further their causes. Unfortunately, tiny minorities have been able to take advantage of those freedoms and have used them for the evil purposes of channelling money, recruits, training and other assistance to organizations

responsible for the murder of many innocent people. Sometimes, those support networks can get involved in the operational aspects of terrorism.

I know I will not need to remind members of this committee that a group of what I am sure started as support-network people was involved in the worst act of civil aviation sabotage in civil aviation history in a flight from Canada to Europe in which the airplane blew up just off the coast of Ireland with the loss of 329 lives. I believe the investigation is ongoing into that and the judicial process is gradually taking its course.

I would remind members of the committee that no country is immune from this occurrence, from a support network becoming an operational network. No country is immune from the effects of the terrorist violence on its citizens.

I will take another example, which nearly came to pass on the September 11. Many of the specialists involved in the investigation of the suicide hijackings in the United States are of the opinion that there was a plan to fly one of the airliners at 500 miles an hour into a civilian nuclear reactor. If that happened, and the action had caused a major disaster in that plant, the consequences would have been experienced by many of the urban areas on the Canadian side of the border as well as within the United States.

That is not a piece of nightmare fiction. This is a serious possibility given the ruthlessness and indiscriminateness of the terrorists groups that have been concerned in the recent events. They have no compunction about actions that involve the death of thousands of people. For that reason, we can no longer be reassured by the comment of one of my American colleague, Brian Jenkins, that terrorists want a lot of people watching, not a lot of people did.

Sadly we now have groups involved in international terrorism who are quite committed to killing large numbers of people, indeed, as many people as they can because they believe fanatically that the end justifies this means. That means we are one step nearer, sadly, to the use of the kind of chemical, biological or nuclear/radiological device by a terrorist organization.

I always had the rather optimistic view, which is reflected in my thirteen or so books on the subject of democracy's combating terrorism, that there would be political constraints that would discourage a terrorist group from embarking upon such massive loss of life as part of its campaign. I am afraid, as far as the al Qaeda network is concerned, one can no longer assume that that kind of restraint exists.

The affiliates of al Qaeda contain many fanatics who take the same kind of view of the terrorism method that bin Laden takes.

We are in a more dangerous situation that calls for a much more carefully considered global policy to counterterrorism. I welcome the main provisions of the legislation, which I studied carefully, reading from cover to cover after my arrival from New York. My eyes were popping out of my head by the end of the evening.

I view many of the provisions as entirely comparable to the kind of provisions that are being introduced in European countries, including the British legislation introduced in the Terrorism Act 2000.

I happen to be to be familiar with that legislation because I was appointed adviser to Lord Lloyd, the law Lord, whose job was to inquire into the legislation and make recommendations for a new framework for legislation in the light of the improving situation in northern Ireland and the move forward in the peace process. We issued our report in October 1996. There was a consultation paper issued about a year later.

The effort to review the options for legislation was supported by all the major parties in both Houses of Parliament. The legislation was carefully considered, and I think that is an extremely important fact. It was not rushed through in the aftermath of a particular event. It was carefully considered, and, of course, looked at by lawyers in both Houses. There are many law Lords with a special knowledge of the law of European Convention on Human Rights in the House of Lords. They considered very carefully the compatibility of this legislation with that convention. I believe they found it was compatible.

The criticisms after the September 11 events are that we did not make some of the legislation strong enough. I feel that is unfair because it only came into implementation March of this year. We have not seen yet what the overall impact of the new British legislation really is. We need the give it a chance, I believe.

I want to pick up one point before opening up for questions to the panel, if you would allow me. It is the point about the listing of organizations that was mentioned by my colleague, Mr. Matas.

The British legislation, after much careful consideration, by the Parliamentarians and by the committee that inquired into legislation, decided that they would adopt the policy of listing certain organizations as designated terrorist

organization. It is important to recognize that that wasn't intended to simply aim the legislation solely at those groups.

In other words, I do not think it is discriminatory in the sense that Mr. Matas was suggesting because the legislation applies to any group that has carried out a terrorist activity, which supports, trains, recruits, arms or finances terrorism, whether in the United Kingdom or abroad. Therefore, the use of the designated list is really aimed to try to streamline and make more effective the measures particularly against the financing of terrorism.

I will explain the rationale behind that. If you try to trace by complex methods of investigation, the routeing of funds from some organization usually under some apparently innocent name that is being run for the benefit of a terrorist organization in another part of the world, and prove that that money was actually expended on a supply of conventional weapons, a supply of explosives or any other terrorist equipment, it is impossible. Modern financial transactions can be made quite complex. However, you can decide on the track record of a particular organization.

Let us take al-Qaeda as a good example. Due to terrorist actions in which it has been involved, one knows that any money that goes to that organization is helping that organization to carry out the violence in which it is involved. Therefore, by including it in a list of designated organizations, in rather the same way that the U.S. congress decided to do in 1997, you will make it easier for the law enforcement branch of government to clamp down on the flow of funding to those organizations.

That is a very important strength of the listing. Of course, it is important that that list is reviewed, and that there is a means by which the groups that are listed can appeal if they believe they have been unfairly included. In the British legislation we have set up a thing called the prescription appeal board, to which the group could apply.

