BILL C-59 AND THE FORMER BILL C-22: COMPROMISED OVERSIGHT AND CONTINUING THREATS TO NON-DEROGABLE RIGHTS

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Abstract

This article assesses the context and content of Bill C-59's proposed revisions to the *Anti-terrorism Act, 2015* (the former Bill C-51), which created a controversial warrant-based regime for authorizing CSIS activity that would otherwise violate the *Charter*. These amendments have been introduced in Parliament and are currently being debated in the House of Commons. Bill C-59, the product of a fatally-flawed public consultation process, addresses the possibility that this warrant regime might lead to serious abuses in two ways. First, it creates an oversight body (the National Security Intelligence Review Agency), which will supervise these warrant applications and other activities undertaken by the Canadian Security Intelligence Service ("CSIS" or "the Service") and advise the National Security and Intelligence Committee of Parliamentarians (created by the former Bill C-22). Second, it specifies in further detail what the warrants can and cannot authorize.

This article demonstrates that these revisions are not sufficient; they respond to an inadequate assessment of the problems with Bill C-51. Its ambition to balance expanded powers with increased accountability is the product of a consultation process that was overborne by political concerns. The new oversight bodies to be created lack sufficient powers to be effective, and they are as likely to be influenced by executive interference as those which they replace. The powers retained by CSIS, although trimmed, still give the Service the power to violate non-derogable rights in a future major public order emergency.

In particular, the new restrictions on this warrant regime leave open the possibility of the authorization of *incommunicado* detention. This would constitute enforced or involuntary disappearance, a practice of arbitrary detention that places a suspect outside of the protections of the law that are safeguarded by access to counsel. As this violates rights that are inviolable in any emergency, however serious, this cannot be justified by reference to the balancing of rights or by means of enhanced accountability, even if the oversight regime created by Bill C-22 was not seriously

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deficient.

Introduction

Bill C-59[2] introduces certain amendments to Bill C-51, passed under the title of the *Anti-terrorism Act, 2015* (the "*Act"*).[3] Bill C-51 was the most controversial piece of legislation of the new century. In addition to prompting widespread protests,[4] it was the subject of an open letter signed by over one hundred law professors,[5] as well as a joint statement by five former Supreme Court justices, seven former solicitors general and ministers of justice, three past members of the Intelligence Review Committee, and two former privacy commissioners,[6] each of whom called for substantial amendments or the bill's withdrawal. The *Act* remained exceptionally controversial after its enactment, both internationally and domestically. During the 2015 federal election campaign, the provisions of the *Act* were a leading topic of the leadership debates. The Liberal caucus whipped the vote in favour of Bill C-51, which had been necessary for the passage of the *Act*, as the Harper Government was in the minority. Justin Trudeau, then leader of the Liberal party, argued that "we made a call that we were going to support the bill [but] push to have it amended" by a Liberal Government.[7] These long-awaited amendments are now before Parliament. The most criticized section of the *Act* pertained to the enlargement of CSIS's powers.

*"*Part 4 of Bill C-51 amends section 12 of the CSIS Act to allow the Service to undertake measures, both within Canada and outside, to reduce activities that constitute a threat to the security of Canada. These measures are referred to in this document as 'disruption activities or operations.'"[8] The *Act* created a warrant-based regime for the authorization of what would otherwise (it is argued)[9] violate a suspect's

[2] Bill C-59, *An Act Respecting National Security Matters*, 1st Sess, 42nd Parl, 2017 (first reading 20 June 2017) [Bill C-59].

[3] SC 2015, c 20 [*Anti-terrorism Act*].

[4] Michael Shulman, "Demonstrators Across Canada Protest Bill C-51", *CTV News* (14 March 2015), online: <www.ctvnews.ca>.

[5] "An Open Letter to Members of Parliament on Bill C-51" (23 February 2015), online: <www.documentcloud.org/documents/1678018-open-letter-on-bill-c-51.html#document/p1>.

[6] "CSIS Oversight Urged by Ex-PMs as Conservatives Rush Bill C-51 Debate", *CBC News* (15 February 2015), online: <www.cbc.ca/news>.

[7] See Mark Kennedy, "Trudeau Defends Liberal Vote on Bill C-51 as the 'Right' Move for Canadians", *Ottawa Citizen* (17 June 2015), online: <ottawacitizen.com>.

[8] Julie Béchard et al, "Legislative Summary of Bill C-51" (19 June 2015), online: Library of Parliament <https://lop.parl.ca/content/lop/LegislativeSummaries/41/2/c51-e.pdf>; see *Canadian Security Intelligence Service Act*, RSC 1985, c C-23 [*CSIS Act*].

[9] See statements of Michael Duffy, Senior General Counsel, National Security Law, Department of Justice, in House of Commons, Standing Committee on Public Safety and National Security, "Evidence" (31 March 2015), online: <www.ourcommons.ca/DocumentViewer/en/41-2/SECU/meeting-62/evidence>.

rights under the *Canadian Charter of Rights and Freedoms* ("the *Charter*").[10]

These and other provisions were the subject of two consultation processes addressing Canada's national security framework: one undertaken by the House of Commons Standing Committee on Public Safety and National Security,[11] the other being the Government's own.[12] These consultations produced disparate recommendations. The parliamentary response rejected the notion of balancing rights against the government's interest in promoting national security:

> The Committee recognizes that the responsibility bestowed upon a government to counter terrorism-threats and ensure the safety and security of individuals is a vital issue. The Committee is of the opinion that the measures taken to address these threats should respect the constitutionally protected rights and freedoms of Canadians. The "two responsibilities do not compete with each other, they are one and the same."[13]

Bill C-59 purports to strike the balance that the Government advocated prior to and during its consultation process, about which Parliament remained dubious. Rather than abolishing CSIS's controversial "disruption powers" as the House of Commons Standing Committee on Public Safety and National Security recommended, the Bill narrows these powers by creating a set of presumptively permissible "disruptions" that will be approved under a new oversight regime that would purport to monitor (and, by extension, to prevent) the abuse of these powers.

This article will demonstrate that this approach to the problems introduced by the former Bill C-51 is ill-conceived and inadequate. Part I will demonstrate that the consultation process which preceded the framing of Bill C-59 was flawed and wholly inferior to those conducted within Parliament. It was a Potemkin process designed to produce conclusions that accorded with a preconceived approach to reform. Part II will show that the Government's focus on balancing the retention of kinetic powers with greater oversight is predicated on a faulty premise: the reforms that purport to create more accountability will only create bodies that are likely to be ineffective and incapable of restraining abuses at CSIS and other intelligence agencies. Parliament failed to implement reforms that would give any weight to constitutional rights, and instead chose to rely on pat reassurances about the amelioration of what is by now a

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[10] *CSIS Act*, *supra* note 8, s 21.1 (1): "If the Director or any employee who is designated by the Minister for the purpose believes on reasonable grounds that a warrant under this section is required to enable the Service to take measures, within or outside Canada, to reduce a threat to the security of Canada, the Director or employee may, after having obtained the Minister's approval, make an application in accordance with subsection (2) to a judge for a warrant under this section."

[11] House of Commons, Standing Committee on Public Safety and National Security, *Protecting Canadians and Their Rights: A New Road Map for Canada's National Security* (May 2017) (Chair: Robert Oliphant), online: <https://www.ourcommons.ca/Committees/en/SECU/StudyActivity?studyActivityId=8988648> [*Protecting Canadians and Their Rights*].

[12] See Public Safety Canada, "Consultation on National Security", online: <https://www.canada.ca/en/services/defence/nationalsecurity/consultation-national-security.html>.

[13] *Protecting Canadians and Their Rights*, *supra* note 11 at 37.

badly compromised intelligence oversight apparatus, which Bill C-59 stripped of all remaining independence, even the final fail-safe of parliamentary privilege. Part III will demonstrate that the decision to retain these powers is particularly dangerous. Even after the introduction of new restrictions, warrants could still be obtained that would authorize restrictions on the communications of suspects already subjected to preventative detention under other provisions of the former Bill C-51 that were untouched by Bill C-59.

The conclusions that follow are troubling. A warrant that would authorize the "disruption" of a suspect's communications with their lawyer, if this suspect was already being held in preventative detention (under the *Criminal Code*'s provisions for warrantless preventive arrest of terrorism suspects, as expanded by Bill C-51, which are found in section 83.3 of the *Code*) would transform that custody into an enforced or involuntary disappearance. This authorization would allow for the violation of non-derogable norms that are integral to the rule of law. When this possibility is considered in the context of the inevitable and endemic breakdown of restraints on executive authority during emergencies – as demonstrated by Canadian history and elsewhere more recently – this should be considered foreseeable misuse of the legislation. Accordingly, if Bill C-59 becomes law, Canada's system of emergency powers and intelligence oversight will still be grossly deficient when judged against international standards and its own basic constitutional norms.

Bill C-59 is also evidence of a continuing failure to explicitly acknowledge the existence of a set of rights, well defined in international law, that can never be violated, no matter how serious the national emergency. This increases the possibility that non-derogable rights will be violated in Canada after the next large-scale terrorist attack, and, what is worse, that these will be authorized by warrants permitting the infringement of the right to counsel of a suspect already subjected to preventative detention. This is a threat to the rule of law that should have been identified and addressed explicitly when the legislation was debated. Rather than being reassured by Bill C-59's amendments to the *CSIS Act*, scholars and the engaged public should be alarmed by its failure to address a serious threat to the rule of law in Canada's next major public order emergency.

I. The Consultations on Canada's National Security Framework

In September of 2016, the Government inaugurated its "Consultation on National Security", which it later claimed was "instrumental in the development of Bill C-59, the proposed legislation to update Canada's national security framework."[14] However, this much-derided consultation process presented every appearance of proceeding inevitably towards a predetermined conclusion, namely a set of amendments that would not affect the fundamental structure of the *Act*, or even the process that the government admitted was the most controversial and, to the public, the most troubling: the amendments to the *CSIS Act* that created a warrant to violate the *Charter* rights of

[14] Public Safety Canada, *supra* note 12.

terrorism suspects.[15] A comparison of this consultation process and its outcome to those of the House Standing Committee on Public Safety and National Security reveals how the politicization of the reform of Canada's national security framework led to a flawed and inadequate set of amendments to the former Bill C-51.

A. The Government's Consultation: Balance as Leitmotif

The Government's approach to the public consultation betrayed no hint of the reason why Bill C-51 had been so controversial; the public was invited to comment only after the issue had been reframed as an anodyne and soporific consideration of how best competing concerns could be reconciled, rather than the response to a remarkable outcry over the most controversial bill of the century. The documents that accompanied the launch of the consultation all indicated that the Government's chief talking point was that a balance needed to be struck between what these documents presented as the serious threat of terrorism and the rights of the public.

The Green Paper that accompanied the process' launch began with the statement that "Canada has long dealt with terrorism threats from a diverse set of groups. Some threats resulted in tragic terrorist attacks."[16] After detailing these serious and immediate terrorist threats, the Government concluded with a call to balance the promotion of security with the protection of rights:

> The threat of terrorism, by global and by domestic actors, is real and evolving. More people are radicalizing to violence. Some are leaving Canada to join terrorist groups overseas, while others focus their attention on Canada itself. Canadians expect the Government to keep them safe. At the same time, the Government must comply with the rights enshrined in the *Charter*.[17]

The "Message from the Ministers" that accompanied the Green Paper reiterated this dubious talking point, taking for granted the desirability of a balance between security and rights, two analogous concerns (rather than sets of rights and governmental objectives) which were presented as equally important, although national security was always given pride of place: "A fundamental obligation of the Government of Canada is the responsibility to protect our safety and security at home and abroad. Equally fundamental is the responsibility to uphold the Constitution of Canada, and to ensure all laws respect the rights and freedoms we enjoy as people

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[15] See *CSIS Act*, *supra* note 8, s 12.

[16] Government of Canada, *Our Security, Our Rights: National Security Green Paper, 2016*, Background Document (Ottawa: Public Safety Canada, 2016) at 5, online: <https://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/ntnl-scrt-grn-ppr-2016-bckgrndr/index-en.aspx> [Government of Canada, *Our Security, Our Rights*].

