Debating the Anti-Terrorism Legislation: Lessons Learned

by Alex Mazer

Bill C-36, Canada's anti-terrorism bill, was drafted under extraordinary circumstances, and was the subject of an extraordinary debate within and without Parliament. This article describes the legislative process and broader societal debate surrounding Bill C-36. Furthermore, it argues that three central lessons can be learned from studying the discussions of the Bill: that the legislative process should be "internationalized" to correspond with increasingly international law and policy; that parliamentary committees can and should be empowered to play an important role in formulating policy; and that emergency legislation poses grave dangers and should be made as temporary as possible.

Bill C-36, the *Anti-Terrorism Act*, was the Government's legislative response to the terrorist attacks of 11 September 2001, and Canada's domestic contribution to an international legal effort to suppress terrorism. In the aftermath of September 11, the United States, the United Kingdom, France, Germany, and Australia, *inter alia*, all passed bills with purported objectives similar to those of C-36.

Bill C-36 was complex, cross-jurisdictional, and unprecedented. It received more public attention than almost any bill in recent memory. It was tabled in the wake of one of the most calamitous events in North American history. It was drafted and studied under considerable time constraints and political pressures. Perhaps most significantly, it proposed changes that touched on some our deepest societal values and most profound philosophical ideas – individual human rights, racial and religious inclusion, national security, and liberty of the person.

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The Legislative Process

Bill C-36 was introduced in the House by Justice Minister Anne McLellan on 15 October 2001. It was the result of intensified, accelerated work by Department of Justice officials. Assistant Deputy Minister Richard Mosley, speaking at a University of Toronto conference on the Bill, described the behind-the-scenes process by which the legislation came into being. Immediately after 11 September, Mosley said, the department conducted a review of all Canadian legislation of relevance to terrorism – an "already formidable body of law,"[1] in Mosley's words. On 18 September, Minister McLellan spoke in the House about moving forward with amendments to implement the two international conventions on Bombing and the Suppression of Terrorist Financing, while also making reference to changes to the *Canada Evidence Act* and the *Official Secrets Act*. At this point, Mosley suggests, the Bill was still in its early stages within the Department, where drafters were struggling with "conceptual issues" such as how – or indeed whether – to define terrorism. The Department continued to debate the question of definition, among other things, up until 13 October, at which point the Bill had to be printed to table in the House. However, says Mosley, "we recognized

that this was not going to be anywhere near the end of the debate and that it would then have to be addressed in a broader public context and also, of course, within Parliament." In drafting the bill, the Department was working under significant time constraints. The most formal – if not the most important – of these was mandated by United Nations Security Council Resolution 1373 of 28 September 2001. This resolution lays out what member states must do to prevent terrorism, and binds states to report back within 90 days of the resolution's adoption. In other words, Canada's anti-terrorism law had to be passed by the end of December 2001. In consideration of this deadline, the Bill was tabled two weeks before the planned date of 1 November.

The Bill was brought before the House of Commons Standing Committee on Justice and Human Rights on 18 October 2001, following approximately 8 hours of Second Reading debate and a vote expressing support for the Bill by a margin of 208-8 (with the NDP caucus opposed). The day before saw the striking of a Senate Special Committee on Bill C-36, where the Bill would be sent for a rarely employed procedure called pre-study. Pre-study is intended to allow the Senate an opportunity to scrutinize the legislation in concert with the House of Commons, effectively both assisting the House committee in its consideration of amendments and granting the Senate a head start in its own scrutiny of the bill.

On the afternoon of 18 October, only hours after Bill C-36 had passed Second Reading in the House of Commons, Anne McLellan appeared before the House committee to defend the legislation. Between 18 October and 22 November, the day the committee tabled its report with amendments, the Justice committee would hear testimony on the Bill from approximately 80 individuals. The Senate committee, meanwhile, began to hear witnesses on 17 October 2001 and submitted its pre-study report on 1 November. After receiving the post-amendment Bill from the House, it resumed hearings on 3 December and issued its second and final report on 10 December. Over the course of its study of the bill, the Senate committee heard testimony from approximately 60 witnesses. As parliamentary committees held hearings a larger debate was happening in the public square, drawing participation from the gamut of social commentators, including newspaper columnists, social scientists, jurists, NGOs, religious and cultural organizations, grassroots activists, and many others.

The Bill's Content

The overall committee process can be characterized by expressions of support for the principle of the Bill coupled with the articulation of a panoply of civil libertarian concerns. In other words, the overriding timbre of witness testimony – echoed, with slight variations and temporal shifts, in the wider public debate – was this: we need a counter-terrorism bill, but C-36 goes too far.

First, let us address the Bill's *raison d'être*. Most witnesses described the C-36 as a response to a terrorist threat, to a new kind of transnational menace; Justice Minister McLellan, for one, described terrorist as a "special threat to our way of life." It is this threat – or, more precisely, the recent evolution of this threat – that provided the justificatory basis for the Bill.

In his testimony to the Senate Committee on October 24, 2001, St. Andrews University terrorism expert Paul Wilkinson described the 11 September attacks as a "terrible watershed" in the evolution of terrorism – the dawn of an era of "mass terrorism." First, the scale of the terrorist threat is now larger and more international in character. "Terrorism," said Wilkinson, "is no longer to be adequately understood as a law-and-order threat...It has become a strategic threat to the well-being of the international community and to the human rights of large numbers of people." Second, the intent underlying the terrorist threat has changed. No longer, in the minds of terrorists, is the lethality of terrorist attacks subordinate to the fear they sow in the people who watch; the "new" terrorist is less interested in instilling emotions of terror in a society than he is "hell-bent on killing large numbers of people."