Under your proposed legislation, I believe that there is a method of appeal to the senior legal officer. Therefore, a means of appeal and review is built into the legislation. That is a useful part of your overall proposed legislation. It would be, in my view, a great pity if one weakened it by taking out that provision for listing organizations.

One could always add to it as Congress has done. One should recognize that groups would cleverly change their names having found that they can no longer operate under one name. Based on the advice of the person whose job is to monitor such changes, you could consider adding to the list of the names and taking out the names of organizations that for one reason or another are no longer used in the boundaries of one's county.

You may argue about the organization that moves its operations to another country as happened after the 97 listing of organizations in the United States. Some, as you know, intensified their activities in Canada to compensate for the more difficult legal framework that existed in the state.

I accept that that is likely to happen and those that find things a little tougher in Canada as a result of the new legislation might well move their operations elsewhere. Then it is, as my colleague has said, up to other countries to strengthen their national laws to bring them up to the standard required to implement the UN convention on the suppression of terrorism and terrorist bombings, and so on.

There are ways to encourage other members of the international community to amend and improve their own legislation against terrorism in the way that your government is doing. I give overall strong support to the measures in this bill. I would be happy to answer questions about the way in the which the British legislation was formulated and about the measures of other countries in Europe, which we studied in the process of developing a new British act.

The Chairman: Thank you.

Senator Kinsella: I have one question with several parts. I will direct those parts to the members of the panel. Mr. Wilkinson, is it your testimony in summary, in respect of the British anti-terrorism legislation -- the current act -- for which Lord Lloyd provided the preliminary work, is consistent with the European Convention on Human Rights?

Mr. Wilkinson: Yes, sir.

Senator Kinsella: Mr. Matas, I was pleased that you raised the issue of non-discrimination, and I wish to draw honourable senators' attention to Article 4 of the International Covenant on Civil and Political Rights that states:

> In times of public emergency, which threatens the life of the nation, the existence of which is officially proclaimed, the States Parties to the covenant

> may take measures derogating from their obligations under the present covenant. To the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with other obligations under international law and do not involve discrimination solely on the grounds of race, colour, sex, language, religion or social origin.

I find that article helpful in my own analysis in that it must be "the strict exigencies" of the situation that guide us in the derogation from rights. However, there are some rights that can never be derogated from, including the right to be free from non-discrimination.

The Commissioner of the RCMP testified directly last night that there would be no racial profiling or ethnic profiling in the application of the act by his force. There would be behaviour profiling or terrorist activity profiling. Would you explicate a little further on your point in respect of non-discrimination.

Mr. Magnet: Certainly, the non-derogation clause is a useful guide to deal with this legislation. Part of the problem is that we do not have a time-limited public emergency in this bill. Some of these provisions do derogate from previously acceptable rights. The non-discrimination is non-derogable. It is useful to include in the bill a non-discrimination clause. One might believe that it is in the Charter and thus not necessary in the bill, but it is useful to include as a reminder, as a statement of principle, as a commitment not to derogate even in a time of emergency, and as a realization that this area is problematic.

There are many who believe that a particular cause is just and, therefore, terrorism activity is okay. People will make excuses, depending on their political sympathies, for some terrorism as opposed to others. Once we get into that, we have a problem in terms of our charter, our principles and our credibility in our anti-terrorism fight.

As we have heard, terrorism is a human rights violation of the gravest sort. Once we start discriminating, then we are saying that human rights violations against some are acceptable. It is important to emphasize this principle in the context of this legislation.

Senator Kinsella: Professor Bayefsky, many human rights students subscribe to what Mr. Matas has said. We are in an unusual circumstance. That means there are things we have not thought of before now and which might be useful to include on a parallel basis for monitoring purposes from the human rights or civil liberties

standpoint. Could you comment on the viability of these powers in the hands of those who would exercise them? Do you know of a monitoring or auditing mechanism that would assist in ensuring Canadians that there are no abuses. I have two points. Following up on the non-discrimination suggestion, I would take a slightly different approach. This reverts to my earlier point of ensuring that the language of root causes -- the whys and "the end justifies the means" -- is not included in our protections and inhibits the use of this kind of terrorism bill, by incorporating the specific provisions of the two conventions that we are about to ratify. Those provisions could be inserted after the definition of "terrorism" in Bill C-36. It would have to be modified somewhat in terms of its opening remarks, but the gist of it is exactly the same: "…each state party shall adopt such measures as may be necessary including where appropriate domestic legislation to ensure that criminal acts within the scope of this convention..." It continues: "...are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature..." Similarly, the exact same provision is in the Convention for the Suppression of the Financing of Terrorism. Again, Canada is using this bill as an opportunity to ensure a consistency with that convention prior to ratification. It states: "...the scope of the convention under no circumstances justifies considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature."

That ensures that our focus, to some extent, on purposes is not abused for those kinds of considerations as a justification.