[17] *Ibid* at 72.

living in a free and democratic country."[18]

The consultation process was arranged carefully so as to allow the government to conclude that the public had already impliedly agreed that the best outcome was a balance between these "equally fundamental" concerns. Many of the in-person events organized by Public Safety Canada were invitation-only and dedicated to stakeholder groups – like the heads of prosecution services and Chiefs of Police – who would accept and validate this key premise, owing to their personal and institutional investment in the importance of security.[19] No events were exclusively dedicated to advocates for civil liberty or to groups that had been targeted and marginalized during earlier public emergencies, such as Québec nationalists, Japanese-Canadians, or members of historical peace churches.

Members of the public who attended "Engagement Events led by Members of Parliament" frequently found themselves in very small venues, which were largely populated by members of local Liberal riding associations, where party business was conducted in tandem with these presentations.[20] At some of these "Engagement Events", Ministers gave the Government's perspective on the issues; members of the public were then invited to respond to the Government's talking points, rather than on topics of their own choosing. The first of these talking points was whether or not the Government had achieved the correct balance, which, as was the case at every stage of the consultation, begged the question of whether these two objectives – promoting security and protecting rights – are equally fundamental. Those who might disagree, whether they would prioritize one or the other, were sidelined.

During online events, officials from Public Safety Canada promoted this talking point rather than responding to questions as they had promised. During the English-language Twitter chat, not one comment was made by a member of the public suggesting that they considered security or terrorism prevention a matter that concerned them; instead, every tweet raised concerns about privacy and the protection of rights. Nevertheless, officials tweeted in response to a question about privacy (via a *non-sequitur* that returned to the Government's principal talking point) that "[s]ecurity and privacy of Canadians are both crucial considerations, and central to consultation."[21]

Not surprisingly, the official report on the consultation process parroted these talking points. It should be noted that despite being described as an "independent report", this document was commissioned by the Government and written by a

[18] Online: <https://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/ntnl-scrt-grn-ppr-2016/index-en.aspx>.

[19] Public Safety Canada, *supra* note 12.

[20] Here the author relates his personal experience of attending an engagement event led by the Minister of Labour and Employment (Patty Hajdu, MP) and Don Rusnak, MP, held in Thunder Bay on November 7, 2016.

[21] Public Safety Canada, "Twitter Chat on National Security Accountability" (16 November 2016), online: <https://storify.com/Safety_Canada/yournatlsec-twitter-chat>.

notorious global public relations firm.[22] The importance of the creation of a false consensus on the need to balance security and rights should not be understated, as it later served as the basis for invoking

> a seldom-used parliamentary protocol by sending his government's long-awaited proposal to overhaul Canada's national-security and anti-terror laws – which the then-campaigning Liberals had vowed to review in order to address the 'problematic elements' introduced under the Conservatives' controversial C-51 – to committee before second reading … the second-reading vote is generally taken to constitute 'agreement in principle' with the overall goal of the bill, with the understanding that it may have minor or technical shortcomings that would be addressed at committee … as the House has officially signed off on the underlying principle, the committee is under strict limits as far as how substantially it can rewrite the bill before sending it back for final approval.[23]

This allowed the Government to convert the committee amendments process into yet another Potemkin process, echoing both the consultations process and the committee amendments procedure on Bill C-51, as when following this seldom-used parliamentary protocol, "[a]mendments must, for instance, be within the scope of the original bill – the committee can't just tack on new provisions or additional sections, even to deal with related issues or specific concerns that have come up during witness hearings."[24]

The Government invoked this principle to create a process where the "only amendments to succeed will be those that have been pre-approved by the government."[25] Accordingly, "virtually no human rights protections were added."[26] Most problematically, a critical amendment that would have explicitly specified that those in preventative detention have the right to counsel was rejected. As this article will demonstrate, this preserves a state of affairs in which CSIS's disruption warrants could be combined with the preventative detention regime – both of which will remain in place after C-59 – to subject detainees to involuntary disappearance during a future public order emergency, in violation of Canada's international obligations and the

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[22] The firm was Hill & Knowlton Strategies, which attained notoriety in 1992 when members of the United States Congress "conspired with [that] public relations firm to produce knowingly deceptive testimony on an important issue … that Iraqi soldiers had removed scores of babies from incubators and left them to die", a falsehood that became central to the case for war against Iraq: "Deception on Capitol Hill", *The New York Times* (15 January 1992), online: <https://www.nytimes.com>; see generally "A Debate on One of the Most Frequently Cited Justifications for the 1991 Persian Gulf War: Did PR Firm Hill & Knowlton Invent the Story of Iraqi Soldiers Pulling Kuwaiti Babies from Incubators?", *Democracy Now* (2 December 2003), online: <https://www.democracynow.org>.

[23] Kady O'Malley, "It Looks Like the Federal Public Safety Minister's Show of Openness was Just That — A Show" *TVOntario* (27 April 2018), online: <https://tvo.org>.

[24] *Ibid.*

[25] *Ibid.*

[26] "What Happened to Bill C-59 at Committee?" (3 May 2018), *International Civil Liberties Monitoring Group* (blog), online: <iclmg.ca/happened-bill-c-59-committee/>.

bedrock protections of the rule of law.[27]

While the Government's conclusions became embodied in the amendments introduced by Bill C-59, before proceeding to a discussion of how the Government's view of balance took form it is instructive to compare the Government's consultation process with another that was not so carefully stage-managed. The best comparator is one in which the agenda was not set by one political party alone, and which was open to a range of perspectives on the relative importance of particular values. The consultations conducted by parliamentary committees demonstrate how a different approach to considering these issues could lead to quite dissimilar conclusions.

B. Parliamentary Consultations Identify the Priorities for Amendment

A considerably more open-ended and meaningful review of the *Act* was undertaken within Parliament. On June 14, 2016, the House of Commons Standing Committee on Public Safety and National Security agreed to undertake a study on Canada's national security framework. The Committee took pains to note that it is "not a government entity … [but] a creature of the House … [and] not bound by the subject matter contained in the parallel public consultation on national security launched in September 2016 by Public Safety Canada, in collaboration with the Department of Justice."[28] Notably, the Committee not only held open meetings, but encouraged scholars who had not been specifically invited to submit briefs, which were publicly acknowledged and made available on the Committee's website. Many such briefs were also cited in the final report.

The Report that the Committee published in May of 2017 differs from the Government's report in several important ways. First, it acknowledged the difference of opinion that exists among experts about whether "there is too much attention paid to the terrorist threat … when in fact Canada is not threatened to the same extent as other countries."[29] This was entirely absent from every document produced during the Government's consultation process.

Second, when the Report broached the topic of Bill C-51, it turned immediately to its most controversial element, the disruption powers granted to the Canadian Security Intelligence Service.[30] The report noted that in "1971, the McDonald Commission specially recommended the establishment of CSIS as an intelligence agency *without* a mandate to reduce threats."[31] After noting that the *Act* authorized these measures, it cited the brief of a scholar who had noted that "CSIS would probably not hesitate to carry out mass detention in a crisis situation or in the

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[27] Ryan Alford, "Bill C-51: A Threat to the Rule of Law?" (2016) 36 NJCL 113 [Alford, "Bill C-51"].

[28] *Protecting Canadians and Their Rights*, *supra* note 11 at 1.

[29] *Ibid* at 5.

[30] *Ibid* at 19.

[31] *Ibid* [emphasis added].

days following a terrorist attack."[32]

Further, the Report noted that the Canadian Civil Liberties Association had submitted that "CSIS should simply be stripped of its disruption powers."[33] Returning to the submissions of the scholar cited above, the Committee noted that "this provision would allow for the same type of abuses that were committed by the former RCMP Security Service that led to the McDonald Commission and the creation of CSIS" which had been deprived of disruption powers for precisely this reason.[34]

Third, the Report cited the work of various scholars and advocates for civil liberties on the specific subject of the provisions that allow CSIS to apply for warrants to undertake activities that would otherwise (on the Government's theory) violate the *Charter* rights of suspects. The Report specifically noted that "[s]ome witnesses told the Committee that this provision is clearly unconstitutional."[35] It quoted the submission made on behalf of Amnesty International Canada that "there should be no consideration of activities by CSIS, or by any Canadian agency, that violate the Charter or international human rights obligations."[36]

After addressing numerous other problems created by the *Act*, the Report moved to the conclusion and recommendations. While the Committee did note that the Government has a responsibility (not a right) "to counter terrorism-threats", it did not present this as a factor to be considered in an open-ended balancing exercise. Contrary to the Government's National Security Consultation, the Committee's report acknowledged that "measures taken to address these threats should respect the constitutionally protected rights and freedoms of Canadians."[37] For this reason, it recommended that "the reference to the *Canadian Charter of Rights and Freedoms* in Section 12.1(3) of the *Canadian Security Intelligence Service Act* be repealed in order to remove the ability to violate the Charter."[38]

C. The Disparate Conclusions of the Consultation Processes

The results of the Government's and Parliament's deliberations on the national security framework were notably dissimilar, especially on the issue of preserving the warrant regime that authorizes infringements of *Charter* rights. The most pertinent difference was in their responses to the broad consensus that CSIS's disruption powers were dangerous and should be abolished. As noted above, the Report of the House

[32] *Ibid* at 21, citing the brief of Ryan Alford, 27 October 2016.

[33] *Ibid* at 21.

[34] *Ibid* at 22.

[35] *Ibid* at 23.

[36] *Ibid.*

[37] *Ibid* at 37.

[38] *Ibid* at 39.

Public Safety and National Security Committee was unambiguous on this point: it recommended these be eliminated. Conversely, the conclusions on this point contained in Hill & Knowlton Strategies' *National Security Consultations: What We Learned Report* were considerably murkier.[39]

The Report commissioned by the Government stressed the "delicate balance that must be struck" between security and rights.[40] It claimed that those who had been consulted "were essentially divided between the need to decrease CSIS's powers and the need to maintain or increase them".[41] While in other sections of the report the responses to the consultation documents were divided into groups and the percentages corresponding with each position were disclosed, the section of the Report entitled "Threat Reduction" contained no such indication of what percentage of the respondents had argued that CSIS should have even greater powers to violate the *Charter*.

The only indication in this section of the relative numbers of those suggesting that CSIS's powers should be lessened, or conversely (and perhaps counter-intuitively, given the backlash to Bill C-51) be increased came when the Government's preferred solution to the criticism of the warrants that would allow for *Charter* violations was introduced: "More than two thirds of on-line responses called for increased safeguards … to ensure that Canadians' *Charter* rights and freedoms are always protected … [a]s in other forums, there was strong support for oversight mechanisms with sufficient resources".[42]

This language, which yokes together safeguarding rights with greater accountability, rather than to a reduction or elimination of the "disruption powers", foreshadowed the Government's response to those who continued to argue that CSIS's ability to apply for warrants violated the *Charter*. The Government argued that these new powers would be considerably less problematic if they were exercised in a manner that was more "transparent" and subject to "effective oversight mechanisms."[43]

1. The Government Shapes the Responses that led to Bills C-22 & C-59

The Government refined its arguments about how security could be properly balanced against rights in its response to the report of the House Standing Committee on Public Safety and National Security. It indicated that it was preparing to respond to the concerns that led to the Committee's recommendation to abolish the *Charter* violation

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[39] Public Safety Canada, *National Security Consultations: What We Learned Report*, by Hill & Knowlton Strategies (Ottawa: Public Safety Canada), online: <https://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/2017-nsc-wwlr/2017-nsc-wwlr-en.pdf>.

[40] *Ibid* at 3.

[41] *Ibid* at 7.

[42] *Ibid*.

[43] *Ibid*.

warrants, but in two distinct ways.

First, the Government argued that it was "committed to enhancing [the] accountability and transparency of CSIS's disruption activities."[44] It noted that legislation had already been introduced that would create two new oversight bodies with responsibility over some (but not all) federal agencies involved in intelligence gathering. These bodies are the National Security and Intelligence Review Agency ("NSIRA") and the National Security and Intelligence Committee of Parliamentarians ("NSICoP"). The Government's response argued that these bodies would foster accountability and transparency because "CSIS would be required to automatically inform its independent review body … [which] would also gain the authority to inform the Attorney-General … when it deems CSIS to have broken the law."[45] Additionally, the "NSICoP will have the opportunity to comment on CSIS's use of its threat reduction powers in its annual public report."[46] These bodies and the scope of their powers were established by Bill C-22, which received Royal Assent on June 22, 2017.