University of Ottawa law professor Joseph Magnet described three long-term trends in the evolution of modern terrorism: first, a decreasing number of terrorist incidents; second, an increasing lethality of each incident; and third, the adoption of a "war paradigm" by terrorist networks, in place of "coercive diplomacy." The crux of the third trend is that, in the new paradigm, terrorists do not make demands, as they did in the hostage takings and hijackings of the 1980s. Rather, in Magnet's words, "modern terrorism is an act that would be a war crime if war have been declared."[2]

Irwin Cotler, McGill professor, and member of the House Justice Committee, outlined further dimensions of the new terrorism in a speech at the University of Toronto. Among these are included: "the increasing incidence of terrorism associated with or driven by political, ideological, or religious extremism; the growth and threat of economic and cyber terrorism; the teaching of contempt and demonizing of the 'other'; a standing incitement against the demonized target; the dangers of microproliferation; the potential use of weapons of mass destruction; and the increased vulnerability of open and technologically advanced democratic societies like Canada to this genre of terror."[3]

The majority of committee witnesses accepted these assessments of the new terrorist threat, and thus accepted the necessity of some kind of counter-terrorist legislative response. Even Alan Borovoy, General Counsel for the Canada Civil Liberties Association and the de-facto dean of Canadian civil libertarians, argued that "no reasonable person can quarrel with the goal of this bill."[4] The more germane question from the perspective of witnesses as well as many intervenors in the broader public discussion was whether the threat of transnational terrorism justified the specific law-enforcement measures contained in the legislation – or, put differently, whether the Bill effectively achieved what the Canadian Bar Association termed the "delicate balance between collective security and individual liberties."[5]

Central to the achievement this "balance" was deemed to be the amendment or removal of several areas of the Bill that were regarded as offensive to civil liberties. The first pertains to the Bill's definition of "terrorist activity," the predominant concern being its overbreadth. The definition included acts that are intended "to cause serious interference with or serious disruption of an essential service, facility, or system, whether public or private, other than as a result of lawful advocacy, protest, dissent or stoppage of work...." Critics charged that this could include acts of civil disobedience, Aboriginal blockades, boycotts, wildcat strikes, revolutionary actions directed against oppressive governments, and confrontational protest activities, among others. The inclusion of the word "lawful" in the definition drew particular criticism for, the argument goes, just because an activity (a strike, for instance) is illegal does not mean it is terrorism.

Another concern was that the definition did not differentiate between actions taken against democracies and actions taken against dictatorships, thus preventing Canada from supporting foreign groups who use violence to combat tyrannical regimes. The reasoning here is that the legitimacy of an activity depends in part on the governing power against which it is directed. As expressed by Alan Borovoy in an op-ed submission to the *Globe and Mail*, "So long as civilians are not the deliberate targets of such violence, why should not Canadians be allowed to support it? Force is often the only way people can free themselves of dictatorial regimes."[6] Several of the Bill's critics drew parallels with the illegal and often violent actions used by the African National Congress and other liberation movements to overcome apartheid in South Africa. They expressed concern that, in the South African context, a law such as C-36 would have branded Nelson Mandela and his collaborators as terrorists.

The Bill defines "terrorist activity" as an act that is committed "in whole or in part for a political, religious, or ideological purpose, objective, or cause." This stipulation – that motivation should be a determining factor in what is to be considered terrorism – also drew considerable criticism. Terrorism without such motivations would still be terrorism, critics said. The Canadian Bar Association, among others, warned that the inclusion of motivational elements in the definition could result in the deliberate singling out of specific groups. "Terrorists are the target of the bill," the Association said, "not particular religious ideological groups."[7] University of Toronto law professor Kent Roach went further, projecting that the "criminalization" of political, ideological, or religious motivations could constitute a violation of the *Charter of Rights and Freedoms*.

A second area of civil libertarian concern related to the Bill's provisions as regards "preventative arrest" and "investigative hearings." Preventive arrest allows for the arrest and detention for up to 72 hours of individuals suspected to be on the verge of committing a terrorist activity. The main preoccupation of critics was that despite assurances by police that such measures would only be employed under exceptional circumstances, the powers associated with preventative arrest could be abused by law enforcement officials. It was suggested that the Bill should therefore include institutional safeguards to check police power and protect against the misuse of preventative arrest. Investigative hearings allow judges to compel individuals to appear before courts as material witnesses and to prosecute them should they refuse to do so. Among the concerns here was that the allowance of such hearings would compromise the constitutionally protected "right to silence." This right, testified the Criminal Lawyers' Association, "is the last bastion against an ever more omnipotent government."

A third rights-based criticism of the bill was that it risked compromising both access to information and privacy rights. This criticism emanated from a section of the bill allowing the Minister of Justice to issue certificates prohibiting the release of certain pieces of information in the interests of international relations, national security, or national defence. Privacy Commissioner George Radwanski complained that the provision could be used to "nullify the *Privacy Act* by ministerial fiat" because the Act would not apply to the information whose disclosure would be prohibited by the ministerial certificate. In other words, the Privacy Commissioner would no longer be able to review the information, effectively removing the mandate of the Commissioner. Information Commissioner John Reid told the Senate committee that the Bill would give the minister "an unfettered, unreviewable right to cloak information in secrecy for indefinite periods of time." According to Reid, the bill

would remove the Commissioner's right to examine information so as to determine whether secrecy is justified. In sum, the Bill did not provide a mechanism by which either the Privacy Commission or the Information Commissioner could oversee the issuance of ministerial certificates.

A fourth civil libertarian concern was that the bill would unfairly target visible minorities, denying them equal treatment under the law. Some of this concern grew out the proliferation of discriminatory treatment by law enforcement officials and of acts of racism and violence directed against visible minorities – particularly Muslims and people of Arab origin – in the aftermath of the terrorist attacks of 11 September. The danger of discrimination was evoked most emphatically by the Canadian Arab Federation, who testified that "the Muslim and Arab communities in Canada view Bill C-36...as a historically unacceptable, racial, and religious wedge and an excuse to extinguish the civil liberties of all Canadians." They went on to say, "We strongly oppose the misuse of race and religion to hyperventilate an atmosphere of fear, paranoia and mistrust at the expense of and in the name of the Muslim and Arab communities, with the effect of general deprivation of all civil liberties." This basic concern was also expressed – albeit less forcefully – in the testimony of the National Association of Women and the Law, as well as by the Muslim Lawyers Association.

