SUBMISSIONS TO - The Honourable Robert Kaplan
Solicitor General of Canada

RE - Bill C-9
National Security

FROM - Canadian Civil Liberties Association
and
An Ad Hoc Delegation

DELEGATION -

Dennis McDermott
(President, Canadian Labour Congress)

Rev. Dr. V.B.H. Pellegrin
(Anglican Diocese of Ottawa, representing
The Primate of the Anglican Church of Canada)

Rev. Robert G. Lindsey
(Sr. Staff Officer-Office of Church in Society,
United Church of Canada)

Professor Ed Ratushny
(Faculty of Law, University of Ottawa)

A. Alan Borovoy
(General Counsel,
Canadian Civil Liberties
Association)

Ottawa

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This delegation grows out of the concern that, despite the improvements which have been made over its predecessor, Bill C-9 represents an unwarrantedly dangerous threat to the civil liberties of the Canadian people. While the debate over language and terminology may be appropriately conducted through the hearings of the House of Commons Committee on the subject, there are issues of concept and philosophy which it would be wise to address directly to the Solicitor General.

One of the key sources of the dangers in the Bill is that virtually all of the investigations it contemplates are designed to serve intelligence rather than law enforcement purposes. Since the goal of an intelligence investigation is to assess, understand, and predict, the temptation will be to discover almost everything there is to know about the targets including their most intimate habits and beliefs. It's not hard to appreciate the chill that such pervasive surveillance can create to both political liberty and personal privacy.

A law enforcement investigation, on the other hand, is a more limited exercise. It is designed essentially to collect evidence for the purpose of prosecution. Its scope is limited to gathering evidence of crime; its duration is limited to the period before trial. As a consequence, the law enforcement investigation is much less threatening to civil liberties.

There may be an argument for a certain amount of intelligence-centred surveillance in the case of security threats which emanate from foreign powers. It will often be sensible, for example, to employ tactics other than prosecution against foreign agents who break our espionage laws. Prosecution could undermine the viability of our counter-intelligence operations. It could uncover what needs to be undercover. And it would do so without commensurate benefit. The jailing of a few Soviet spies, for example, would hardly dent the Soviet capacity for espionage.

Such considerations do not as readily apply to essentially domestic security threats. They are much more vulnerable than their foreign counterparts to the therapy of law enforcement. The prosecution and incarceration of a few FLQ terrorists, for example, could and did inflict mortal wounds on that organization's activities.

While there is sometimes an intelligence component even in more conventional criminal investigations, the goal, sooner or later, is to prosecute. In any event, the regular criminal law appears to apply intrusive techniques such as wiretapping and electronic bugging for law enforcement rather than intelligence purposes.

Unfortunately, Bill C-9 nowhere makes this distinction. Home-grown revolutionaries are made subject to the same intelligence centred focus as KGB agents.

The dangers of this approach are exacerbated by the overbroad powers which the Bill provides for intrusive surveillance. Under its terms, Canadian citizens could have their conversations bugged, mail opened, homes surreptitiously searched, and confidential records invaded, even though there isn't the slightest suggestion either of law breaking or foreign control.

All of these intrusive techniques would be available, for example, to monitor "activities....in support of....acts of violence....for the purpose of achieving a political objective within Canada or a foreign state". How far would this language mandate the use of intrusive surveillance against Canadian citizens who, without any foreign direction whatever, took up a collection for the State of Israel in the wake of the Lebanese War? Or, suppose such citizens got similarly involved with the rebels in El Salvador or even Afghanistan?

There are real doubts whether such lawful fund raising would be protected by the special exemption for "lawful advocacy, protest or dissent". Thus, the terminology of the Bill would seem to create vulnerability in all of these situations. Yet it is clear that no genuine security threat would be involved in any of them.

By virtue of a companion section, the Bill would make such intrusive surveillance available for "activities....intended ultimately to lead to the destruction or overthrow by violence of the constitutionally established system of government in Canada". When ultimate intentions become the operative threshold, there is a great danger that speculation rather than evidence would be at a premium. What indeed would constitute acceptable evidence of an ultimate intention? Can the

word "ultimately" deal with any point between now and the end of time? The more speculative the exercise becomes, the greater the risk of intruding on completely lawful behaviour.