Second, the Government stated that it "is proposing that the threat reduction warrant regime in the *CSIS Act* be revised to strengthen its compliance with the *Charter*."[47] In keeping with its concern for presenting the problem as being one of achieving a balance between security and rights, the Government noted that a desirable outcome "would reduce the *Charter* risk while still providing CSIS with the tools it needs to respond to national security threats."[48] That said, the Response also noted that "the Government … is proposing legislative changes to ensure that CSIS cannot violate or contravene the *Charter*."[49] The specifics of this legislative response are found in Bill C-59, which is presently before Parliament.

The legislative responses to the two sets of problems the Government identified – accountability and constitutionality – came via these two bills. The first became law as the *National Security and Intelligence Committee of Parliamentarians Act*, which has entered into force.[50] The second is currently before Parliament, in the form of Bill C-59. Before turning to the failings of the latter, those of the former should be discussed in brief so that the significance of Bill C-59's constitutional defects can be seen in the context of a failure to create meaningful oversight for these

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[44] Government of Canada, "Response to the Ninth Report of the Standing Committee of Public Safety and National Security" (undated) at 5, online: <https://www.ourcommons.ca/content/Committee/421/SECU/GovResponse/RP9066732/421_SECU_Rpt09_GR/421_SECU_Rpt09_GR-e.pdf>.

[45] *Ibid* at 5.

[46] *Ibid*.

[47] *Ibid* at 4.

[48] *Ibid*.

[49] *Ibid*.

[50] Bill C-22, *An Act to establish the National Security and Intelligence Committee of Parliamentarians and to make consequential amendments to certain Acts*, 1st Sess, 42nd Parl, 2017 (assented to 22 June 2017), SC 2017, c 15 [*NSICoP Act*].

unconstitutional powers. The Government's failure to create meaningful oversight – after it presented accountability as a way to strike the correct balance between security and rights – is directly relevant to the question of whether the measures retained by CSIS to obtain warrants that authorize the infringement of *Charter* rights remain dangerously overbroad.

II. Assessing the Government's Response: Bills C-22 & C-59

After concluding its consultation process, the Government characterized the public's demands to abolish CSIS's disruption powers and the warrant-based regime for authorizing what would otherwise violate the *Charter* – as endorsed by the recommendations of the Public Safety and National Security Committee's report – as calls for achieving a measured balance between rights and security. Its responses were the product of this reformulation. Balance was to be achieved by two principal adjustments to the framework created by Bill C-51, rather than by its abolition. These were the creation of the two bodies that would purportedly constitute more effective oversight over CSIS and other intelligence agencies, and the further elaboration of the warrant regime that would govern CSIS's applications, which includes further specification of the rights that these warrants might infringe, and those which they might not.

A. C-22's Use of Discredited Models of Intelligence Oversight

The *Act to Establish a National Security and Intelligence Committee of Parliamentarians* ("the *NSICoP Act*", formerly Bill C-22) addressed longstanding problems with intelligence oversight.[51] Unfortunately, its features were disappointing to many who had long been calling for Parliamentary oversight. The new Committee appears to have been given some of the powers necessary to achieve the goal of making these agencies (particularly CSIS) more accountable for any future abuses. However, when its powers are scrutinized in detail, it becomes apparent that the NSICoP has not been given what it would need to implement the level of oversight that the Government has presented as a reassurance that CSIS's new "disruption powers" could not be used in ways that violate non-derogable rights.

Unlike the NSICoP, the intelligence oversight committees created by a majority of the countries in the Commonwealth are directly responsible to Parliament.[52] This separation of powers in intelligence oversight bolsters accountability, as agencies such as CSIS ordinarily report to the Government. Abuses committed by these agencies, which may include a lack of candour before the courts and repeatedly deporting citizens into the custody of regimes that torture dissidents, may embarrass the Government. This creates a clear interest in keeping these abuses

[51] Craig Forcese, *National Security Law: Canadian Practice in International Perspective* (Toronto: Irwin Law, 2008) at 109–18.

[52] *Ibid*.

secret, which militates against transparency.

Bill C-22 chose to locate the NSICoP within the executive rather than within Parliament. It is an advisory committee to the Prime Minister created by statute, and not a parliamentary committee. Accordingly, the NSICoP's annual reports and even its special reports (which presumably would address issues of such serious concern that they could not wait until the end of the year) will be reports to the Prime Minister; they will be subject to vetting by the Government before release. This means that the Government will be the final judge of whether any criticism of the intelligence agencies will ever be made public.

The Committee will also not have the access to information that it may require. The *NSICoP Act* allows Ministers to deny information to the Committee if it would be "injurious to national security" or if it includes "special operational information",[53] a clause described by Murray Rankin as "disturbingly wide if the committee is to do the job that it is being assigned."[54] Additionally, the Committee's Chair is appointed directly by the Prime Minister, despite the recommendation of the Interim Committee of Parliamentarians on National Security made in 2004 that "committee leadership positions should be elected by a secret ballot of its members to enhance the reality, and perception, of committee independence."[55]

The Government's choices to make the NSICoP a creature of the executive branch rather than a parliamentary committee and to give the Prime Minister the power to appoint its chair are directly counter to the decision of the Parliament of the United Kingdom in 2013 to enact the *Justice and Security Act*, which transformed the Intelligence and Security Committee from one that merely advised the Prime Minister to a statutory committee of Parliament (which in 2015 obtained the power to appoint its Chair). These decisions were the product of that Committee's experience of problems of independence and accountability. Unfortunately, these problems were glossed over when the United Kingdom's Intelligence and Security Committee was discussed in the debate on Bill C-22.

In his testimony to the Senate Standing Committee on National Security, the former Chair of the Intelligence and Security Committee ("ISC") of the United Kingdom, Sir Malcolm Rifkind, downplayed the features introduced by the *Justice and Security Act.*[56] Unfortunately, no questions were asked about whether it was

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[53] *NSICoP Act*, *supra* note 50, s 16.

[54] Cristin Schmitz, "Proposed Security Review Panel Called 'Positive' but With Caveats", *The Lawyers Weekly* (1 July 2016), online: <https://web.archive.org/web/20171107222706/http://www.lawyersweekly.ca/articles/2708>.

[55] Interim Committee of Parliamentarians on National Security, *Report of Interim Committee of Parliamentarians on National Security* (October 2004) at 8, online: Scribd <https://www.scribd.com/document/254530886/Interim-Committee-of-Parliamentarians-on-National-Security>.

[56] See statements of The Rt Hon Sir Malcolm Rifkind, Former Chairman of the Intelligence and Security Committee of Parliament (UK), in Senate, Standing Committee on National Security and Defence, "Evidence" (14 June 2017),

prudent to rely upon the testimony of a former Chair forced to step down from that Committee (and away from Parliament) because of his admission of "errors in judgment" after he was implicated in a "cash for access" scheme in 2015.[57] The dangers of taking the advice of such a Chair, who had been appointed by the Prime Minister, on the question of whether this appointment procedure was suitable are obvious.

Rifkind's tenure as the Chair appointed by the Prime Minister had also been controversial. This was highlighted by the comments upon Rifkind's stepping down made by Secretary of State David Davis, who as Home Secretary had "piloted the bill setting up the ISC through Parliament".[58] In the wake of numerous revelations of abuses by the intelligence agencies, Davis noted that Sir Malcolm had "found himself time and again justifying it, saying it is legal".[59] Davis' reaction to these scandals was instrumental in stimulating the reforms that now allow the ISC to elect its own chair.[60]

In adopting a model of oversight that was proven to be ineffective in the United Kingdom, the Canadian Government demonstrates that it has failed to learn from the setbacks in that country. More importantly, the next subsections will demonstrate that it has not learned anything from the failures of intelligence oversight in Canada's recent history, which were serious enough to warrant considerable scrutiny. While the two general features of the NSICoP described above – its location in the executive, and the Prime Minister's power to appoint its chair – are problematic, the implementation of the oversight regime is considerably more problematic since it demonstrates that the new structure is unlikely to solve the problems that existed in the body previously charged with oversight over CSIS.

B. C-22 & C-59 Ignore the Recent History of CSIS Oversight

Bill C-59 creates the agency that will report to the NSICoP, without which it cannot perform its task of promoting accountability and transparency. This body, the NSIRA, replaces the Security Intelligence Review Committee ("SIRC"). As SIRC's shortcomings were manifest, this has led to cautious optimism on the question of whether NSIRA and NSICoP will provide adequate oversight. Unfortunately, after it becomes clear that these bodies have some of the same structural problems as SIRC,

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online: <https://sencanada.ca/en/Content/Sen/Committee/421/SECD/16ev-53431-e>.

[57] "Ofcom: Channel 4 Rifkind and Straw Dispatches Probe 'Fair'", *BBC News* (21 December 2015), online: <www.bbc.com/news>.

[58] "UK Spy Watchdog 'Taken In' By Security Agencies – MP" *BBC News* (27 February 2015), online <https://www.bbc.com>.

[59] *Ibid*.

[60] UK, Intelligence and Security Committee of Parliament, "Intelligence and Security Committee of Parliament: Chairman elected" (15 September 2015), online: <isc.independent.gov.uk/news-archive/15september2015>.

that optimism may appear unwarranted.

1. SIRC: A symbol of political appointees' manifest incapability in oversight

SIRC was founded in response to the McDonald Commission's recommendation that a body be created to ensure that the extraordinary powers granted to CSIS are "used legally and appropriately." It proved to be "as toothless an agency watchdog as you can find."[61] "SIRC is supposed to be in the accountability business. But to some of its critics it long ago morphed into little more than a proverbial rubber stamp for our spies that few in or outside Ottawa regard seriously."[62] Calls to reform SIRC were made in the Report of the Arar Inquiry, which revealed CSIS's role in facilitating the torture of Canadian citizens abroad.[63] These proposals were echoed by SIRC itself in 2011, although they were reframed as a proposal to give it broader powers in the service of oversight and accountability.[64] It is not surprising that a government agency would propose the expansion of its own powers. However, it is rare for clear proof of the pointlessness of structural reforms to emerge so quickly. It soon became apparent that the rot ran through the Committee, all the way to the top.

Arthur Porter, the Chair of SIRC who signed off on these recommendations, resigned two months later, three months before the end of his contract of employment with the Government. Within months, the investigators of the Charbonneau Commission into public corruption had determined that Porter – still serving as the Chair of the body charged with oversight over CSIS – was both a fraudster and fugitive.

A warrant for his arrest was executed by INTERPOL in Panama on May 27, 2013. Porter died in jail on June 30, 2015, still awaiting extradition to Canada, as "Panama ignored its own extradition laws, and Canada did not press to have his case handled quickly."[65] In the words of a journalist who interviewed Porter shortly before his death, "that seems curious, given that Porter was still a privy councillor … [who]

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[61] Brian Stewart, "Why Are We Eliminating the CSIS Watchers?", *CBC News* (31 May 2010), online: <www.cbc.ca/news>. Stewart, a former Senior Correspondent of CBC's *The National*, is now a Distinguished Senior Fellow at the Munk School of Global Affairs, University of Toronto.

[62] Andrew Mitrovica, "Toothless Bark from Spy Watchdog", *Toronto Star* (1 November 2011), online: <https://www.thestar.com>. Mitrovica, now a Professor of Journalism at Sheridan College, was formerly CTV's chief investigative producer.

[63] Canada, Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar: Analysis and Recommendations* (Ottawa: Public Works and Government Services Canada, 2006).

[64] Canada, Security Intelligence Review Committee, *Checks and Balances: Viewing Security Through the Lens of Accountability*, Annual Report (2010–2011) (Ottawa: Public Works and Government Services Canada, 2011), online: <www.sirc-csars.gc.ca/pdfs/ar_2010-2011-eng.pdf>.