I looked at Article 4 of the Civil and Political Covenant and I thought about it carefully. After doing so, I must say that I do not see the analogy to this legislation. I do not think that this is the kind of bill that derogates from the obligations under the convention, which is the point. It does not derogate from the obligations, because the obligations are to protect rights subject to reasonable limitations, like public order and national security. Rights are subject to limitations and these derogations are those rights understood as subject to reasonable limitations.

Furthermore, as I understand it, the government has not said that the point of this bill, as Mr. Matas has pointed out, is one which is being promulgated in time of public emergency threatening the life of the nation, the existence of which is officially proclaimed. The covenant in this article does not apply in these circumstances. Many of the provisions of the bill are largely overdue. This is very broad in its scope, but it affects situations and it takes responsibility for not

providing refuge for terrorism and terrorist support of their activities in Canada. That is something that we could have done a long time ago. We are taking this opportunity to do it now.

In terms of the review mechanism, as I understand it, three years from now the government intends to have a full review of the operations of the bill. I think it is important to have a public examination of how it has worked in many of its details, since it is so broad in its scope and it introduces certain dimensions which have not been part of Canadian law. A clear, public review process is important in addition to the judicial review which will carry on from the outset.

I agree that it is an important dimension. As to the scope of the review and exactly when it is to take place, I do not have firm opinions. However it works, it has to be clearly something that allows for the involvement of Parliament in assessing its reach and its efficacy.

Senator Finestone: As to the question of a sunset clause, a review clause or an exemption for the United Nations issues, where do the three witnesses place themselves?

Mr. Matas: I am in favour of a sunset clause as opposed to just a parliamentary review.

Senator Finestone: Do you mean with the United Nations exemptions or not?

Mr. Matas: The whole bill does not need a sunset clause. As Ms Bayefsky sets out, there is much in here that is long overdue. As I pointed out in my own submission, it should be part of our legislative structure, and should not be subject to a sunset clause. For instance, in considering the amendments to the Human Rights Act that add to hate on the Internet and on the telephone, that is a technological shift that required a change in legislation. It would have been brought into Parliament in due course in any event. There is no reason why it should be subject to a sunset clause or even a review. This bill is an occasion to change many laws that the government was planning to change and which needed to be changed anyway.

There are some provisions in the bill of a different sort. I refer to detention without charge and investigation before a judge. Some of these are violations of standards that we have had in the past. They are repealing standards we have had in the past and they are changing our legal system. They are in response to the

September 11 crisis. They were not in the works long before. Those provisions should be subject to a sunset clause.

I suggest that the bill has to be gone through clause by clause, and a decision made clause by clause as to what should be subject to a sunset clause and what should not.

Mr. Wilkinson: With regard to the question of review, I believe that review is extremely important. I think the three-year idea is an excellent one because, by then, you will see how the legislation is actually working. I would suggest that one of the things which might be considered thereafter is an annual report by an independent judicial figure on the workings of the legislation, something we have found useful in British legislation in the past. Those independent judicial figures can make valuable recommendations for amendment or changes in procedure. Of course, it is not only the way in which the legislation is framed that will be important, but the way it is actually implemented. Those reports were extremely valuable. Parliamentarians of all parties appreciated the work of those independent reviewers. That may be something worth suggesting as a development in the application of this legislation.

I would separate that from the issue of a sunset clause. When I first came into this area as an area of research over 30 years ago, I had hoped that it would be a couple of year's work because I was very much concerned with the history of conflicts in which this method of violence had been used. After all, that is really what it is; it is a method rather than a philosophy or a cause. It is a methodology. As soon as I was finishing that preliminary study, the burgeoning of hijacking, of embassy attacks, of kidnapping of diplomats and so on showed I would not escape from this field. I have been studying it ever since.

I am cautious about assuming that, in some grandiose way, as I think some of the American statements after the September 11 attacks seemed to suggest, we will be able to win a kind of global campaign against terrorism which suppresses this element in the international system. I think that is far too ambitious in practice and we will have this problem as an international community for some years ahead.

Therefore, it would seem unwise to scrap the legislation after such a relatively brief period, especially when one bears in mind that investigations into some of the worst of the terrorist attacks take a very long period of time. Look at the Lockerbie investigation as an example, or look at the investigation into the Air India sabotage bombing in 1985, three years before the Lockerbie attack.

We should not jeopardize that by saying that this is a framework for a short period. One can always envisage Parliament revisiting the legislation in the light of changed developments, if we had a dramatic breakthrough and terrorism was to reduce to a residual fringe problem of security and law and order. Of course, it would be possible for Parliament to reconsider the whole thing, but I would think it very unwise to have a sunset clause applying to the entire legislation and, indeed, to crucial parts of it. It would be better to wait for the review, and then for Parliament to consider the individual parts of the legislation in the light of later developments, rather than to put a kind of shutter down on the implementation of this legislation in such a short period.

Senator Finestone: Because you are answering something that is so important I would ask you to look at the Privacy Act at the same time.

Ms Bayefsky: To respond to your question briefly, I completely agree with what Mr. Wilkinson has said about the sunset clause. I do not share the view that it is a wise thing to do. It has taken us so long to energize ourselves in terms of concrete action in this area. I do not share a kind of optimistic view that it will be a short-term campaign. A sunset clause would require us to do this all over again in a way which is not helpful to the ultimate goal, which is reducing terrorism.