A fifth rights-based concern involved the advocacy of a so-called "sunset clause" for some – if not all – of the Bill, a clause that would guarantee the law's expiry after a specified time period. This was arguably the area of debate that received the most attention in the media and in the public arena. Proponents of a sunset clause argued that the three year parliamentary review provided for in the Bill was inadequate because, as a 19 November *Globe and Mail* editorial, put it ... "governments are not known for repealing laws they don't need or shouldn't have." Among other supporters of a sunset clause in the popular press were the editorial boards of the *Montreal Gazette*, the *National Post*, the *Halifax Daily News*, and the *Calgary Herald*,as well as *National Post* columnist Andrew Coyne, *Edmonton Journal* columnist Lorne Gunter, *Globe* columnist Hugh Winsor, *La Presse* columnist Yves Boisvert and *Vancouver Sun* columnist Barbara Yaffe. The sunset provision was also supported by many of the witnesses who testified before parliamentary committees, including the Canadian Bar Association, who reasoned that "when governments seek to impose such restraints on fundamental rights and freedoms, particularly with limited time available for study and debate, those restraints must be limited in duration."

There was much vacillation on the part of the Government over whether or not to include – or, perhaps more precisely, whether to allow a debate over – a sunset provision. When justice minister McLellan appeared before the House justice committee, she declared herself open to the committee's review of all parts of the bill, also stating that the committee was welcome to consider a sunset clause. Meanwhile Prime Minister Chrétien, speaking from Shanghai, said that he would not support a sunset clause because the threat of terrorism is permanent, not temporary, and because putting an expiry date on the Bill could interfere with police investigations. Further, the *Globe and Mail* reported a week later that Chrétien, in a caucus meeting, "challenged arguments from Liberal MPs and that the legislation should be amended to put time limits on some of the more controversial elements." In the end, as mentioned earlier, a five-year sunset clause was included in the Bill, but only for the provisions dealing with investigative hearings and preventive arrest.

Aside from a somewhat weakened sunset clause, the government did accept several substantive amendments from the House committee's recommendations. First, the definition of terrorist activity was narrowed to exclude unlawful, as well as lawful "advocacy, protest, dissent, or stoppage of work." Second, an element of *mens rea*, or guilty intent, was added to the requirements for criminal responsibility for a terrorist offence. Third, several safeguards were put in place with regard to the issuance of Attorney General certificates, including the subjection of such certificates to judicial review. Fourth, a non-discrimination clause was inserted to clarify that "political, religious, or ideological" activity would not in itself be considered terrorism and that minorities would not be targeted for discriminatory treatment.

Reports of the Senate Committee

But if the government was attentive to some of the House committee's concerns, the recommendations of the Senate Special Committee on Bill C-36 fell on deaf ears. On 1 November 2001, the Senate committee issued its first report. The report, which was adopted unanimously by the Senate Chamber of 22 November, expressed serious reservations about the passage of the anti-terror bill in its existing state and made a series of far-reaching recommendations about how the legislation's problems might be tempered. Included in the recommendations were the provision for a five-year sunset clause on the entire bill, the appointment of an Officer of Parliament to "monitor the exercise of powers" provided in the bill and to report annually to both Houses, the strengthening of safeguards on preventive arrest and ministerial non-disclosure certificates, and the narrow-

ing of the definition of terrorist activity. Although the report may have had marginal effects on the eventual decisions of the House committee, its recommendations were ignored by the government. The committee's second report was far more acquiescent. While the first report warned that "the bill must reflect a careful equilibrium between rights, privileges, and duties...and the needs of ...a state to protect its citizenry," the second report tabled on December 10, 2001 noted witnesses' suggestions that "security itself is a pre-condition to liberty." While the first report contained unanimous recommendations, the second was divided between Liberal majority observations, which held that "the very nature of [the] terrorist threat requires that we provide our law enforcement and security agencies with certain new tools," and Progressive Conservative Senators' Observations, which expressed continued support for the recommendations of the first report and submitted that "significant amendments must be brought to [the] Bill before we can be satisfied that the civil liberties of Canadians will be adequately protected."

The First Lesson of Bill C-36

Bill C-36 typified international law and policy. Yet while this fact may have been taken into consideration during the drafting of the legislation by departmental officials, who collaborated extensively with their counterparts in other countries, it was not reflected in the parliamentary aspect of the legislative process. In fact, of the dozens of witnesses who testified before the House and Senate committees, only a handful represented organizations with international mandates – including Rights and Democracy and Amnesty International Canada – and only one – St. Andrews University counter-terrorism specialist Paul Wilkinson – came from outside Canada. There was no consultation with government officials from nations – such as Spain, India, Indonesia, the United Kingdom or Israel – who had had previous experience in responding to the threat of terrorism. There was no consultation with "allies" in the anti-terror "war" who had put or were in the process of putting in place similar domestic anti-terrorism legislation, despite the frequent – and almost necessarily speculative – discussion of other nations' counter-terrorism regimes by witnesses and committee members. There was no consultation with American officials or specialists *vis-à-vis* the mass detention of individuals – particularly ethnic minorities – in the United States following the 11 September attacks, despite the fact that this was raised by numerous witnesses and committee members as a potential lesson on what emergency powers to grant Canadian law enforcement. There was no consultation with representatives from the UN or any other international body as to whether the Canadian legislation conformed with the international counter-terrorism law and policy regime.