[65] John Nicol, "Arthur Porter's Death in Panama Leaves Lingering Questions about McGill, Extradition", *CBC News* (2 July 2015), online: <www.cbc.ca/news>.

hinted to CBC News that he had much to tell that would make people in Ottawa uncomfortable."[66] Despite being a serving member of the Queen's Privy Council for Canada, the Prime Minister's Office issued no comment on his death; and, in a breach of protocol, refused to lower the flag on Parliament Hill to half-mast, "a decision [that] came from the Prime Minister."[67]

It is remarkable that the circumstances surrounding the death of a Privy Councillor and former head of SIRC who resigned his office and fled the country while facing serious criminal allegations was the subject of no official inquiry. The opposition in the House of Commons questioned how someone who later became the subject of the largest fraud investigation in Canadian history was appointed by the Prime Minister to serve as the Chair of the body charged with oversight over the Canadian Security Intelligence Service,[68] especially after it was revealed that the Prime Minister had received "[a] letter warning in stark language against the 2008 appointment" from Bloc Québécois leader Gilles Duceppe, which had been sent in response to the Government's official invitation to comment on his nomination.[69]

Duceppe's letter drew on numerous public sources that had raised questions about Porter's many conflicts of interest, which tracked closely the allegations of fraud that later led to his flight from justice. Prime Minister Harper declined to comment on whether this letter was ever forwarded by the Prime Minister's Office to the officials at the Privy Council Office who were responsible for vetting Porter. The *National Post* noted that "emails obtained under access-to-information laws suggest the Bloc's concerns about Porter's background in Detroit may not have been passed on to security officials."[70]

In the estimation of Penny Collenette (now a law professor at the University of Ottawa, formerly the director of appointments in the Prime Minister's Office under Jean Chrétien), "the information from Mr. Duceppe might have been discounted because (the PMO) wanted to barrel ahead with the appointment or because of political reasons…"[71] This is a damning possibility that has never been properly investigated, although its implications are so serious that they call into question any structure of intelligence oversight that retains a place for political appointees and the Government's power to choose them. It remains unknown what political reasons could have trumped concerns about the honesty of the official charged with making sure that

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[66] *Ibid*.

[67] Daniel Leblanc, "Ottawa Won't Lower Flag for Arthur Porter, Accused in Bribery Scandal", *The Globe and Mail* (1 July 2015), online: <https://www.theglobeandmail.com>.

[68] Greg McArthur & David Montero, "Meet Arthur T. Porter, the Man at the Centre of One of Canada's Biggest Health-care Scandals", *The Globe and Mail* (22 December 2012), online: <https://www.theglobeandmail.com>.

[69] "Letter Warning Stephen Harper Against Appointing Arthur Porter to Oversee Spy Agency Raised No Red Flags", *National Post* (4 October 2013), online: <nationalpost.com>.

[70] *Ibid*.

[71] *Ibid*.

CSIS was using its extraordinary powers legally and responsibly.

L'Affaire Porter presents a fundamental question about the competency and political neutrality of the appointees to SIRC, even when leaving aside the possibility of corruption and political tampering. Porter was a medical doctor and hospital administrator with no prior training in the field of intelligence, much less in the specialized field of managing the oversight of agencies comprised of closed-mouthed and secretive professionals. The next Chair appointed to SIRC after the Porter scandal was Chuck Strahl, a long-time politician and former minister who resigned less than midway through his term, after it was revealed that he was still serving as a registered lobbyist for the oil industry.[72] It was later revealed that "half of the other Harper government appointees keeping an eye on the spies also have ties to the oil business … [a]mong the five members of the intelligence oversight committee, [Frances] Lankin alone has no ties to either the current government or the oil industry."[73]

These conflicts of interest were more than mere technicalities; they raised the possibility that members of the intelligence oversight body either encouraged or turned a blind eye to CSIS's abuses. While Denis Losier served as a member of SIRC he was also serving on the board of the pipeline company Enbridge N.B. (which was also one of Strahl's clients), while Yves Fortier was on the board of TransCanada pipelines. As members of SIRC's board, they were responsible for oversight of CSIS, while it was allegedly engaged in the illegal surveillance and disruption of the anti-pipeline protest movement that had crystallized in response to Enbridge's Northern Gateway project. CSIS targeted groups such as the Yinka Dene Alliance and the Sierra Club of B.C. at the behest of the National Energy Board (itself another regulator notorious for conflicts of interest involving its members and the companies it regulates).[74] These groups' subsequent allegations that CSIS "'broke the law by gathering information on the peaceful and democratic activities of Canadians' … [were based on] CSIS documents [that] reveal the agency was watching people and groups opposed to pipeline expansion … [at] a gathering in a Kelowna church basement and the All Native Basketball Tournament in Prince Rupert."[75]

These allegations were the subject of closed-door hearings at SIRC which went on for three years. After that, SIRC dismissed them and

> extended a gag order it had put in place over the hearings to permanently ban the B.C. Civil Liberties Association or any of the groups involved in testifying before the hearing about anything they had heard, presented or

[72] Stephen Chase, "Canada's Top Spy Watchdog Resigns Over Lobbying Questions", *The Globe and Mail* (24 January 2014), online: <https://www.theglobeandmail.com>.

[73] Greg Weston, "Other Spy Watchdogs Have Ties to Oil Business", *CBC News* (10 January 2014), online: <www.cbc.ca/news>.

[74] Bruce Livesey, "Canada's Spies Collude with the Energy Sector" *National Observer* (18 May 2017), online: <https://www.nationalobserver.com>.

[75] "CSIS Surveillance of Pipeline Protesters Faces Federal Review", *CBC News* (12 August 2015), online: <www.cbc.ca/news>.

> learned when there. It also banned the group from disclosing that a decision into the complaint had been made at all.[76]

This remarkable decision was made by the interim chair of SIRC who followed Chuck Strahl – Deborah Grey – who was pressed into service upon Strahl's resignation, despite having served on SIRC for a mere nine months. Grey has a long record in politics, having served as the Reform Party's first Member of Parliament, and later as deputy leader and successor to Preston Manning. Her first legislative assistant was Stephen Harper, who as Prime Minister appointed Grey to SIRC.

The political appointees who serve as the chair and members of SIRC are, at least until the creation of NSICoP and the NSIRA, the only body charged with CSIS's oversight; this has been the case since 2012, when the Government abolished the Office of the Inspector-General of the Canadian Security Intelligence Service. This office, staffed by professional investigators who supervised CSIS's compliance with its statutory mandate, was quietly eliminated by means of a clause slipped into an omnibus budget bill, which was not the subject of debate in Parliament.[77] When pressed by journalists, Public Safety Canada argued that the elimination of this body "will save taxpayers nearly a million dollars per year" and presented the transfer of responsibilities to SIRC as beneficial: "By consolidating review functions into a single organization we will provide more effective review".[78]

This unified review would be performed by political appointees; the Government eliminated this professional body less than six months after the Porter scandal. When this unheralded elimination was made public, Porter was still a fugitive from justice; Chuck Strahl had yet to be appointed. None of this appeared to have any bearing on the Government's conclusion that the oversight of CSIS was best entrusted to political appointees, despite the conclusions of former members of SIRC, such as Bob Rae, who noted that this "means less accountability."[79]

2. C-22 & C-59 complete the displacement of professional oversight

The creation of a super-SIRC in the form of the NSIRA and the formation of the NSICoP to which it reports solves only some of SIRC's long-standing problems.[80] Discussions of the technical merits and failings of these two new oversight bodies have

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[76] Amanda Connolly, "Early Win for BC Civil Rights Group in Pipeline Protest Spying Case Heading to Federal Court", *Global News* (6 December 2017), online: <https://globalnews.ca>.

[77] "Ottawa Abolishes Spy Overseer's Office", *National Post* (26 April 2012), online: <nationalpost.com>.

[78] *Ibid.*

[79] *Ibid.*

[80] Bill C-59 does address the concerns of some scholars and advocates (including integrated oversight over CSIS, the Communications Security Establishment, and 15 other federal departments, including the Canada Border Services Agency. It remains unclear if all of the CBSA's activities will be reviewable; if not, it would be a significant omission).

been robust as Bill C-22 and C-59 moved through Parliament and have addressed these extensively. What is lacking in the debate up to this point is unrestrained criticism of its political infirmities.

While the Minister of Public Safety lauded the creation of an integrated system as the end of fragmented intelligence oversight, Bill C-59 could have given the NSIRA and the NSICoP powers to review all of these agencies without eliminating other oversight bodies. The Government chose otherwise. Bill C-59 eliminates the Office of the CSE Commissioner ("OCSEC"), the dedicated watchdog of Communications Security Establishment Canada, which is the agency responsible for signals intelligence (i.e. mass electronic eavesdropping), which became significantly more controversial in the wake of the revelations of Edward Snowden.

Unlike SIRC, the OCSEC recently proved that it was not entirely toothless, as its Commissioner issued a statement to the public in 2013 that "encourage[d] the government to be as transparent as possible" after Snowden revealed that the CSE had collected metadata from Canadians by monitoring the use of Wi-Fi at various airports,[81] which allowed it to "track the travellers for a week or more as they … showed up in other Wi-Fi 'hot spots' in cities across Canada".[82]

Bill C-59 accomplishes the elimination of the OCSEC, in the same manner as the *Budget Implementation Act* of 2012 abolished the Office of the Inspector-General of the Canadian Security Intelligence Service. In both instances, the Government presented the elimination as providing for better oversight, although both the Harper and Trudeau Governments abolished independent agencies staffed by experienced intelligence professionals, who were well-acquainted with the agencies they held accountable.

As the serving CSE Commissioner recently noted, his independence was guaranteed by statute:

> The *National Defence Act* requires the CSE Commissioner to be a supernumerary or a retired judge of a Superior Court. The Commissioner is appointed by the Governor in Council during good behaviour, for a term not exceeding five years. A judge's career is based on independence and impartiality, with a practice of determining conclusions based on facts and tough probing questions.[83]

While Bill C-59 creates the analogous position of Intelligence Commissioner,

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[81] Canada, Office of the Communications Security Establishment Commissioner, "Statement by CSE Commissioner the Honourable Robert Décary - 2013" (13 June 2013), online: <https://www.ocsec-bccst.gc.ca/s41/s60/d340/eng/statement-cse-commissioner-honourable>.

[82] Wojtek Gwiazda, "Canadian Intelligence agency CSEC Tracked Thousands through Airport's Free Wi-Fi", *Radio Canada International* (31 January 2014), online: <www.rcinet.ca/en>.

[83] Canada, Office of the Communications Security Establishment Commissioner, "Statement by CSE Commissioner the Honourable Jean-Pierre Plouffe re: January 30, 2014 CBC story" (31 January 2014), online: <https://www.ocsec-bccst.gc.ca/s41/s60/d341/eng/statement-cse-commissioner-honourable>.

one well-informed scholar "expect[s], however, that many OCSEC employees would almost immediately move to NSIRA, which would take on the bulk of the tasks currently performed by OCSEC".[84] This means that this oversight would now be performed under the supervision of political appointees, rather than under a retired judge of a superior court, i.e., the Intelligence Commissioner, who would be deprived of the most effective staff members, who would now be considerably less independent.

While the reach and powers of the new oversight bodies are considerably more robust than SIRC, it is unclear if this alone will lead to more effective oversight, particularly if the new political appointees prove as feckless as some of their predecessors. The problem that remains is political, not technical: the Government – which in the twenty-first century increasingly means the Prime Minister's Office – will now have the power to appoint everyone responsible for intelligence oversight, in addition to the ability to censor every report they produce by failing to declassify them.[85] As the Canadian Civil Liberties Association noted, "[w]hether or not this new review body can fulfill its promise will depend on whether appointees are credible".[86]

There are no indications from the Government to date of who they would seek to nominate to lead the NSIRA, or whether they will create a list of desirable competencies or other criteria before making the appointments. Even if the first set of appointments demonstrates a desire to appoint competent, well-informed, and independent officials, these appointees are sure to attract considerably more scrutiny than those that follow. Neither Bill C-22 nor C-59 restrict the Government's freedom to appoint individuals on the solitary criterion that they can be entrusted to keep the Government's secrets. The first preliminary indications are not encouraging: the Government rejected the suggestion from the House of Commons Standing Committee on Public Safety and National Security that parliamentarians have a role in the selection of the officials who will staff the NSIRA.