If the review process works properly, if Parliament takes a close look at how it has worked in the past, and it is a public document that could be periodically renewed, even possibly with some suggestion that that review process ultimately involved an independent kind of ombudsperson who could deal with it from time to time, then that ought to be sufficient, in an open and democratic society, to give us enough of an indication as to whether something is working so poorly it has to be rethought.

Senator Beaudoin: Mr. Matas, you said that the Criminal Code provisions in the bill should have a retrospective effect. I agree with that. I think it is possible. Usually, the Canadian Charter of Rights and Freedoms prohibits retroactivity, but there are some exceptions. What are those exceptions?

You refer to offences that are international or criminal according to general principles of law recognized by the community of nations. I agree with that. Is there a short way to include many of them? It would be a mistake for this to be too vague. Could you elaborate on this?

Mr. Matas: We do actually have experience in Parliament in legislating this sort of retrospective clause. As I mentioned, it is already in the Crimes Against Humanity and War Crimes Act. That act sets out those offences of crimes against humanity and war crimes. It says that a person can be prosecuted for those offences if the acts were committed at the time that these offences existed at international law. It takes the wording of the Charter.

One can say the same about all the offences in the bill. The legislation does not actually have to say when that time began, as that is a matter for the courts, the prosecutor and the defence to do something as specific as that.

In a general sort of way, because it says international law, of course, treaty law is part of international law, and we have a number of treaties setting up international law and terrorist offences, some of them going back many years. In particular, hijacking goes back many years. Of course, we are dealing with hijacking with regard to September 11.

Many of the people involved in the September 11 activities would come under that hijacking convention. We do have a hijacking provision in the Criminal Code right now. This legislation expands the offences tremendously and relates them to all the anti-terrorism conventions. I say that we should be able to go back to the time those anti-terrorism conventions became part of international treaty law, and that if we get fugitives who committed acts of violation of those treaties who come to Canada, we should be able to prosecute them, even if the acts were committed before the legislation came into effect, as long as it was after the treaties came into effect.

Senator Beaudoin: This would be sufficient?

Mr. Matas: Yes, that would be sufficient legally and in terms of compliance with the Charter. I should say that the issue of the Charter validity of that clause has been approved by the Supreme Court of Canada in the case of Imre Finta. He won his case but he did not win his Charter challenge. That sort of law is not only advisable; it is constitutional and legal.

(French follows: Senator Bacon: Vous êtes quand même…)

(après anglais)

Le sénateur Bacon: Vous êtes quand même des experts internationaux et j'aimerais faire appel à vos connaissances pour répondre à la question sur la protection des renseignements secrets internationaux.

Le procureur général du Canada s'attribue le pouvoir de délivrer un certificat pour interdire la divulgation de certains renseignements. L'une des raisons qui semble justifier ce pouvoir est d'assurer nos alliés que les renseignements qu'ils transmettront au Canada ne seront pas divulgués. Croyez-vous que le pouvoir du procureur général aux article 87 et suivants du projet de loi soit nécessaire pour rassurer nos alliés?

(Mr. Wilkinson: You have raised a very important issue...)

(anglais suit)

(Following French)

Mr. Wilkinson: You have raised a very important issue. I think we should be trying to coordinate, as closely together as we can, our legislative frameworks so that we make it relatively easier to engage in mutual assistance in investigation, judicial cooperation and extradition.

As I am sure you are aware, this has led to problems in Europe, because we have such different legal systems and traditions. The proposals at the recent European Union meeting of interior ministers to streamline this cooperation were very much welcomed at the time when the announcements were made. However, the implementation will be difficult. There are already problems of a technical nature arising in, for example, the idea of arrest warrants, extradition procedures and speeding up procedures. However, with goodwill on all sides, we should be able to work as close allies in ensuring that we overcome unnecessarily bureaucratic hurdles.

At the same time -- and I believe this is really underlying your question, Senator Bacon -- we need to ensure that we are not doing it in such haste that we undermine the safeguards of a fair trial, the defence of the rights of a suspect, and the essentials that we value as a democratic society. We should not throw out the rule of law in our haste to cooperate judicially. It is possible to find a way of safeguarding the rights of the suspect while at the same time taking less than three or four years to complete an extradition case.

Mr. Matas: We must separate the standard from the process. We have in clause 87 a standard that already exists in the Access to Information Act and the Privacy Act. You are asking us if we agree with the standard. Of course, the standard is a good one. The problem of clause 87 is the process, not the standard. Clause 87 takes everything away from the privacy process and the access process and puts it with the Attorney General, and there is no process. That is a problem.

In my own view, the privacy process and the access process already sufficiently protect that standard and provide a proper balancing of rights. In my view, to take access and privacy out of that process and put it into basically a no-process system is problematic. Therefore, I have trouble with clause 87.