The lack of international input into the committee process restricted the committee's ability to ground its discussion of the Bill in the appropriate historical and political contexts, engendering a deference to spurious historical-political parallels. Because Canada has never experienced a terrorist attack against its territory, and thus had never – prior to the passage of Bill C-36 – implemented a dedicated counter-terrorism law and policy, the degree to which the bill could be placed in Canadian historical and political context was limited. The result was the frequent allusion, particularly by the Bill's critics, to the *War Measures Act* as an analogous piece of legislation, particularly as it was invoked in response to the FLQ kidnappings of 1970. This parallel was certainly understandable, given that the October Crisis and the ensuing implementation of the WMA is arguably the closest Canada has come to an experience with counter-terrorism law and policy. And yet, as Department of Justice officials and others pointed out at the time, there are too many points of disanalogy – both in terms of the historical context and in terms of the legislation itself – to justify to comparison between the WMA and Bill C-36. Perhaps most significantly, Bill C-36 came to the legislative table against the backdrop of the *Charter of Rights and Freedoms*, whereas the WMA was drafted and implemented in the pre-*Charter* era. In addition, the WMA was intended to be invoked temporarily in instances of "war, invasion, or insurrection," whereas Bill C-36 was designed to be permanent legislation.

The committee's failure to consider appropriate international historical and political counter-terrorism analogues, twinned with the dearth of such analogues in Canadian historical and political context, ultimately engendered an entrapment of the debate over C-36 within the ideological polarity of individual rights versus national security.

The characterization of the debate in terms of a rights-security dialectic was not wholly inappropriate. However, it did have several important limitations. First, it was a zero-sum analysis, implying that more security necessarily meant fewer individual liberties, and vice versa, whereas the legislation's *raison d'être* was the protection of innocent civilians against terrorist attacks, an objective that arguably favoured the safeguarding of fundamental human rights as opposed to the curtailing of these rights. As international law professor Errol Mendes put it in his testimony before the House committee, "fair balancing...is not just security versus human

rights, but one set of human rights against another set."[8] Second, it effectively excluded other conceptual parameters from the discussion. To give an example, in some instances the debate could have alternatively been framed as a dialectic between increased "security" (through, say, the use of racial profiling in order to keep suspected terrorists from getting into Canada) and equality (the equal treatment of all people under the law, including non-residents and non-citizens). Third, it tended to essentialize the participants in the debate as being pro-civil liberties if they opposed the legislation and having little regard for civil liberties if they supported it.

More disconcerting about the rights-security dichotomy, however, was that it tended to be constructed on purely ideological foundations, with limited grounding in history and little knowledge of circumstances beyond Canada's borders. These shaky foundations were reflected in much of the commentary – both supporting and dissenting – surrounding the Bill.

Those supporting increases to security tended to be dismissive of its potential costs, instead underlining – albeit conjecturally – the costs of not increasing security. According to *National Post* columnist Andrew Coyne, "By refusing to part with our freedoms, we are therefore condemning a certain number of innocent people to death."[9] Yet Coyne provides no substantiation to justify this ill-conceived calculus, aside from glibly remarking, "Were we to live in a police state, or even a mildly autocratic one such as Singapore, there would very probably be fewer murders in Canada." Similarly, a series of *Post* editorials in November declared confidently that "our social contract must be amended" in response to the terrorist threat, but also eschewed any sort of historical or international comparative justification, aside from the asserting that the detention of 1,200 people, post 11 September, in the United States was "not as terrifying" for the detained "as being killed by terrorists" (as if it were a one-or-the-other choice for the individuals being detained). "This country is at war," one of the editorials went on, "and in war individuals should expect to make sacrifices." These types of crude ideological stances do not lend themselves to thoughtful debate.

On the other side, although there was a significantly greater tendency to place restrictions on liberty in historical context, the typical analysis was to emphasize the need to adhere to civil libertarian principles, while largely avoiding a discussion of the contemporary international political context in which the Bill was drafted. In its testimony before the House committee, the Criminal Lawyers' Association declared that "freedom is our most precious treasure"[10] but did not address the question of what restrictions to freedom might result in *not* crafting an anti-terrorism legislation. Similarly, the British Columbia Civil Liberties Association stated in its testimony that "the restrictions on basic rights and freedoms must be no greater than are reasonably necessary to address the problems at hand."[11] However, instead of establishing its critique of the Bill on an awareness of the nature of the "problems at hand," the Association declared that "the onus is clearly on the government, and in particular right now on this committee, to demonstrate where existing institutions of law enforcement are inadequate to protect our rights and freedoms." In other words, it should have been incumbent upon the government and the committee to justify the need for the Bill. One could argue that it is also incumbent upon the civil libertarian community to "build in" to their critiques and understanding of the phenomenon of global terrorism. On the other hand, there is a more salient lesson here. While it is perhaps true that civil libertarians were limited in their ability to establish that the new measures were unnecessary, the more disturbing fact is that the government, through the parliamentary committees and in the broader debate, was also limited in its ability to demonstrate that the new law was necessary. A principal reason for this, I believe, was the near-total omission from the parliamentary legislative process of an international perspective, a perspective that could have shed light on both the nature of the international terrorist threat and the justness of various domestic and international counter-terrorism laws and policies.