The Government decided to embrace a model for intelligence oversight which places a body that lacks institutional independence firmly under the executive, a choice that was rejected by the Parliament of the United Kingdom. Ultimately, that is its choice to make: as this is a political decision, it is up to the Government and Parliament to decide, as the balancing of priorities is undoubtedly an indispensable part of policy making. That said, another more problematic element of the *NSICoP Act* (the former Bill C-22) veers out of policy and into the elimination of constitutional protections against governmental abuses related to intelligence.

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[84] Bill Robinson, "Bill C-59: New Dogs for New Tricks" (3 July 2017), *Lux et Umbra* (blog), online: <https://luxexumbra.blogspot.ca/2017/07/bill-c-59-new-dogs-for-new-tricks.html>.

[85] *Ibid.*

[86] "National Security Accountability, Oversight and Review in Bill C-59" (12 September 2017), online: Canadian Civil Liberties Association <https://ccla.org/national-security-accountability-oversight-review/>.

3. C-22 eliminates the ultimate check on CSIS's abuses: Parliamentary Privilege

In the name of balancing accountability with security, the members of the new National Security and Intelligence Committee of Parliamentarians were stripped of parliamentary privilege, even as it pertains to what they say in the Senate or the House of Commons. Section 11 of the former Bill C-22 (entitled "Disclosure prohibited") states that "a member or former member of the Committee … must not knowingly disclose any information that they obtained … performing their duties or functions under this Act". This is unexceptional. However, section 12 (entitled "Parliamentary privilege") states that:

> Despite any other law, no member or former member of the Committee may claim immunity based on parliamentary privilege in any proceeding against them … in relation to any other proceeding arising from any disclosure of information [prohibited by section 11] … [a] statement made by a member or former member of the Committee before either House of Parliament or a committee … is admissible in evidence against them …

This is unprecedented. The legislative summary prepared by the Library of Parliament's legal and social affairs division commented pointedly that, "[o]f note, the *Justice and Security Act 2013* does not remove parliamentary privilege from ISC members."[87] What is more, this provision breaks with a constitutional principle that had been observed without exception in the United Kingdom and every Westminster democracy that it founded since the enactment of the *English Bill of Rights, 1688*.[88]

Section 12 would allow for a type of prosecution that has not been seen since the Glorious Revolution: that of a Member of Parliament for what they say to their fellow members in the course of parliamentary debate. In fact, C-22 would allow a prosecution even if that Member or Senator has made every attempt to safeguard the information and succeeded, for instance, by telling the members of a relevant parliamentary committee about an abuse they had learned about through the NSICoP during an *in camera* meeting of that committee, where those members could be subjected to discipline that the House of Commons or the Senate deems appropriate for a breach of confidentiality, including expulsion.

The apparent goal of section 12 is to prevent the release of sensitive or embarrassing information to Parliament. Recent history demonstrates that there is a continuing consensus between governments on the desirability of keeping revelations of abuses from parliamentarians, which further demonstrates the continued importance of parliamentary privilege to intelligence oversight, which also serves to protect the

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[87] Holly Porteous & Dominique Valiquet, "Legislative Summary of Bill C-22" (22 August 2016), online: Library of Parliament <https://lop.parl.ca/About/Parliament/LegislativeSummaries/bills_ls.asp?ls=c22&Parl=42&Ses=1&source=library_prb&Language=E#ftn8>.

[88] *Bill of Rights, 1688* (UK), 1 Will and Mar (2nd Sess), c 2, art 9.

public from further abuses. As Nicholas MacDonald noted,

> The ability of legislators to deliberate in an open forum is perhaps the greatest safeguard of a democratic form of government and a fundamental right necessary to ensure the protection of minority opinions … [which] is particularly necessary in matters of national security where the conflict between individual rights and the collective good must be so carefully balanced.[89]

C-22's abrogation of parliamentary privilege for those serving on the NSICoP comes in the wake of a recent change of government, which occurred after testimony protected and secured by parliamentary privilege inflicted considerable political damage on the previous Government. This testimony was given to the House of Commons Special Committee on the Canadian Mission on Afghanistan in 2009 and 2010, by Richard Colvin, the former second-in-command of the Canadian diplomatic mission to Afghanistan. He was the author of a 2007 report into allegations that prisoners transferred by the Canadian Forces to the Afghan authorities were then subjected to torture.[90]

Colvin came forward in 2009 and offered to testify about his report, which was classified, before the Military Police Complaints Commission (the "MPPC"). The Minister of Public Safety then issued a national security order to prohibit that testimony; according to the opposition, this was done because "much of this evidence might embarrass the government because it might reveal what they knew, when they knew it and whether they did anything about it or not."[91] Colvin was then subpoenaed by the Special Committee, which gave his testimony the protection of parliamentary privilege. This testimony of November 18, 2009,[92] led to calls for a public inquiry, which the government immediately dismissed. Amid calls for the resignation of the Minister of National Defence, the Government refused to release unredacted documents related to Afghan detainees to the Special Committee, which raised the possibility of a motion that the Harper Government was in contempt of Parliament. This created a significant constitutional crisis, as Parliament was prorogued by the Governor-General on the advice of the Prime Minister, who wished to forestall a finding of contempt of parliament that would have precipitated the fall of his

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[89] Nicholas MacDonald, "Parliamentarians and National Security" (2011) 34:4 Can Parliamentary Rev 33 at 38.

[90] The 2007 report remains classified, although Colvin testified as to its contents and described it in general terms in his supplemental evidence to the Committee. See "Full Text of Richard Colvin's Letter", *CTV News* (16 December 2009), online: <https://www.ctvnews.ca>.

[91] "Government Trying to Muzzle Diplomat: Lawyer" *CBC News* (6 October 2009), online: <https://web.archive.org/web/20091008093859/http://www.cbc.ca/canada/story/2009/10/06/diplomat-testimony-afghan.html>.

[92] Canada, House of Commons, Special Committee on the Canadian Mission in Afghanistan, "Evidence of Richard Colvin" (18 November 2009), online: <www.ourcommons.ca/DocumentViewer/en/40-2/AFGH/meeting-15/evidence#Int-2956563>.

Government.[93]

The relief the Government obtained by prorogation was only temporary in nature. On April 27, 2011, the Speaker of the House of Commons ruled that the House had a right to ask that the government turn over the unredacted documents; members of the opposition had argued it possessed that right pursuant to the collective parliamentary privilege of the House.[94] These documents, and others obtained by the MPCC, led to further allegations of abuse during the interrogations of detainees by members of CSIS themselves.

Inquiries into detainee abuse by CSIS and the Canadian Military Police accelerated after the release of these documents and continued after the change of government in 2015. The Government continued to refuse to provide unredacted documents to the MPCC (whose members have the requisite security clearances and are subject to the *Security of Information Act*), even after members of the Canadian Forces alleged that detainees were abused.[95] In 2016, members of the opposition called for a public inquiry into detainee abuse (which would have resolved the issue of access to unredacted documents), a demand which the Government rejected. Specifically, the Minister of National Defence (Harjit Sajjan) responded in the House of Commons to an e-petition calling for the inquiry by dismissing it. This was a reversal of position, as the Liberals had made the same demand of the Harper Government the previous year, when the Liberals sat in opposition.

This sudden *volte-face* caused significant embarrassment to the Trudeau Government. Sajjan's rejection of the petition led to questions as to whether or not he made that decision while personally in a position of conflict of interest, as he "would be an absolute key witness" at any such inquiry, owing to the fact that he had been a senior intelligence officer with the Canadian Forces in Afghanistan at the time of the detainee abuse.[96]

These embarrassing questions lingered and flared up twice in 2017: first, when the MPCC concluded that it did not have the jurisdiction to investigate what the public inquiry – which Sajjan had rejected – would have addressed;[97] second, when Sajjan claimed that he had been the architect of "Operation Medusa", a battle in which elements of the International Security Assistance Force led by the Royal Canadian Regiment Battle Group captured 136 individuals alleged to be members of the

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[93] Peter H Russell & Lorne Sossin, eds, *Parliamentary Democracy in Crisis* (Toronto: University of Toronto Press, 2009).

[94] "Afghan Documents Debate Heats Up", *CBC News* (18 March 2010), online: <www.cbc.ca/news>.

[95] David Pugliese, "Military Police Watchdog Gears Up for Investigation of Alleged Detainee Abuse in Afghanistan", *National Post* (4 August 2016), online: <nationalpost.com>.

[96] David Pugliese, "Afghan Service Puts Defence Minister Sajjan in Conflict of Interest on Detainees, Say Lawyers", *Ottawa Citizen* (21 June 2016), online: <ottawacitizen.com>.

[97] Murray Brewster, "Military Watchdog Limits Investigation of Complaint into Afghan Prisoner Abuse", *CBC News* (2 March 2017), online: <www.cbc.ca/news>.

Taliban.[98]

Colvin had revealed much about this in his testimony, but only after he received the protection of parliamentary privilege by testifying before a parliamentary committee and was released from any pressure of being prosecuted for violating a national security order. Namely, he confirmed that "all prisoners transferred to Afghan authorities by Canada in 2006 and early 2007 were tortured and most were likely innocent."[99] Bill C-22, which abrogates the parliamentary privilege that led to all these revelations and the embarrassments to two successive governments that ensued, received its second and third readings in the House of Commons just as the Government suffered the last of these, in March and April of 2017.

Bill C-22's abrogation of parliamentary privilege would have blocked the measures that proved effective during the Afghan detainee scandal. First, if Richard Colvin testified before the NSICoP rather than a parliamentary committee, he would have been liable for prosecution. Second, if parliamentarians serving on the NSICoP had informed members of the House Standing Committee on Public Safety and National Security so that that Committee could obtain Colvin's testimony, those parliamentarians would be subject to being prosecuted under the *Security of Information Act*, as section 12 of the *NSICoP Act* (the former Bill C-22) provides explicitly for that possibility and eliminates the defence of parliamentary privilege in such a prosecution.

Writing on the subject of parliamentary privilege, Joseph Maingot notes that "[t]he importance of this right is such that a Member of the Senate or the House of Commons may with impunity, and subject only to the rules, customs, and practices of the House of Commons, make statements in Parliament that would elsewhere be an infraction of the *Official Secrets Act* [now *Security of Information Act*]."[100] In his introduction to the 2016 edition of Maingot's treatise, Peter Milliken (a former Speaker of the House of Commons) noted that "[p]arliamentary privilege and the immunity of members are subjects essential to the workings of our legislatures."[101] Maingot concludes his volume by noting that "the *raison d'être* of Parliament is to hold the government to account … [p]rivilege is what is necessary for Members to fulfill their constitutional responsibility in a parliamentary proceeding".[102] It is unclear why Canada should have a Parliament if its Members can be cowed by the threat of prosecution from holding the government accountable for serious lapses of the type

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[98] "Canadian Troops Shut Down Bomb Making Factory", *CTV News* (8 December 2007), online: <https://web.archive.org/web/20090215210135/https://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20071209/musa_qala_071209/20071209?hub=TopStories>.

[99] Stephen Chase & Campbell Clark, "Many Detainees Just Farmers: Afghan Official", *The Globe and Mail* (20 November 2009), online: <https://theglobeandmail.com>.

[100] JP Joseph Maingot, *Parliamentary Privilege in Canada*, 2nd ed (House of Commons & McGill-Queen's University Press, 1997) at 26.

[101] "Foreword" in JP Joseph Maingot, *Parliamentary Immunity in Canada* (Toronto: LexisNexis Canada, 2016) at iii.6

[102] *Ibid* at 317, 318.

that have been particularly frequent in the area of national security.

As noted in Part I, the Government's key talking point before Bill C-59's introduction of amendments to the former Bill C-51 was balance: it asserted that more oversight meant that CSIS's power to seek warrants to violate the *Charter* would be used responsibly. Accordingly, when Bill C-59 was introduced, the Government argued that the new legislation would correct the equilibrium between the promotion of security and the protection of rights. Unfortunately, neither the NSIRA nor the NSICoP has the powers that it needs to make this a reality. These bodies cannot obtain information that the Government deems too sensitive; any reports they produce after they otherwise discover abuses can be suppressed by the Government.