(French follows: Senator Bacon: Vous avez écrit…)

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Anti-Terrorism - 38355 0830– 61

(après anglais)

Le sénateur Bacon: Vous avez écrit un article : «Security and Terrorism in the Twenty-first Century». Je pense que cela date de janvier : «The Changing International Terrorist Treats». Comment qualifiez-vous le projet de loi C-36? Est-ce une loi exorbitante comme certains témoins l'ont dit précédemment, ou sommes-nous en présence de mesures qui réussissent à atteindre un juste équilibre entre la protection de la sécurité de la population et le respect des droits civils?

(Mr. Wilkinson: That is a very difficult dilemma...)

(anglais suit)

(Following French)

Mr. Wilkinson: That is a very difficult dilemma that you refer to. We need to constantly emphasize something that Ms Bayefsky made clear in her comments and that I thought was extremely welcome: the need to be informative to the public about the kind of issues evolved, and to establish a dialogue that is wider than what we have in a parliamentary committee or in a governmental forum, where officials of various departments discuss these issues.

These issues, if I may be forgiven for saying so, are too important to be left entirely to government and politicians. There must be an effort to integrate the public debate into the policy process. If we do not, we will not get the kind of understanding and awareness and vigilance that is actually essential.

One way of ensuring that we do not have to take what I would call draconian and undesirable shortcuts in the law is to carry the public with us in spirit, in recognizing the need to cooperate in a practical way. If I can give just one instance, a great deal of the breakthrough in discovering plots to blow up parts of London in the late 1980s and early 1990s came from members of the public who were alert enough to draw attention of the police to things that they thought were somewhat odd. They often thought they were bothering the police unnecessarily, but in many cases, they passed on information that proved vital in allowing the police to act proactively, to arrest the group before the atrocity was committed, which is the best of all possible outcomes in intelligence work and policing in an open society.

That public cooperation is often forgotten when we are looking at legislation. We have to remember that it is not just legislation. What we are doing here is very important. It is also how the public responds to the way in which government and Parliament legislate and formulate their policies. If we implement it with full public cooperation and support and a good public awareness of the threat, we should be able to avoid the panicky overreaction of introducing measures which, quite frankly, are quite incompatible with the rule of law, and very undesirable.

Senator Andreychuk: Your last point was that good legislation is founded on good intelligence, that we know exactly what we are facing and being asked to address. Of course, we can move on and amend in that light because, you said, the other dilemma would be that we would go draconian and take shortcuts and that would not be desirable. In all of your studies in England or in Canada or in the

United States or in Europe, if we are not in an emergency situation going to an emergency measures act, a wartime act, but looking at an ongoing strategic threat, is it desirable to ensure that even the powers we hand to the executive are in some way scrutinized and reviewed?

Mr. Wilkinson: It is an inherent part of a healthy parliamentary democracy that all the policies and legislative measures undertaken are open to question and review by the legislature and by powerful interest groups if they have points of view, and by the general public, if they feel their views are not being heard.

There is, inevitably, a process of questioning and feedback from society to respond to the way in which important legislation of this kind is actually working. We therefore, in my view, should not be overly concerned about whether the public will be reluctant to make its views heard, or whether parliamentarians will be reluctant to criticize if they think that the measures are not working properly.

Our experience in the United Kingdom has been that one can change in many ways the implementation of legislation, as well as the actual formulation of particular clauses, without necessarily throwing out the entire legislative framework. I suggest that will be the way that, very probably, the Canadian Parliament and government will deal with the experience of applying this legislation in the future.

I do not regard it as inevitably a straitjacket, which will be impossible to change, in the future. It could be changed very rapidly, if it is found that one particular element has been missing, and we need to insert additional clauses.

I am particularly persuaded by Mr. Matas's point about retrospective power, parallel to the war crimes legislation. In the case of terrorism, when you think about it, morally, there is little difference between a person blowing up an airliner full of innocent airline passengers, and someone putting a bomb in a public place in the course of conflict in another part of the world, an armed conflict, which is, technically, a war crime, because it is a deliberate attack on a civilian population.

Senator Andreychuk: If there have been powers that have been a review mechanism in a judiciary, and we are now transferring those powers absolutely to executive without power to review, would you be for it or against it? I take it you say we should find some other method than that kind of absolute, non-reviewable discretion.

Mr. Wilkinson: In my understanding of the legislation, it does not exclude the possibility of review by judicial figures or by Parliament. Implicit in the whole process of bringing the legislation about and the way in which government is conducted is the power to raise these issues whenever parliamentarians feel sufficiently moved to do so. I think we can be unnecessarily concerned about because we are introducing legislation now, it can never be changed. In fact, it may be of interest to you that when we looked at legislation in other countries, as part of the British exercise in examining the legislative options, we found in most cases they changed their legislative frameworks six or more times in the last 35 years quite substantially. There is no ground for assuming that you are caught in the same legislative framework, regardless of changes in circumstances. It is entirely up to Parliament, government and concerned members of the public to campaign for changes.