When questioned about the usefulness of inviting international witnesses to committee hearings, parliamentarians gave mixed responses. Progressive Conservative MP Peter MacKay indicated that it would have been particularly helpful to hear from officials from the UK or the Middle East. He said that at the time, he did some reading about the laws that other countries had passed, but didn't feel he would have been able to conduct a thorough comparative analysis.[12] Canadian Alliance MP Vic Toews also stated that the inclusion of an international perspective would have been useful, underlining the special utility of Paul Wilkinson's contribution, but conceded that he hadn't considered the idea at the time of the hearings.[13] NDP MP Bill Blaikie, too, expressed lukewarm support for the suggestion, but pointed out that the usefulness of potential witnesses is difficult to ascertain before hearing their testimony.[14] Blaikie also indicated that the time constraints imposed upon the committee process may have impeded the committee's ability to consult non-domestic intervenors. House of Commons Justice committee chair Andy Scott pointed out that, while the committee did not hear from international witnesses directly, it did receive a "grid" from the

Department of Justice that compared Bill C-36 with the counterterrorism legislation of other nations.[15]

But even given the time constraints imposed on the C-36 legislative process, there exists at least one novel technique by which the committees could have solicited international input without having to travel or to bring in witnesses from abroad. The committees could have invited foreign diplomatic representatives to relate the experience of their home countries in combating terrorism. In its recent pan-Canadian consultations leading up to the G-8 Summit in Kananaskis, the Standing Committee on Foreign Affairs and International Trade heard testimony from representatives of seven African embassies and high commissions on the New Partnership for African Development, a centrepiece of the 2002 G-8 agenda.

The Second Lesson: The Danger of Low Expectations

While most students of the Canadian Parliament agree that "Parliament now plays a marginal role in lawmaking," there is some disagreement as to what that role should be. This disagreement finds particular expression in the scholarly debate over whether House of Commons and Senate committees should serve more as policymaking bodies or as forums for public discussion. Professor Jonathan Malloy observes that while the government and most interest groups view the committee process in terms of its value as a public forum, committee members themselves tend to concentrate on the act of making policy.[16] He goes on to argue that the expectations on the part of committee members that they should undertake a major policymaking role are ultimately detrimental and that they must be brought into line with the structural constraints of the Westminster style system – namely, strong partisanship and concentration of power in the executive.

The C-36 experience provides some insight – although it is of limited generalizability – into the proper role of committees. Notably, it shows that parliamentary committees can play an important role in the formulation of policy. This is evidenced by the number of substantive amendments put forward by the House of Commons committee and ultimately accepted by the government, in spite of both the time constraints imposed on the committee and the highly complex nature of the legislation itself. That said, two special conditions dictated the committee's ability to play a policymaking role. The first was the committee's unique composition. The fact that justice committee members tend to have a special personal concern for the issues they deal with caused the government to have a higher degree of respect for the committee's work. "Government members are attracted to this type of committee," said Andy Scott, "this isn't the Finance Committee wannabes; they believe in the subject matter."[17] Also, several of the committee members had considerable expertise in the criminal law areas touched on by the Bill: Vic Toews is former Attorney General of Manitoba, Andy Scott is former Solicitor General of Canada, Peter MacKay is a former Nova Scotia Crown Prosecutor and Stephen Owen is former Deputy Attorney General of British Columbia. Perhaps most significantly, Irwin Cotler, an eminent international human rights lawyer and McGill law professor, was able to augment the committee's ability to operate on a sophisticated policymaking level. According to *Globe and Mail* columnist Hugh Winsor, Cotler set "a new benchmark...for how far a Liberal backbencher can go to confront his government on its highest priority legislation and get away with it."[18] Cotler supported the bill in principle and was able to achieve several of the amendments he advocated through continual negotiation with the Department of Justice and the executive.

The second condition emanated from the circumstances under which the legislation was drafted. In a way, the committee had been given a kind of legislative double green light, in that both the Prime Minister and the Department of Justice had declared themselves amenable to changes in the Bill. According to Andy Scott, these circumstances precipitated important differences in how the committee would go about its deliberations. "Normally, one problem with legislation," said Scott, "is that someone wrote it. So there is a defensive instinct. Amendments can be seen as an affront to the drafters. But C-36 was drafted so quickly that the government took the position: 'We may not have it quite right; take a look at it.' And the Justice Committee was tasked with cleaning up the bill."[19]

If the C-36 experience shows that parliamentary committees can, under certain conditions, play a significant policy-making role, it also underlines their extremely important function as forums for public discussion. For as was indicated at the outset of this study, the challenge of developing a counter-terrorism law and policy response to the 11 September terrorist attacks engendered a high level debate in the public square and it was the work of Commons and Senate committees that served as the linchpin of this debate. The legislation received extensive coverage in the popular press and the majority of this coverage made reference to committee proceedings. The University of Toronto even organized a two-day conference on the Bill, deliberately scheduled in to coincide with the House committee's deliberations. On the occasion of the conference constitutional lawyer Kent Roach praised the level of societal debate the Bill had generated, declaring, "the best thing that has happened

since 9/11 is not C-36; it is the increasingly robust democratic process that has surrounded the introduction of the bill. It is the process...that best honours our traditions".[20]

While the experience of Bill C-36 demonstrates how committee proceedings can give rise to vigorous debate in the public square, some of this debate reflected back on Parliament and pondered the effectiveness and democratic legitimacy of parliamentary institutions. Interestingly, the conclusions drawn, at least in the popular press, were highly ambivalent. *National Post* columnist Andrew Coyne declared on 21 November 2001, after the Justice Committee passed its amendments, "Glory be: the system works."[21] The *Vancouver Sun* entitled its 22 November 2001 editorial, "Ottawa did the right thing," submitting that the government's amendments were "a case in point" that "every once in a while, Parliament works as it should."[22] Meanwhile, on 28 November, after the government-invoked closure on debate in the House, Coyne published another column, entitled "The death of Parliament," in which he proclaimed that "the Commons has become a formality, an anachronism." In a 29 November 2001 column, the *Ottawa Citizen's* Susan Delacourt wrote that while the committee hearings were "rushed but relevant" and the amendment process was "not perfect" but "substantial," the decision to invoke closure revealed, regrettably, that it was "business as usual in Parliament once again." As for the Senate, *Globe and Mail* columnist Edward Greenspon suggested that it had "made a useful contribution," and rather than criticizing the government's dismissal of the Senate committee's recommendations he submitted that it was proof justice minister Anne McLellan had "earned her political stripes."[23] Meanwhile, An *Ottawa Citizen* opinion piece by Trent University professor Andrew Potter stated that "the Senate is a dusty old rockpile, but it produced a gem during its remarkable pre-study."[24]