The new oversight body at the top of the hierarchy, which is a narrower pyramid since the Harper Government eliminated the CSIS Inspector-General's office and the Trudeau Government abolished the Office of the CSE Commissioner, is ultimately toothless. The Government has eliminated independent oversight just when it points to increased accountability as a justification for the retention of the intelligence agencies' sweeping new powers.

While the decision to create a top-level oversight body for intelligence matters in the form of an advisory committee to the Prime Minister was a legitimate political decision, the decision to abrogate parliamentary privilege was an illicit removal of a bedrock protection of the Canadian Constitution. The Minister of Justice did not issue a *Charter* Statement when Bill C-22 was introduced, perhaps because the constitutional rights at issue are not contained in the *Charter*. However, as the Supreme Court of Canada reasoned, "[b]oth parliamentary privilege and the *Charter* constitute essential parts of the Constitution of Canada".[103] Accordingly, Bill C-22 is now the subject of a constitutional challenge that seeks a declaration of invalidity pertaining to the section that abrogates parliamentary privilege for the members of the NSICoP.[104]

III. Problematic Features of Bill C-51 Retained by Bill C-59

The problems with the new structure of intelligence oversight identified here would be less significant if CSIS had narrowly defined powers, as the McDonald Report had suggested they be circumscribed. The stakes of the failure to create an effective oversight regime by means of Bill C-22 became clear after the Government decided to ignore the recommendations of the House of Commons Standing Committee on Public Safety and National Security and allowed CSIS to retain the "disruption powers" introduced by the former Bill C-51, which the McDonald Commission had taken away from the RCMP. While Bill C-59 does narrow these powers, the *CSIS Act*

[103] *Harvey v New Brunswick (Attorney General)*, [1996] 2 SCR 876 at para 69, 178 NBR (2d) 161.

[104] The present author has brought that application, which was scheduled for a hearing on April 6, 2018.

continues to allow for the violation of non-derogable rights.

A. The Dangers of a Regime of ad hoc Derogation of *Charter* Rights

The warrant regime created by Bill C-51 was subjected to substantial scholarly criticism, as its amendments to the *CSIS Act* authorize the Service to take "measures" either inside or outside Canada to "reduce the threat" to the nation, noting only that CSIS may not "cause … death or bodily harm … willfully attempt in any manner to obstruct, pervert or defeat the course of justice; or … violate the sexual integrity of an individual".[105] Until the enactment of Bill C-59, these are the only limitations to what a warrant from the Federal Court made under section 12.1 of the *CSIS Act* might authorize. The *CSIS Act* continues to explicitly authorize the Service to seek warrants to undertake measures that will violate *Charter* rights, should it conclude that these actions "'will' (not 'may') contravene a *Charter* right or Canadian law."[106]

When discussing the types of activities that CSIS might undertake under this regime,[107] Forcese and Roach mention such examples as breaking and entering into private residences.[108] It is clear that the former Bill C-51 creates a framework for authorizing precisely the sort of activities (to be performed in secret) as those that brought about the demise of the RCMP Security Service after they were revealed by the McDonald Commission. The key difference is that these actions would – in the Government's view – now be legal, owing to the warrants authorizing them.

The most troubling possibility is that section 12.1 warrants would be used to modify the conditions of preventative detention during a future public order emergency, such that it would assume a form that constitutes indefinite arbitrary detention or involuntary disappearance, for instance by denying the right to counsel. This would violate bedrock constitutional protections,[109] along with Canada's international obligations to respect the non-derogable rights enumerated in Article 4 of the International Covenant on Civil and Political Rights ("ICCPR"), as clarified by the Siracusa Principles,[110] which create a right not to be subjected to certain forms of detention, an obligation which cannot be abrogated during an emergency, however

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[105] *CSIS Act*, *supra* note 8, s 12.2.

[106] Craig Forcese & Kent Roach, "Bill C-51 Backgrounder #2: The Canadian Security Intelligence Service's Proposed Power to 'Reduce' Security Threats Through Conduct that May Violate the Law and Charter" (14 February 2015) at 15, online: SSRN <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2564272> at 15 [Forcese & Roach, "Backgrounder #2"].

[107] *Anti-terrorism Act*, *supra* note 3, s. 44.

[108] Forcese & Roach, "Backgrounder #2", *supra* note 106 at 19.

[109] Alford, "Bill C-51", *supra* note 27.

[110] *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights* (28 September 1984), E/CN.4/1985/4.

severe.

International law is particularly uncompromising in its approach to "disappearances", in which detainees are held in secret and without access to counsel or human rights observers.[111] This is due to the fact that, in countless emergencies, *incommunicado* detention served as a prelude to torture and extrajudicial killing. During the October Crisis, for example, detainees were initially denied access to counsel, but none were prevented from meeting lawyers for the entirety of the 21-day period of detention authorized by the Order-in-Council.[112] There were many credible allegations of torture (including mock execution) from the initial period in which detainees were held *incommunicado*, from October 5 to October 21, 1970.[113] After the Quebec bar asserted itself at the outset of the Crisis, the right to counsel was respected during the remainder of the Crisis, a period in which allegations of torture declined.

A similar pattern can be seen more recently in the United States when detainees were held without access to counsel on material witness warrants in the aftermath of the 9/11 attacks. After this was uncovered and access to counsel was restored, allegations of abuse declined precipitously. For example, in the early stages of that crisis, agents of the Federal Bureau of Investigation told Abdallah Higazy – who was later absolved and victorious in federal court in a civil suit against them – that if he did not confess, it would request that Egyptian State Security arrest and torture his relatives.[114] Higazy was held without access to counsel, which was contrary to the Fifth Amendment to the United States Constitution.[115] After numerous cases were brought exposing the abrogation of this right, this practice, and the abuses that follow, appears to have been eliminated in the United States.

In Canada, it does not appear as if that sort of tactic was barred by the three specific restrictions on section 12.1 warrants contained in the former Bill C-51, which highlights the dangers that regime created: in a major public emergency, a warrant from the federal court might have been obtained that authorized the abrogation of a suspect's *Charter* right to counsel. Such a warrant would facilitate, at minimum, inhumane treatment of the sort endured by Abdallah Higazy, as threatening to have a detainee's foreign relatives tortured is not barred by the specific restrictions of section 12.1(1). However, Bill C-59 introduced limitations on what these warrants could authorize, and it specifically bars detention warrants. These restrictions must be considered in detail before any conclusions about whether the re-amended *CSIS Act* could still be used to authorize unconstitutional abuses of this type during a future

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[111] MFP Solla, *Enforced Disappearances in International Human Rights* (Jefferson, NC: McFarland & Company, 2006) at 7–31.

[112] William Tetley, *The October Crisis, 1970: An Insider's View* (Montréal: McGill-Queen's University Press, 2007) at 91.

[113] *Ibid* at 93–108.

[114] *Higazy v Templeton*, 505 F (3d) 161 (2d Cir 2007).

[115] See *In re Class Application for Habeas Corpus on Behalf of all Material Witnesses in Western Dist*, 612 F Supp 940 (WD Tex) at 945.

major public order emergency.

B. C-59's Bar on Detention May Not Prevent Involuntary Disappearances

Section 101 of Bill C-59 would introduce amendments to section 20 of the *CSIS Act*; namely, it would add more specific restrictions on what can never be authorized under the section 12.1 warrant regime. Until it receives Royal Assent, only authorizations to cause death or bodily harm, wilful obstruction of justice, or the violation of the sexual integrity of an individual are barred. If enacted, Bill C-59 would prohibit warrants "subjecting an individual to torture or cruel, inhuman or degrading treatment or punishment, within the meaning of the Convention Against Torture" and "detaining an individual."[116]

On their face, these categorical exclusions seem to bar warrants that would create the conditions which encouraged the mistreatment during the earliest phases of the October Crisis and the 9/11 emergency. However, as unambiguous as these provisions seem, they do not close every possible loophole. They leave open the possibility that, during a future major public order emergency, these could be exploited; this exploitation should be considered a foreseeable misuse in the context of the framework for the preventive arrests and detention of terrorism suspects which Bill C-59 leaves unmodified.

The former Bill C-51 bolstered provisions for preventative detention that have a wholly different statutory basis than the *CSIS Act*'s warrant regime. Bill C-51 also amended the detention provisions of the *Criminal Code* of Canada: it lengthened the detention period in which someone suspected of terrorism could be held without a warrant under the preventive arrest powers of section 83.3, from three days to seven.[117] While the section 12.1 warrants can no longer be used to authorize detention, they are not necessary if CSIS relies on the seven-day period authorized by Bill C-51's amendments to the *Criminal Code*.[118]

Kent Roach and Craig Forcese highlighted the problems inherent to the extension of the period of preventive detention:

> Preventive detentions should not amount to a form of investigative detention, allowing protracted interrogation of subjects. Such an approach could also do an end-run around the restrictions imposed by Parliament and

[116] Bill C-59, *supra* note 2, s 20.1(18).

[117] Warrantless preventive arrest of terrorism suspects was first introduced by the *Anti-Terrorism Act, 2001*, SC 2001, c 41, which limited the period of detention to 72 hours.

[118] Craig Forcese & Kent Roach, "The Roses and the Thorns of Canada's New National Security Bill", *Macleans* (20 June 2017), online: <www.macleans.ca>.

the courts on investigative hearings.[119]

The dangers of such an end-run are considerably more perilous when this detention takes place in secret. The most troubling threat to non-derogable rights created by Bill C-59 is that preventive arrest will be used to detain a suspect for seven days, who will then be subjected to a section 12.1 warrant that would authorize holding that detainee in conditions that would amount to enforced or involuntary disappearance.

The coupling of preventive detention with a warrant disrupting communications with counsel is a plausible scenario owing to what the new amendments to the *CSIS Act* presumptively authorize. Bill C-59 would amend section 21.1(1) of the *CSIS Act* to authorize the Service to seek warrants that fall into certain specified categories. The majority of these contemplate activities that do not implicate the core of the rule of law. However, one category raises troubling possibilities.

Subsection 21.1(1.1) (a) of Bill C-59 would allow for warrants that would authorize "altering, removing, replacing, destroying, disrupting or degrading a communication or means of communication". This would authorize warrants for the execution of techniques that impair the electronic communications of those suspected of involvement with terrorist groups. While preventing someone from posting messages on the Internet (or altering those postings) without a warrant would clearly engage the right to freedom of speech under section 2(b) of the *Charter*, it would not implicate the core restrictions of the rule of law. This would not be true, however, if subsection (1.1) (a) were used to authorize an attempt to restrict the communications of someone already subjected to seven days of preventative detention, such that they would now be held *incommunicado*.

A strong argument can easily be made that a request for a warrant to prevent any communications from a suspect already being held in preventative detention – which would also include their attempts to retain or communicate with counsel – would wrench the meaning of subsection (1.1) (a) violently out of context. However, the recent history of major public emergencies demonstrates that such an aggressive and faulty interpretation of CSIS's powers should be expected after any significant terrorist attack.[120] Owing to this history, the House of Commons Standing Committee on Public Safety and National Security's Committee's rejection of an amendment that would have explicitly specified that anyone detained under section 83.3 of the *Criminal Code's* provisions for preventative detention "has the right to retain and instruct counsel at any stage of proceedings under this section" is particularly

[119] Craig Forcese & Kent Roach, "Proposed Amendments to Bill C-51, Antiterrorism Act 2015" (12 March 2015) at 16–17, online: SSRN <https://papers.ssrn.com/sol3/Delivery.cfm?abstractid=2576202>.

[120] See generally Ryan Alford, *Permanent State of Emergency: Unchecked Executive Power and the Demise of the Rule of Law* (Montréal: McGill-Queens University Press, 2017) [Alford, *Permanent State of Emergency*].

troubling.[121]

C. C-59's Attempt to "*Charter*-proof" this Derogation Regime

It remains unclear how sections 12.1–3 and 20.1 of the newly re-amended *CSIS Act* might be misinterpreted in a public order emergency in the future. However, there are also some troubling indications that its structure might serve to insulate such misuse from being challenged effectively in the courts.