Because the law has to be applied, as we see from the legislation, by judicial power, by the courts, in many cases, you will have the feedback from the decisions of the courts on those matters, which are raised pertinent to this act, and that may well cause a change in the way in which the legislation is implemented, or, indeed, may lead to a demand for changes in the law itself. This happened in the United Kingdom, and it happened in France. In France, they had a special court set up, after President Mitterand's experience in 1981 of releasing people on amnesty, and then finding they immediately violated the amnesty and started to launch attacks. He then set up a special criminal court to deal particularly with terrorist issues. That was very effective, and it may be something worth considering in the future. I did not make that point in my introduction, and perhaps I should have. Some countries have found that a helpful procedure. This field is a rather specialized field. Thank goodness many of us have no need to know a lot about the inner workings of terrorist organizations. People such as Judge Brugiere, the very brave Paris judge, who has a well deserved reputation on terrorism cases, do not emerge suddenly, overnight from the benches of the law, because the law is so complex in so many areas. You need people who specialize in particular areas, and specialism in terrorism cases is very useful.

Senator Fraser: Does the British legislation provide for preventive detention and, if so, how does it work and what are the safeguards?

Mr. Wilkinson: I noticed that after the September 11 attacks, there were reports in the press and announcements in Parliament that the Home Secretary is introducing measures of that sort because he regards the situation as one of

emergency where one has to derogate from the European convention on human rights. Apparently, other governments in Europe are considering the same action.

I am not, as I implied in my opening comments, convinced that we need new legislation when we have only had our new act for a short period. It was only implemented as of March of this year. We should give it a chance. I hope there is careful thought before any changes of that kind are introduced. In my view, previous experience of detention without trial in the United Kingdom has been unfortunate indeed and actually, in the case of Northern Ireland, clearly counter-productive. It became a recruiting sergeant for the terrorist organization. It is clearly unsatisfactory to suspend *habeas corpus*. It is far better, if you are sure that you have evidence against individuals, in a rule of law society surely it is right to bring that evidence to a court and let the court decide. If they convict, then it will be seen that justice has been done. I much prefer that method to the idea of detention without trial.

However, we will have to see what the new Home Secretary, Mr. Blunket, says when these new measures are introduced. I have not seen a draft of these measures yet. I do not think they have been presented to Parliament, but no doubt they will be debated closely when those measures are introduced.

Senator Tkachuk: Ms Bayefsky, you mentioned -- and I want to get this straight -- that you were supportive of the bill. Are you supportive of the conventions of the United Nations that are part of the bill, or are you supportive of the whole bill?

Ms Bayefsky: My intention was to be clearly in favour of the bill, as it stands, and as the bill intends to implement certain of the two most recent conventions on terrorism, to support its implementation or its language, which is in pursuit of conformity with those international obligations which we are about to sign.

Insofar as the bill is a reflection of the requirements of international law, and certainly a series of provisions that take action as required by the Security Council resolution from the end of September, I am in support of the bill and those Security Council provisions that put certain kinds of responsibilities on all states to act accordingly.

Senator Tkachuk: Are you in favour of the use of certificates, rather than some sort of legal process of the minister, in regard to freedom of information and privacy matters?

They have no review provision in them whatsoever right now. If a citizen wanted to get information on himself, to find out if the government was putting out a file on him, it seems from what I understand, that a minister can sign a certificate and use national security as a reason for not giving out that information. Are you in favour of those kinds of matters being there for the longest period of time?

I believe you left the impression that you are in favour of the bill. Are you truly in support of the whole bill or just the part in support of the UN convention?

Ms Bayefsky: I am not sure I am making myself understood. I am in support of the bill because the bill implements requirements of international law.

Senator Tkachuk: Are you in support of those aspects of the bill?

Ms Bayefsky: I have not identified aspects of the bill that are in contravention of international human rights law.

Senator Tkachuk: I am still not quite sure, but that is okay. On the question of international terrorism, terrorists have been around a long time; in Britain they have been experiencing the IRA. We had an enemy come here to North America. We have had some terrorists internally in North America, from time to time. We had the FLQ crisis in Canada. We had the Oklahoma bombing in the United States and the bombing of an Air India flight. This kind of act was new to North America.

We have a good idea of who these people are, and hopefully we find them and eradicate them from the face of the earth. We know who they are. Then we have all the other terrorists around that Mr. Matas mentioned earlier. I know we have to fight a war on terrorism, but is it not our duty as a country to secure our own citizens first and then to assist those other western democracies to get rid of their terrorists?

China, as a member of the Security Council, is in favour of this, but they are not a democratic state, they are a Communist totalitarian state that abuses human rights. They may have a group down there that used methods normally used to bring democracy to China. What do we do if they insist that we put that group on the list here in Canada?

Mr. Matas: With terrorism, we are dealing with the killing of innocent civilians, and the killing of innocent civilians in China is just as wrong as the killing of innocent civilians in Canada. There is no more excuse for the killing of

innocent civilians in China than anywhere else in the world. Innocent people are innocent wherever they are, and people are people wherever they are, and we cannot differentiate on the basis of the government that is in place in the country where these innocents are killed, which is just an arbitrary distinction.

Senator Tkachuk: I understand it is arbitrary. This particular reasoning would make an African despot feel pretty secure.