Parliamentarians also offered mixed reviews of the committee process. Justice committee chair Andy Scott called it "by far my best experience on a parliamentary committee as a committee member." Conservative Senator Lowell Murray said that although the C-36 experience "proved the value of pre-study," it was yet another example of the government's inattentiveness to the Senate. "We produced a good report," he said, "it's too bad the government didn't listen." Conservative MP Peter MacKay was only partially satisfied with the process: "The committee was successful in producing legislation that the government wanted, but whether it was successful in striking the right balance between liberty and security remains to be seen." However, said MacKay, "the committee did have very broad representation of stakeholders." NDP MP Bill Blaikie was also only partially satisfied: "The Bill was changed, but not as much as we wanted."

What are we to make of these mixed reviews of the effectiveness of Parliament? Two general conclusions can be drawn: one regarding House committees, and one in relation to the Senate. As regards the House committee process, the C-36 experience casts doubt on Malloy's thesis that the "unrealistically" high expectations of committee members are "ultimately detrimental." Bill C-36 shows that committees can play substantial policy-making roles – even on the government's highest priority legislation – given the presence of expert committee members and the openness of government to amendment. One might be tempted to draw the conclusion that C-36 was the exception and not the rule, and that parliamentarians keen on making policy should not expect an iteration of C-36-like conditions in normal committee work. But this conclusion, however pragmatic, is dangerously acquiescent and is inimical to the advocacy of hopeful reforms to the committee process. Rather than reinforce Malloy's call to lower expectations, the C-36 experience should raise the ante, not only for the high level of public discussion committees have the potential to facilitate but also for the ability of committees to do substantive policy work. Rather than discarding the lessons offered by C-36 because the Bill's exceptionalisms, committees should seek to reiterate the two special conditions that enabled the Justice Committee to play a policy-formulating role: that is, to recruit parliamentarians with diverse areas of expertise in law and policy, and to encourage openness to amendment on the part of the government. As a final aside, we should be careful not to hold up Bill C-36 as an exemplary committee process. For while the House committee may have done good work under the circumstances, the lack of international perspective in the committee's deliberations and the constricted timeframe for study of the Bill were not favourable to good lawmaking.

As regards the Senate, the largely placid reactions of commentators to the government's inattentiveness to the Senate's pre-study report begs the question: why was there such outrage at the government's decision to invoke closure in the Commons and so little at its eschewing of the Senate's recommendations? The answer may be partly related to the Senate's lack of democratic legitimacy. That is, because Senators are the political appointees of prime ministers, their input – however germane, however insightful – is widely considered to be irrelevant. The overarching public sentiment on the Senate's role in contemplating Bill C-36 seemed to be one of pessimism: that perhaps the Senate committee had produced a good report, but no one ever expected that the govern-

ment would act on it. This pessimism is regrettable: the Senate committee heard many of the same witnesses and was arguably composed of as many experts as the House committee, yet produced a significantly different set of recommendations. Clearly this diversity of opinion has value, and we should not be so quick to dismiss the Senate's findings as irrelevant simply because its members are not democratically elected.

Third Lesson: The Perils of Emergency Legislation

Bill C-36 was legislated under severe time constraints. The Bill was drafted in mere weeks by the Department of Justice and was given Royal Assent only two months after being tabled in the House. It received nine hours of debate over three consecutive days during Second Reading, 11 hours of debate over three consecutive days during Report Stage, and two hours of debate during Third Reading. After five hours of Report Stage debate, the government put forward a motion of time allocation, curtailing the Report Stage debate to one further sitting day and the Third Reading debate to one sitting day as well. The motion, according to Justice Minister Anne McLellan, was put forward after it "became clear to the government House leader that opposition members would not co-operate in the expeditious passage" of the Bill. The decision to shut down debate was widely criticized in the popular press. A *National Post* editorial declared that the government's invocation of time allocation "undermine[d]...its seriousness of purpose." Meanwhile *Globe and Mail* columnist Hugh Winsor submitted that McLellan's and House Leader Don Boudria's justifications for moving closure were "either misleading or procedurally specious." *Ottawa Citizen* columnist Susan Delacourt called the government's decision "galling."

The committee process was also significantly accelerated. The House and Senate committees may have heard from a significant number of witnesses, but their hearings were squeezed into a very short time period. Committee members interviewed in conjunction with this study indicated that a Bill of C-36's complexity would normally have been allotted more time for consideration by committee. Said Andy Scott: "If we had done this in less extreme circumstances, we would have taken quite a bit longer." As well, several of the witnesses who testified before the parliamentary committees indicated that they would have liked to have had more time to execute a thorough study of the Bill and all its ramifications. Warren Allmand, President of the Montreal human rights organization Rights and Democracy and former Solicitor General of Canada, stated in his testimony that it was "impossible to do a proper review of [the] bill in the short time that you have."[25]

Three important questions arise from this. First, was the government's decision to so severely constrict deliberation really necessary? Second, what are the dangers of rushing legislation in this manner? Third, what can be done to mitigate these dangers?

On the first question it is clear that while the government was perhaps justified in accelerating the legislative process generally, the restrictions it imposed on debate – particularly the motion for time allocation – were unnecessary. Part of the government's rationale for closing down debate was that it was bound by a deadline by which to comply with UN resolution 1373, drafted on 28 September 2001, which called on states to submit anti-terror legislation by 27 December 2001. Yet the Bill received Royal Assent on 18 December, ten days before the deadline, meaning the government could have conceivably allowed for several more days of debate. What is more, the UN deadline was flexible to the calendars of domestic legislatures: Resolution 1373 states, "the Committee acknowledges the complexity of the legislation and areas of activity covered by resolution 1373, and notes that national parliamentary procedures will need to be complied with."