The analysis of Bill C-59 by informed commentators such as Michael Nesbitt supports the interpretation that its limiting provisions would make it more difficult to challenge the constitutionality of "CSIS's continuing power to act disruptively in violation of the *Charter*", even if these are abused.[122] By enumerating specific areas in which disruptive activity could presumptively be authorized by section 12 warrants, Bill C-59 makes it considerably more likely that a justice of the Federal Court presented with such a warrant application could conclude that what would otherwise violate the *Charter* could be saved by the application of section 1, as it allows the Government to argue that the "limitation" on the right is prescribed by law and to argue that under *Oakes*, the infringement the warrant would authorize is justified owing to a pressing and substantial concern about a threat to national security and proportional given the potential for damage that such a threat entails.

It is impossible to determine in advance how a justice of the Federal Court would respond when presented with a novel or expansive interpretation of the categories that are presumptively authorized by section 20.1 – such as the argument that keeping someone in custody for seven days of preventive detention during an emergency is necessary. However, the history of these emergencies, which includes the shameful episodes of the wartime detention and deportation of citizens designated "enemy aliens" during the Second World War (in both the United Kingdom and Canada),[123] does not provide much comfort to those concerned with the prospect of future abuses during future wars or major public order emergencies.

Scholars addressing the risks of Bill C-51 noted that the Federal Court may restrain the Service from obtaining warrants that authorize problematic derogations from the *Charter*, as none of its judges "will ever wish to be (directly or indirectly)

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[121] House of Commons, Standing Committee on Public Safety and National Security, "Evidence" (25 April 2018), online: <https://www.ourcommons.ca/DocumentViewer/en/42-1/SECU/meeting-108/evidence> (rejecting NDP-97).

[122] Michael Nesbitt, "National Security, Bill C-59, and CSIS's Continuing Power to Act Disruptively in Violation of the *Charter*" (27 June 2017), *ABlawg.ca* (blog), online: <https://ablawg.ca/2017/06/23/national-security-bill-c-59-and-csiss-continuing-power-to-act-disruptively-in-violation-of-the-charter/> (the quote comes from the article's title).

[123] See generally AWB Simpson, *In the Highest Degree Odious: Detention without Trial in Wartime Britain* (Oxford: Clarendon Press, 1992); Eric M Adams, Jordan Stanger-Ross, & The Landscapes of Injustice Research Collective, "Promises of Law: The Unlawful Dispossession of Japanese Canadians" (2017) 54:3 Osgoode Hall LJ 687.

implicated in a scandal, court case or commission of inquiry sparked by a judge-approved CSIS 'kinetic' measures gone wrong."[124] In normal circumstances this is likely to be true. However, this prediction fails to account for increased judicial deference during a crisis, and in particular the fear of being indirectly implicated in the failure to prevent a major terrorist attack, one that the Service may argue is imminent and which can be prevented only by the Court's approval of extreme measures.[125]

The possibility that the pressures inherent in the political atmosphere of a public order emergency might influence the courts is particularly problematic when combined with the absence of any meaningful review of what will be *in camera* and *ex parte* warrant applications. Nesbitt summarizes these shortcomings as follows:

> First, the usual process by which courts can confirm the propriety of a warrant is almost completely absent, for there will never be a court challenge or judicial review. Second, the usual process by which, in a criminal trial, the judge will review the subsequent actions of the police to determine if they actually acted in compliance with the warrant will also be absent. In the context of CSIS, once the warrant is issued there is no provision for continued judicial oversight…[126]

These features will also prevent appellate courts from exercising their oversight function in this particularly fraught area, which is particularly troubling given CSIS's willingness to breach its duty of candour to the courts.[127] The grant of exclusive jurisdiction over these warrants to the Federal Court would also exacerbate a dangerous dynamic of funnelling controversial and effectively unreviewable political decisions to one particular tribunal, which has implications on the future independence of that court, where these concerns are already obtaining considerable traction.

Criticism of the Federal Court from certain sections of the legal profession led to a vigorous response from the Chief Justice of the Federal Court. Speaking at the 2014 conference of the Canadian Bar Association, he rejected "suggestions that the Federal Court is a government court".[128] Unfortunately, these allegations are unavoidable when one court has exclusive jurisdiction over a number of issues that are

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[124] Craig Forcese & Kent Roach, "Bill C-51 Backgrounder #5: Oversight and Review: Turning Accountability Gaps into Canyons?" (1 March 2015) at 17, online SSRN: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2571245>.

[125] David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge: Cambridge University Press, 2006).

[126] Nesbitt, *supra* note 122.

[127] *X (Re)*, 2014 FCA 249, [2015] 1 FCR 684.

[128] Yamri Taddese, "Chief Justice Pushes Back Against Bias Claims, Insinuations of Kangaroo Court", *Law Times* (25 August 2014), online: <www.lawtimesnews.com>.

of central importance to the government.[129]

The unreviewability of these warrants highlights the importance of the Government's reliance on flawed oversight bodies. The NSIRA and the NSICoP are the only bodies who would have regular access to the warrant applications filed by CSIS. However, as noted in the previous section, any reports about the misuse of the section 12 regime that they include in their reports could easily be suppressed by the Government. As well, any leaks could be punished with prosecutions under the *Security of Information Act*, even if these took the form of disclosure by Members of Parliament to their fellow parliamentarians inside closed-door meetings of bodies such as the House Standing Committee on Public Safety and National Security, as the *NSICoP Act* abolishes their defence of parliamentary privilege.

Even after the previous section's discussion of the lengths to which the past two Governments have gone to avoid embarrassing disclosures of CSIS's abuses, it is difficult at present to imagine this sort of heavy-handed use of the powers of censorship and the punishment of whistleblowers. However, this is only true during the political environment that prevails during peacetime. There are numerous examples of parliamentarians being castigated as disloyal or traitorous during wartime, and of political prosecutions of Members of Parliament.[130] Given the history of the exploitation of loopholes and the weakness of the oversight powers of the bodies charged with policing this conduct, the creation of broad categories of presumptively reasonable *Charter* violations presents clear risks.

D. The Danger of not Recognizing that Some Rights are Non-Derogable

The significance of the Government's failure to propose and implement meaningful intelligence oversight is determined by the likelihood that this will allow serious rights violation to pass unnoticed. This increased danger of serious infringement is complicated by a failure to recognize important distinctions between rights that can be subjected to derogation (like those in the *Charter* that are subject to section 33) and those which are not (domestically, sections 3–6 and 16–23 of the *Charter*; internationally, the rights specified in Article 4 of the ICCPR). Canada's Constitution and its international obligations prohibit it from justifying the infringement of certain rights (among them, the right not to be deprived of life, not to be tortured, not to be subjected to indefinite arbitrary detention) by reference to the importance of safety and security, even during the most serious public emergency imaginable.[131] These rights are not subject to any balancing test, but are instead absolute and inviolable.

The danger of failing to recognize the existence of non-derogable rights is

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[129] Norman M Fera, "The Federal Court of Canada: A Critical Look at Its Jurisdiction" (1973) 6:1 Ottawa L Rev 99 at 111–13.

[130] See Thomas Berger, *Fragile Freedoms: Human Rights and Dissent in Canada* (Toronto: Clarke, Irwin & Co, 1981) at 135.

[131] Alford, "Bill C-51", *supra* note 27 at 123–29.

best exemplified by anti-terrorism programs that do not recognize the existence of a non-derogable right not to arbitrarily deprived of life (as found in the ICCPR). The justification of such a program would be a particularly troubling threat to non-derogable rights in Canada because in the twenty-first century there has been no statutory or constitutional recognition of the existence of rights that must be considered inviolable, even during the most serious public emergencies.

This was not the case during the twentieth century. When the *War Measures Act* was replaced by the *Emergencies Act*, Parliament took care to specify that whenever it was invoked, "such special temporary measures […] must have regard to the *International Covenant on Civil and Political Rights*, particularly with respect to those fundamental rights that are not to be limited or abridged even in a national emergency".[132] Unlike the *Emergencies Act*, the *CSIS Act* acknowledges no limits on Parliament's authority to authorize violations of any right, including those which are non-derogable. This is particularly dangerous at a time in which even the most fundamental non-derogable rights are being violated by Canada's closest allies, the United States and the United Kingdom, pursuant to their targeted killing programs. The ongoing existence and toleration of these programs threatens to eliminate any remaining awareness of the existence of a set of non-derogable rights.

In 2011, the President of the United States issued an order that authorized the drone strike of an American citizen who was accused by the executive of allying himself with al-Qaeda, a terrorist organization designated as an enemy by the Authorization for the Use of Military Force, 2001. This was in substance an allegation of treason against that citizen, although the suspect was never given an opportunity to respond. Despite never being formally accused of this crime, he was sentenced and executed by means of a process that involved only the Government, without any judicial review.[133]

It is important to note that this practice cannot be justified by reference to the laws of war (now known as International Humanitarian Law), at least when it does not take place in a war zone in which the targeting nation is a lawful combatant. During the first decade of the twenty-first century, the majority of the targeted killings conducted by the United States took place in Pakistan and Yemen – according to the conclusions of three successive Special Rapporteurs to the United Nations for Extrajudicial, Summary, or Arbitrary Executions – which were not war zones. In the opinion of these Rapporteurs, this meant that the United States' drone strikes were extrajudicial executions.[134]

This practice has been expanded into Syria and taken up by the United Kingdom, which killed two British subjects in a drone strike there in 2015. While the

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[132] *Emergencies Act*, RSC 1985, c 22 (4th Supp), Preamble, para 3.

[133] Ryan Alford, "The Rule of Law at the Crossroads: Consequences of Targeted Killing of Citizens" (2011) Utah L Rev 1203.

[134] Alford, *Permanent State of Emergency*, *supra* note 120 at 3–7.

conflict in Syria does rise above the threshold of international armed conflict and non-international armed conflict (according to the conclusions of the International Commission of the Red Cross in 2016),[135] as the United States has attacked both the terrorist group known as the Islamic State of Iraq and the Levant ("ISIS") and later, the armed forces of the Syrian Government. However, the United States and its coalition partners are not engaged in lawful military operations, but rather in aggressive war; the consensus among scholars of international law is that the U.S.-led coalition's uses of force in Syria are unlawful, as they "do not appear to fall within the limited exceptions of collective security or self-defence."[136] These exceptions are the only way to justify such attacks, given that Syria has not given the coalition approval to conduct military operations within its sovereign territory, and no resolution approving this without Syria's consent has been issued by the Security Council of the United Nations. Accordingly, these military operations are not defensive, but rather constitute crimes against peace.[137]

Furthermore, even if these targeted killings could be justified under International Humanitarian Law, this would not establish that they are constitutional, as the constitutional tradition of the United Kingdom and the Commonwealth embraces a formative rejection of the idea that the invocation of martial law can be used to trump constitutional rights.[138] For this reason, it is rather shocking that the Government of the United Kingdom has consistently refused to provide a constitutional rationale for its power to target and kill its citizens, even after this program became the subject of public knowledge and came under considerable parliamentary scrutiny, and indeed, criticism. In 2016, The (British) Joint Parliamentary Committee on Human Rights concluded,

> it is clear that the Government does have a policy to use lethal force abroad outside armed conflict for counter-terrorism purposes. We understand why the Government does not want to call its policy a "targeted killing policy". In our view, however, it is important to recognise that the Government's policy on the use of lethal force outside of areas of armed conflict does contemplate the possibility of pre-identified individuals being killed by the

[135] Stephanie Nebehay, "Exclusive: Situation in Syria Constitutes International Armed Conflict - Red Cross", *Reuters* (7 April 2017), online: <https://www.reuters.com>.

[136] Anne Orford, "No Legal Justification" (7 April 2017), *LRB blog* (blog), online: <https://www.lrb.co.uk/blog/2017/04/10/anne-orford/no-legal-justification/>.

[137] Pierre-Marie Dupuy, "The Constitutional Dimension of the Charter of the United Nations Revisited" (1997) 1 Max Planck United Nations YB 1 at 21–24.