Mr. Matas: We have laws about war that are really somewhat similar to the laws on terrorism. The laws of war are often directed to states and say that states cannot do certain things in the conduct of war. We cannot say that war crimes make one side secure or insecure. The war crimes have been accepted by the community of nations, which often engage in war because they view it as not having anything to do with legitimate war objectives; it does not really help in the furtherance of war.

One can say the same about terrorism. The terrorism directed against the United States has not destabilized the American government. It has not made that government less secure in power. The purpose and result of terrorism is terror. That has nothing to do with security or insecurity of the regime in power. It just attacks innocents.

Senator Tkachuk: Dresden was a war crime.

Mr. Matas: That is a debatable issue.

Ms Bayefsky: If I may, in so far that you are suggesting that Canada somehow draw a nice circle around its borders and pretend that we take care of ourselves first, as if there if identification of ourselves first in distinction from making ourselves part and parcel of a global fight against terrorism. I believe that September 11 taught us that those borders are simply a figment of the imagination of those who think that we will be entitled to maintain prosperity without taking part and being active participants in what clearly has to be a global effort. That is our responsibility. We cannot do less. It is what will, in the end, protect Canadians best.

Senator Tkachuk: That is not what I said but that is okay, you go on and get these questions over with.

Senator Stollery: My life has not changed since September 11. I spent my youth in Algeria during the civil war. I was in the British colonies where the

Special Branch used to use all kinds of methods to stop what was referred to then as terrorism, and those people are now actually running the government. They are in the United Nations voting on some of these measures.

I am not saying that it was not a terrible thing that happened in New York City, a month or so ago, but it does leave one with the thought, that it makes it worse if the people killed look like us, rather than if they look like other people. There is no question that all governments have used terrorism as a state policy. We did it in World War II and I am sure we will do it again.

Mr. Wilkinson: First of all, this is closely linked to the senator's point about the African despot. It would not be wise for the African despot to assume that because terrorism was made more difficult through international legal action that he would be safe today.

If you look at the way in which dictatorial governments have been overthrown, particularly since the ending of the Cold War, it is surprising that in nearly every case it has not involved terrorism, it has involved people in the streets expressing their protests, as in eastern Europe. Terrorism is no not the panacea that people think it is.

I agree with my colleague, Mr. Matas, that the killing of innocents in the name of a cause, whatever the cause or movement claims to be trying to achieve, is never justified. One must take a consistent view, whether the civilians are under threat from the Chinese or in an African country under the most ghastly dictatorship. We must be consistent and frame our legislation in accord with international measures.

The colonial period where terror was used as major weapon by the rebels against colonial regimes encompassed the 1940s to the 1960s, ending with the campaign in Aden, in 1964, and the Evian agreement ending the Algerian conflict and so on. That has not been a major feature of terror in the period since the mid-1960s.

In those rather extraordinary conditions of the colonial system, where there was overwhelming support for the end of colonial war, and where the governments were not supported by even public opinion at home because the public at home did not really believe it was necessary to go on risking the lives of their soldiers and police officers and the treasure in those other countries. In the special circumstances of Algeria, Cyprus and Aden, terror was a particularly valuable weapon. However, if you look at its record since in toppling governments, it is a

faulty weapon which often misfires and makes the change of the political system more difficult and postpones the problem.

If I may correct an impression that I may have created in responding to an earlier question, preventive arrest, as used as an expression in Bill C-36 is not the same as the detention without trial that I was condemning that had been used in the British case, in Northern Ireland. I believe that the safeguards for the preventive arrest, which are in Bill C-36 are safeguards that will guarantee the conformity to rights and the rights of the suspect, because the person must appear before a judge, and the judge must decide whether there is a case for holding the individual or not. This does not involve a suspension of the judicial process. There are special reasons why it may be difficult to resolve the questioning of a terrorist suspect or suspects in a very short period, because terrorists are trained to withstand questioning and to evade the danger of having to give information in a court. That makes it much more difficult for the police to get vital information that might save lives. Therefore, it is justifiable to have that power of arrest in the legislation. I do not wish to give a misleading view of that as a result of my use of terminology.

On a final point, the question of certificates and the protection of national security is an inherent dilemma in trying to win the intelligence battle, which is so vital against terrorism. One must protect sources; otherwise, you have no chance of saving lives in a terrorist situation.

Provided the intelligence community, CSIS, in the Canadian case, is subject to democratic control and accountability, as I believe it is, in addition to the minister responsible for that area being accountable, the certificate system is a compromise that we must be prepared to accept. If we do not, and if we disclose the sources that we have about the terrorist organization and the secret information about the testimony of witnesses, we will never win the intelligence battle against terrorism. You may as well give up before you start.

Senator Jaffer: Mr. Wilkinson, under this bill, the minister can issue a certificate. I understand that, in the United Kingdom, you have the same process, that you will have a review. Can you explain if that is the case? What is the review? Is it by a judge? Who will do the review?

Mr. Wilkinson: We do have the same process of ministerial certificates on issues of national security where they believe that by disclosing particular documents, they would endanger national security. The safeguard that the matter can be taken to review by a judge if it is challenged accompanies that process.

There have been instances where it has been challenged and the minister has lost. You are well informed.