But even if the government used the UN deadline as a fig leaf for its desire to pass anti-terror legislation as quickly as possible, it appears on the surface that the legislative process surrounding Bill C-36 was less hastened than the lawmaking that brought its American counterpart into being. The American Civil Liberties Union described the US process as "an offence to the thoughtful legislative procedures necessary to protect the Constitution and the *Bill of Rights* at a time when the rights of so many Americans are being jeopardized."[26] According to the ACLU, the US Senate was presented with the legislation "in a take-it-or-leave-it fashion with little opportunity for input or review." Further, it indicated that no conference committee had been struck to reconcile the differences in opinion on the Bill between the Senate and the House of Representatives. Although it is beyond the scope of this inquiry, a comparison between the legislative processes surrounding the Canadian and American counterterrorism bills could be a useful area of future research.

In response to the second question, the simple answer is that it depends on the nature of the legislation. Clearly, rushing legislation is less dangerous if the bill in question is minor and technical than if it is far-reaching and transformative. From this point of view, the quick study of Bill C-36 – not only because of its complexity but also because of its philosophical profundity – posed particu-

lar dangers. In other words, the task of scrutinizing Bill C-36 demanded not only the understanding of the novel legal mechanisms contained in the legislation, but also a coming to terms with the difficult philosophical questions inherent in the Bill – questions about how much we value liberty, how much we value security, and what each of these concepts means and how they are related. These are not questions Canadians ask themselves on a regular basis, so a thoughtful assessment of them demands time for reflection and time to distance ourselves from the calamitous events that precipitated the legislation. Certainly some bills such as C-36, by virtue of their content, require more time or deliberation than others. But the problem is that the content of the bill is not the only factor in determining how long a bill will be debated; political priorities also have a role, and sometimes these priorities serve to invert the notion that profound legislation should be studied for longer. When this author asked NDP MP Bill Blaikie whether the process of lawmaking had changed over the past 20 years, he replied, "Not really. When it's really important we spend less time on it; when it's not important we spend more time on it. The government uses the fact that legislation is important to shorten the process." This raises interesting questions – although they are tangential to the subject matter here – about whether there is, in fact, any relation between the nature of the content of legislation and amount of time spent debating it. Again, these questions are beyond the scope of this paper, but their answers could provide meaningful insight into the true influence of committees in the Canadian Westminster system, a system in which, despite several rounds of reforms to the committee system, the executive continues to have a coercive impact on committee work.

The dangers of rush legislation, then, are most pronounced when the legislation is far-reaching and transformative – as Bill C-36 was. And, positing Bill Blaikie's rule of thumb, we could also hypothesize that rush legislation becomes more likely in the face of major political pressures, which certainly loomed large, both domestically and internationally, in the case of Bill C-36. If we establish that "emergencies," broadly defined, can result in the among the most exigent of political pressures and if we consider that the powers conferred by emergency laws tend to be far-reaching and transformative in nature, what we are talking about in the case of Bill C-36 is not the dangers of "rush" legislation per se, but more precisely the pitfalls of "emergency" legislation. According to Oren Gross, an Israeli jurist who has written extensively on emergency lawmaking, these dangers are manifold.[27]

First, Gross says, governments have a tendency to over-react in making legislation under emergency circumstances, under threat, in a climate of fear, panic, hatred, and other intense emotions. In doing so, they risk engendering a transplanting the terrorism from "below" into an institutionalized terror from "above," and by legitimating the use of power and force as means of resolving disputes, they risk losing the moral authority that they possess over terrorist organizations. Second, emergency legislation tends to be extended beyond the timeframe for which it is originally intended to apply. The State of Israel, for instance, has been under a continuous declared emergency regime since 1948. The *Civil Authorities (Special Powers) Act (Northern Ireland)*, which was originally intended to expire after one year, was subsequently extended to last for five years, and was finally transformed into permanent legislation. Third, the longer that emergency legislation lasts, the more likely it is to infiltrate and have lasting effects on the "normal" legal system. Gross illustrates this phenomenon through an examination of the recent history of the curtailment of the right to silence in Northern Ireland and the United Kingdom. Fourth, emergency legislation normalizes the powers contained in the legislation and tends to increase the threshold of what is considered sufficient as a response to future emergencies. Fifth, the structures and institutions put in place to implement emergency legislation may remain and continue to exert an effect even after the legislation itself expires. Sixth, emergency legislation is often justified by means of a discourse of spurious "bright-line" distinctions (us-them, permanent-temporary) that crumble under critical examination. Gross goes on to point out other dangers of emergency legislation, but the fundamental point is this: we should not under-estimate (although we often do) the fallout from emergency legislation, for the differences between "emergency" and "normal" legislation are not as clear as we might think.

This brings us to the third question, that is: what can be done to mitigate these dangers? Gross calls for "rational, calm, and reasoned discourse." Certainly this is a laudable goal, and one worth highlighting again and again in exigent political climates. But what happens when very character of the political climate precludes "rational, calm, and reasoned" debate? What happens when executive-driven political pressure severely circumscribes a committee's legislative timetable (a particular risk in Westminster-style systems such as our own)? The answer lies first in the recognition by government that a legislative process was indeed more hastened than would be desired under normal circumstances. This recognition – the same recognition that was offered by the

Department of Justice to the parliamentary committees studying Bill C-36 – is also in effect an acknowledgement of the inherent dangers of emergency lawmaking, and is thus the appropriate philosophical premise – if not justification – for maximizing the strength of mechanisms for oversight and review within the legislation. Bill C-36, particularly in its post-amendment form, contained several such devices, including: annual parliamentary oversight by House of Commons and Senate committees; annual reports to Parliament by the federal and provincial attorneys general and solicitors general; a three-year parliamentary review; oversight by Privacy and Information commissioners; the subjection to judicial review of ministerial certificates preventing the disclosure of certain information for purposes of international relations, national defence, or national security; the subjection of orders to preventive detention to juridical review within 24 hours and the requirement that such orders be consented to by the Attorney General; and, of course, the possibility of challenging the Bill's constitutionality under the *Charter of Rights and Freedoms*.