In any event, the case has never been made that essentially domestic threats require powers of intrusive surveillance which are greater than those already provided in the Criminal Code. Under the Code one of the most intrusive devices - electronic bugging - is available for a wide variety of offences including sabotage, murder, arson, highjacking, wounding, kidnapping, robbery, extortion, and even conspiracies to commit such offences in Canada or elsewhere. What conceivable act of serious political violence has been omitted from the list? While there may be an argument that the Criminal Code gives the police too much power, it could hardly be maintained that it confers too little. Why, then, is it necessary to allow electronic bugging for something as remote and speculative as "activities intended ultimately"?

In this regard, it is not without significance that all of the electronic bugging against domestic security threats in the United States has been conducted since 1972 under a general criminal statute which requires probable cause to believe that certain actual crimes have occurred or are about to do so. Despite a declaration of the United States Supreme Court in 1972 that a broader bugging power could be created for domestic intelligence purposes, the U.S. Congress has never done so. Even more significant, not a single U.S. President since then has even requested such Congressional action. And there have been four presidents with a variety of political ideologies - Nixon, Ford, Carter, and Ronald Reagan. What domestic security threat in Canada justifies an electronic bugging power so much wider than the one on the United States?

Accordingly, the Canadian Civil Liberties Association and the members of this delegation call upon the Solicitor General of Canada to effect a split in the security and intelligence functions. The new agency created by the Bill should be restricted to counter-intelligence activities against foreign controlled security threats. A general police force, perhaps even the RCMP, should deal with essentially domestic security threats. The distinction is a sensible one.

Domestic security threats are essentially criminal in nature. They should be handled, therefore, by a police force which is involved primarily in law enforcement. It is significant that, when the FBI's violations of civil liberties became public in the mid 1970's, the United States adopted the kind of approach we are recommending here. The Americans amalgamated the FBI's domestic security investigations with its general criminal investigative division. The"express purpose" of this move, in the words of the then FBI director,was to handle domestic security cases as much as possible "like all other criminal cases". In short, the narrower focus of criminal investigations was less likely to intrude on lawful dissent.

As a counter-intelligence entity against foreign threats, the new agency might have a somewhat wider information-gathering function. For the reasons indicated, such counter-intelligence investigations often do not culminate in criminal prosecutions.

The adoption of such a split between foreign and domestic threats would provide a helpful structure for adjusting the troublesome surveillance powers. Foreign security threats would be the province of the new agency armed with a limited set of intelligence-gathering powers in an amended new Bill. Domestic security threats would be under the jurisdiction of a general police force, perhaps the RCMP, armed only with the law enforcement powers of the Criminal Code.

We recognize, of course, that some crucial problems would survive the split. It would be necessary, for example, to specify in the new Bill, as was done in a key American statute, that the targets of the surveillance have to be effectively under foreign control. Even at that, we would see a compelling need to reduce the proposed powers of the new agency and increase the controls on it. It would also be essential to ensure that, at the very least, such increased controls and external review mechanisms be imposed upon the police force which is handling domestic security matters. This country simply could not tolerate a return to the kind of unspervised encroachments which characterized so much of the past RCMP wrongdoing.

A number of these and other details are being addressed by members of this delegation in their various submissions to the Parliamentary Committee. In addition and in light of what we are saying in that forum, we ask the leadership of the Solicitor General to bring about this crucial split in security functions.

The Canadian Civil Liberties Association and the members of this delegation do not question the need for a country like Canada to have a security and intelligence function performed on its behalf. We live in a dangerous world; the democracies have resourceful enemies. Elementary common sense can easily justify, therefore, the adoption of special self defence precautions. Moreover, the Canadian Civil Liberties Association and the members of this delegation believe it is important that Canada's security and intelligence forces operate under a proper statutory mandate. The existing state of affairs is unacceptable. Appropriate legislation should be enacted at an early date.

But support for the goal cannot entail a carte blanche for the means. The experience of the last several years, both in Canada and elsewhere, has revealed how dangerous to the rule of law and democratic values an improperly conceived security operation can be. Moreover, we are fully mindful that the process surrounding the enactment of such a statute might well represent the last practical opportunity for many members of the public to influence the way these matters will be handled. Once a statute is enacted and proclaimed, our security agencies could effectively disappear from public view. We seek, therefore, to promote the wisest possible balance of powers, safeguards, and controls. To this end, we urge the adoption of the recommended split in security functions between the domestic and foreign arenas.