Senator Jaffer: I am concerned about the right to silence. You spoke earlier about the fact that it is necessary to get the information. I respect that. Our law comes derives from the English common law. What is the present status on the right to silence in the United Kingdom?

Mr. Wilkinson: The laws that were introduced after the Omar bombing caused considerable controversy. It was argued that the right to silence, which is seen as absolute in the eyes of many civil libertarians, had been in some way overturned. The government's case was that they were not denying the right to silence, if an individual does not wish to say anything, they can insist on not saying anything.

After the Omar bombing, the law was changed to enable the court to take into account the refusal of the individual to answer the charges. Ultimately, that position was the one which had wide spread support in Parliament.

Senator Joyal: To Ms Bayefsky and Mr. Wilkinson, can you tell us if the United States and the United Kingdom have ratified the 12th Convention of the United Nations on terrorism?

Ms Bayefsky: I do have the list. The United States has not ratified all of them.

The two that it has not ratified are the two that we have not ratified. I am not sure how the bill currently before the U.S. Congress would affect that. Your other question was about the United Kingdom. The answer is that the United Kingdom has ratified all 12 of them.

Senator Joyal: You have pronounced very clearly that you are against an expiration clause. Professor Wilkinson has listed some things that may jeopardize an investigation that takes time. I am surprised that Congress has specifically provided an expiration clause for very important powers in its special legislation. The expiration clause applies to powers to enhance surveillance procedures relating to interception of wire, records, e-mails and so forth. Those clauses expire on December 31, 2004.

Section 16 of the other American bill refers to a convention that the United States has not ratified and provides that the provisions of the International Money Laundering Abatement and Anti-Terrorist Financing Act of 2001 and amendments

made thereto shall no longer have the force of law at the first day of fiscal year 2005.

The Americans have a written Constitution. By having an expiration clause, they have affirmed the principle of the continuity of their Constitution. They have affirmed the principle that the values for which America stands are unalienable and that if they are suspended it will be for only a short period of time. They have maintained that principle.

In Canada, we are in a comparable position. We have a Charter of Rights that is constitutionized, which the United Kingdom does not have as such. The constitution of the U.K. is the parliament. The protection there is different from Canadian and American values.

We want to fight terrorism so strongly that we are even considering suspending some of the freedoms and rights that we enjoy under our constitution because we want to maintain the continuity of the rule of law and of our values.

Why do you think the Americans have accepted a sunset clause on very important powers in their capacity to fight terrorism? Of course, they can reason re-enact after three or five years. However, they have maintained the fundamental democratic principle that is at the basis of freedoms in the United States. This seems to me to be very important when we are doing what we are now doing.

Ms Bayefsky: First, this bill does not derogate or do away with the principle of constitutionality in this country. Everything in it is subject to judicial review under the Charter. The courts have the capacity to strike down parts of it if it should operate in specific circumstances in a way that violates Charter rights.

The American situation is quite different from ours for one major reason, and that is that you do not get a Republican president with Congress on side in this kind of law without a provision which allows the next president, whoever that may be, a chance to do it all over again, or to do it very differently. That is American politics speaking. The Constitution and the Charter remain vital, alive and applicable.

Senator Joyal: Other witnesses have questioned the fact that the bill excludes judicial review of the certificates that ministers provide and that it excludes large sections of the Access to Information Act and the Privacy Act. I want to know

where the continuity of the principle is maintained and where it is suspended. That is what we are wrestling with. That is the Gordian knot of our discussions today.

Although the United States, the largest target of terrorism, as September 11 has unfortunately shown, has taken that route, it does not jeopardize the efficiency of its capacity to fight terrorism. That is why I think there is a qualification to what Professor Wilkinson has said on this.

Senator Kenny: Mr. Wilkinson, how can you be in favour of a parliamentary review of a sunset clause when we have seen such a centralization of power in our parliamentary system and when we know that if we give the executive more power, there is no way on earth they will give it up in the face of a parliamentary review?

Mr. Wilkinson: I am sure the senator has detailed knowledge of the Canadian political system that I do not share. He may be right in his pessimism about the lack of possibility of change, but I am an irrepressible liberal optimists. I believe that you can effectively introduce change and reform in legislation if there is a good case and it is made clearly by the opposition and by members of the governing party who feel dissatisfied with the way it is working.

I believe there are plenty of instances of legislation concerning terrorism being changed in other democratic countries and I am optimistic enough to believe that Canada could achieve the same kind of changes if they are found to be necessary.

To add to Professor Bayefsky's point about expiration clauses, one of the problems the United States has had in dealing with the terrorism issue is that its domestic law has not been very effective and efficient in dealing with the problem. They have now realized that they have much catching up to do. A vast number of problems have accumulated for which they did not have the necessary resources and powers to deal.

I have not seen the latest proposed legislative ideas, but I suggest that we wait and see what the Americans will introduce as a result of re-thinking after September 11, because I think they will find that time-limiting terrorism legislation for a two- or three year period would be a rather dangerous thing to do if this problem is to be, as I suggest, a long-term problem that will not be easily resolved.

The Chairman: Thank you. We are very pleased this you could come.

The committee adjourned.