But are such oversight mechanisms – however plentiful, however robust – sufficient antidotes for the widespread dangers of emergency lawmaking? The answer here, I believe, is a firm "no." First, as Gross points out, even when limitations on the application of new powers are built in to emergency legislation, these tend to wither away over time. Second, although the legislation can be challenged before the courts on the grounds that it violates the *Charter*, *Charter* jurisprudence is not necessarily immune from the wider impact of the legislation. That is, the "creeping" effect that emergency legislation can have on judicial precedents could make courts less likely to rule the legislation unconstitutional. Third, no amount of after-the-fact safeguarding can compensate for the limitations inherent in a legislative process that was constrained and pressure-laden in the first place. Fourth, although the Bill does provide for review of the legislation by Parliament after a period of three years, there is no guarantee that this safeguard will provide the in-depth scrutiny and the prolonged debate that are needed.

What is required, rather, is a forced re-drafting and reconsideration of the Bill, with the benefit of hindsight, under different political and historical circumstances. As the Senate Special Committee on Bill C-36 stated in its first report, "Now is a time of heightened anxiety, fear, and confusion and...it is important that departures from our legal norms be reconsidered at a time that will allow for sober reflection and a full evaluation of the effect of these new measures."[28]

This "sober reflection" could have only been guaranteed with the provision for a genuine sunset clause. The two primary arguments against the inclusion of a sunset provision – that the threat of terrorism was permanent and not temporary, and that the sudden expiry of the legislation would interfere with on-going police investigations – were highly problematic. First, even if we agree that global terrorism constitutes a permanent, immutable threat – which, considering that the lack of adequate intelligence makes it quite difficult to assess the extend of the *current* threat, is a problematic assertion to say the least – the fact that a problem will persist does not invalidate the re-thinking of our response to that problem. Just because the difficulties facing First Nations peoples in Canada are not going to disappear is not a valid argument against repealing the *Indian Act* if we feel it is harmful legislation. Second, the worry that the sunsetting of the legislation would interfere with police investigations is perhaps a legitimate concern, but it is largely a technical matter that could be solved through cooperation between government and law enforcement officials. The introduction of the new police powers and procedures ushered in with the passage of Bill C-36 surely also posed technical challenges for the law enforcement community, but these challenges were never held up as reasons to oppose the legislation. Third, although it was argued that the Bill could not be sunsetted because some parts of it involved the domestic implementation of conventions to which Canada is bound by international law, these sections of the Bill could have been exempted from a sunset provision.

A sunset clause would give legislative expression to the civil libertarian principle that freedoms are much more difficult to gain than to lose, while acknowledging the concern, frequently expressed during committee hearings, that the burden of proof in establishing that the legislation is necessary should lie with the government. A sunset provision would allow the Department of Justice to re-draft the bill in an atmosphere of calm, and would grant parliamentary committees the time to carry out an adequate study of the new bill, including the incorporation into committee hearings of the international dimension of counter-terrorism law and policy that, as was argued earlier in this study, was absent during the initial legislative process. An extended time period for study of the Bill would also allow for committee travel, either internationally, so as to deepen understanding of the political and historical context in which global terrorism exists, or within Canada, to hear citizens – particularly visible minorities – describe the impact of the new counter-terrorism powers on their lives. It would also help dissolve the polarization of the debate between civil libertarians, on the one hand, and those attentive to collective security on the other. With the new law repealed,

those concerned with the effect of counter-terrorism on civil liberties would not be essentialized as antagonists in the struggle to uproot terrorism, but rather considered as partners in the deliberative process of crafting counter-terrorism policy that is effective in achieving its avowed goal, but that is also protective of essential freedoms and fair to minorities. At the same time, proponents of counter-terrorism legislation would not be falsely identified as being indifferent to civil liberties.

A renewed debate would also allow for a discussion of the broader economic and political circumstances – the so-called "root causes" – undergirding the rise of global terrorism, a theme that was almost entirely absent, within the parliamentary process as well as within the mainstream media, in the debate surrounding Bill C-36. Such a discussion could pave the way for a more comprehensive, human security-based counter-terrorism law and policy – one that considers the eradication of global poverty, the protection of human rights, the upholding of democratic norms (by Western as well as non-Western states), the curbing of global diseases, and the adherence to international law to be objectives commensurate with the elimination of global terrorism.

Most importantly, for a procedural point of view, a sunset clause would recognize the inherent incongruity of permanent "emergency" legislation. For one cannot, on the one hand, justify the rushed passage of a piece of legislation on the basis that it is an emergency response to extraordinary circumstances, and, on the other hand, justify the permanence of the same legislation on the grounds it is to be sustained response to a threat that is now a part of our "ordinary" global reality.

Notes

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3. Irwin Cotler, "Thinking Outside the Box: Foundational Principles of a Counter-Terrorism Law and Policy" in Ronald J. Daniels *et al* eds., *op. cit.*, p. 114.
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6. Alan Borovoy, "Does the antiterror bill go too far?" *Globe and Mail*, 20 November 2001.
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25. House of Commons Standing Committee on Justice and Human Rights, *Evidence*, 8 November 2001.
26. American Civil Liberties Union, letter to U.S. Senators (23 October 2001), www.aclu.org.
27. For an thorough discussion of the risks of emergency legislation, see Oren Gross, 2001, "Cutting Down Trees: Law-Making Under the Shadow of Great Calamities", *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill, op. cit.* Pp. 39-61.
28. Senate Special Committee on Bill C-36, *First Report*, 1 November 2001.