[138] *The Petition of Right* [1627] (UK), 3 Cha 1, VII: "your officers and ministers of Justice have unjustly refused or forborne to proceed against such offenders according to the same laws and Statutes upon pretense that the said offenders were punishable only by martial law…wholly and directly contrary to the said laws and statutes of this your realm". (author's transliteration from early modern English).

> State to prevent a terrorist attack.[139]

The Joint Parliamentary Committee's report concludes that "[t]he legal basis of the Government's policy appears to be that the use of lethal force abroad outside of armed conflict for counter-terrorism purposes is lawful if it complies with (1) the international law governing the use of force by States on the territory of another State, and (2) the Law of War."[140] This ignores the existence of any limitations on the infringement of non-derogable rights derived from either the Constitution of the United Kingdom or International Human Rights Law. It remains to be seen whether Canada adopts a similar approach.

Owing to Canadian involvement in the U.S.-led coalition in Syria, Canada could not avoid addressing the legal issues that perplexed the Government and Parliament of the United Kingdom for long. As Forcese and Sherriff noted in 2017,

> For the first time since the introduction of the *Canadian Charter of Rights and Freedoms*, Canada is an armed conflict with an insurgency that has actively recruited Canadians and directed them to use or promote violence against Canada. In the result, the Canadian government may ask its soldiers to target and kill fellow Canadians abroad or to assist allies in doing so. This situation raises a host of novel legal issues, including the question of "targeted killing."[141]

As Forcese and Sherriff noted, the Canadian Government will be forced to address the specific constitutional protections of the *Charter* when considering these issues. As will be demonstrated below, the erosion of constitutional protections within a warrant regime that does not recognize the non-derogable status of certain rights may play a decisive role in the determination of whether the targeted killing of Canadian citizens should be considered constitutional. The Canadian Security Intelligence Service noted in 2014 that approximately 80 Canadian citizens were members of ISIS fighting in Syria.[142] CSIS obtained reliable information in part due to its close cooperation with the intelligence services of the United States and the United Kingdom (to the point where it was chastised by the Federal Court for deputizing these agencies to spy on Canadians abroad).[143]

Questions were soon raised in the media about the course of action that should

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[139] House of Lords House of Commons Joint Committee on Human Rights, *The Government's Policy on the Use of Drones for Targeted Killing*, Second Report of Session 2015–16 (May 2016) at 37, online: <https://publications.parliament.uk/pa/jt201516/jtselect/jtrights/574/574.pdf>.

[140] *Ibid* at 43.

[141] Craig Forcese & Leah West Sherriff, "Killing Citizens: Core Legal Dilemmas in the Targeted Killing Abroad of Canadian Foreign Fighters" (2016) 54 Canadian YB Intl Law 134 at 134.

[142] Marc Montgomery, "Canadian Security Agencies Track Canadian 'Foreign Fighters' Returning Home", *Radio Canada International* (24 March 2014), online: <www.rcinet.ca/en>.

[143] *X (Re)*, 2013 FC 1275 at para 115, [2015] 1 FCR 635: "Given the unfortunate history of information sharing with foreign agencies over the past decade and the reviews conducted by several Royal

follow if the Service received reports that Canadian citizens in Syria were planning terrorist attacks within Canada: in particular, what should be done if Canada or its coalition partners had the capability to target these Canadians? Would the Government consider targeted killing? As citizens targeted in the same manner as those of the United States and the United Kingdom would not receive due process, this would implicate Canada in a practice that – if it is not sanctioned by both International Humanitarian Law and Canadian constitutional and criminal law – would constitute extrajudicial assassination.

On March 30, 2015, Canada extended its participation in the international military coalition against ISIS (which included the United States and the United Kingdom and eleven other nations) into Syria. The question of whether Canadian citizens fighting in Syria were protected by the Constitution from violations of their non-derogable right not to be killed without due process was no longer hypothetical, yet it remained unanswered until it was rendered moot on February 27, 2017, when the Trudeau Government terminated Canada's participation in these airstrikes. Later in 2017, media reports of Canadians who had fought with ISIS in Syria seeking to return to Canada re-opened the debate as to whether the Government should have participated in the targeted killing program. Many noted that the stated preference of officials in the United States and the United Kingdom was to kill those seeking to return before they had an opportunity to do so.[144]

After the Minister of National Defence stated that the rules of engagement for the Canadian Armed Forces would not allow for the creation of a kill list, anonymous sources at the Department of National Defence contradicted him directly in the press, saying that targeted killing of Canadians would have been authorized.[145] These sources clearly understood the implications of such a conclusion: "[s]peaking on background, one senior DND official told CBC News that drone strikes 'are not just speculation. We are part of a coalition that has these capabilities.'"[146]

In response to these comments, notable scholars of Canadian constitutional law argued that even if this were permissible under the laws of armed conflict and international human rights law, targeted killing of Canadian citizens would contravene section 7 of the *Charter*. As Carissima Mathen noted, "if the Canadian state engages in the targeted killing of a Canadian citizen without any other due process, then that would appear to violate the person's right to life".[147] However, she also noted that the section 7 right to life is not absolute, and that there are exceptions where the

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Commissions there can be no question that the Canadian agencies are aware of those hazards. It appears to me that they are using the 30-08 warrants as authorization to assume those risks."

[144] Monique Scotti, "Should Soldiers Kill ISIS Fighters Recruited from Canada Before They Can Return?", *Global News* (17 November 2017), online: <https://globalnews.ca>.

[145] Evan Dyer, "Does the Law Prevent Canada from Killing its 'Terrorist Travellers'?", *CBC News* (4 December 2017), online: <www.cbc.ca/news>.

[146] *Ibid*.

[147] *Ibid*.

Government "could point to extreme or exigent circumstances" in which there would be a better argument for the constitutionality of depriving someone of life where it was connected to "a policy … authorized by Parliament … authorized by law."[148]

Mathen's comments on the ways in which the constitutional viability of a Canadian targeted killing program could be bolstered serve to highlight what is most problematic about the warrant regime within the *CSIS Act*, which Bill C-59 reinforces. The inclusion of a presumptively authorized set of infringements – which includes the "disruption of communications", which when combined with preventative detention might produce *incommunicado* detention – multiplies the inherent danger in a system for authorizing *Charter* violations based on *ad hoc* balancing of rights against governmental objectives, such as the protection of the public. It also illustrates the irresponsibility of successive governments in failing to recognize the existence of absolute rights, whether these originate in international obligations such as Article 4 of the ICCPR, or in the provisions of quasi-constitutional instruments like the *Canadian Bill of Rights* (or in the unwritten constitutional principles that entered into the Constitution through the preamble to the *Constitution Act, 1867)*.[149]

Owing to this failure, the legislative authorization of what would clearly constitute indefinite arbitrary detention (or indeed, targeted killing of Canadian citizens abroad) would require only a minor amendment to section 12 of the *CSIS Act*, one that would specifically authorize what is currently explicitly prohibited. Owing to Bill C-59's attempt to "*Charter*-proof" its warrant regime for the authorization of *Charter* violations, it would be possible to argue that such a provision is presumptively authorized by law and proceed to considering whether it is a reasonable limitation of rights pursuant to the *Oakes* test. The Federal Court's conclusion might never be subject to appellate review, despite the fact that this might take place during a major public emergency, when the judiciary's protection against the violation of non-derogable rights is particularly important.

The possibility – however attenuated it might appear to the reader – of a grant of governmental powers that could contribute to the abrogation of the rule of law (in a manner that would not be dissimilar to what occurred in Canada and abroad in wartime, including recently during the war on terror in the United States) highlights the serious inadequacies of both Bill C-59's warrant regime and the oversight regime that would be created by it and the former Bill C-22, which the Government has blithely touted as providing the necessary protections that justify a dangerous extension of its powers.[150]

Conclusion

Concerns about the insufficiency of Bill C-59's amendments to the former Bill C-51

[148] *Ibid*.

[149] Alford, "Bill C-51", *supra* note 27.

[150] *Ibid*.

are well-founded. The new revisions to the *CSIS Act* would not prevent the foreseeable misuse of warrants obtained under section 12 of the *CSIS Act*, which could be used in the context of a major public order emergency to seek judicial approval of the violation of the rights designated by Article 4 of the ICCPR as non-derogable, in particular, by means of the "disruption" of solicitor-client communications of those in preventative detention. This would amount to sanctioning actions that constitute enforced or involuntary disappearances under international law. The failure to explicitly reference non-derogable rights (especially those that serve to prevent *incommunicado* detention) is an unacceptable oversight.

Additionally, the possibility of foreseeable misuse of the disruption powers that CSIS will retain (even if Bill C-59 is passed) highlights the importance of the Government's continued failure to implement sufficient oversight over the Service and other intelligence agencies, even after the passage of Bill C-22. This article demonstrates that the persistent emphasis on supervision and accountability as providing for the correct "balance" between security and rights functions principally as a justification for a dangerous expansion of powers, rather than as a genuine check on CSIS's abuses. As the NSIRA and the NSICoP will have near-exclusive responsibility for intelligence oversight (as Bill C-59 eliminates another professional body), the failure to address the heart of the problems that plagued SIRC –particularly, its politicization and responsiveness to the Government's assessments of threats to public safety created by peaceful protest movements – is lamentable. The decision to prioritize the semblance of independent oversight while eroding its substance, especially via the assault on parliamentary privilege in the wake of the Afghan detainee torture scandal and the constitutional crisis that followed, is indefensible.

Successive governments have privileged the avoidance of embarrassment over the protection of rights and the effective supervision and control of intelligence agencies. Recent efforts to spare the Minister of National Defence's blushes complete a pattern of evasion of responsibility over serious misconduct, which does not bode well for future crises in which preventative detention might be coupled with similar justifications (including an assertion of a need for secrecy) to those that covered up grave abuses in Afghanistan. The possibility that *incommunicado* detention might lead to similar mistreatment in Canada should have been taken much more seriously.

The failure of implementing constitutional limitations on CSIS's powers and to create an independent oversight regime for intelligence activity also indicates that the flaws of a consultation process that produced manifestly inadequate reforms warrant further inquiry. The Government succeeded in engineering a process that would lead to a conclusion that CSIS's disruption powers should be retained as part of an approach to national security which balanced the government's interests against the protection of rights. This came at a substantial cost. The recommendations of parliamentary committees were sidelined in favour of a report authored by a public relations firm with a particularly unsavoury reputation. This followed a consultation process that sought to minimize the public's concerns about CSIS's kinetic powers and a warrant-based regime to authorize *Charter* violations, but which only obtained

this result after obvious and heavy-handed stage management of the consultation.

Recent revelations of serious misconduct at CSIS underscore the importance of the lost opportunity represented by Bills C-22 and C-59. CSIS's involvement in the surveillance of environmental and Aboriginal activists opposing new pipelines allegedly occurred at the same time that SIRC was compromised by conflicts of interests of directors who had continued to serve as lobbyists for the oil and gas industry. If the Government permitted this even after the shocking but under-reported Arthur Porter scandal – which, lamentably, was followed by the abolition of the Office of the Inspector-General of CSIS – this alone would demonstrate that more radical reforms of intelligence powers and oversight are clearly necessary. The lengthy and ineffectual SIRC review of these allegations and the disturbing attempts to muzzle its critics show that political independence should be the watchword of the reform of intelligence oversight.

Unfortunately, successive governments have prioritized political control over these intelligence oversight bodies over the protection of rights. They have continued to do so even after CSIS gained a dangerously ill-defined set of disruption powers, limited only by an unclear and foreseeably misusable set of restrictions on *Charter* violations. While another wide-ranging consultation on Canada's national security framework is unlikely in the near future, scholars should nevertheless continue to press for reforms.

After Bill C-59 receives Royal Assent, the focus of scholarly commentary on intelligence reform should shift to the serious deficiencies that will remain untouched. At minimum, the *CSIS Act*'s section 12 warrant regime should be amended to acknowledge the existence of non-derogable rights (in the same manner as the *Emergencies Act*), and the presumptive authorization of warrants to disrupt communication should explicitly exclude solicitor-client correspondence. Finally, the right to counsel for those subjected to preventive detention under section 83.3 of the *Criminal Code* should be acknowledged and protected from any derogation or limitation. Until such time as these amendments are made, grave threats to the rule of law are likely to present themselves during future public order emergencies.