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Civil liberties in a grave new world

Bill Calcutt - 08 August 2013

Since the Second World War Western democracies have championed human rights, decrying the abuse of civil liberties in undemocratic states. A defining feature of the Cold War was trenchant Western criticism of the pervasive surveillance of citizens in authoritarian Eastern Bloc states. In stark contrast Western democracies took great care in seeking to balance national security and civil liberties, often reflected in detailed legislation circumscribing the powers of intelligence agencies and upholding the rights of individuals.

Australia operates under a Westminster system of democratic governance that is intended to provide checks and balances against the concentration and abuse of power. Justice Robert Marsden Hope showed great foresight in crafting Australia's unique intelligence architecture, institutionalising the separation of information collection and analysis, national and foreign intelligence, and advisory and decision-making functions.

While Hope recognised that national security agencies need to operate under the cloak of secrecy to be effective, he established mechanisms to ensure proper oversight and accountability. He emphasised the intrinsic fallibility of intelligence advice (intelligence always involves an element of interpretation and subjectivity) and its limited utility as evidence in legal proceedings or as the sole basis for executive action.

Since the turn of the millennium three major technology-enabled developments have significantly altered the balance between national security and civil liberties. The first is that virtually universal access to information and communication technology has empowered individuals and groups to communicate and organise. This development, most graphically illustrated in the social revolutions in the Middle East (the Arab Spring), seems to represent the disaggregation of power from traditional state institutions to the broader community and diverse media outlets.

The second development is that technology has dramatically increased the capacity of the state to remotely surveil its citizens under the aegis of national security. As revealed by US National Security Agency contractor Edward Snowden, ubiquitous electronic linkages and a largely unregulated cyberspace make it technically possible for the state to monitor and collect virtually every single piece of personal digital data created knowingly or unknowingly by every citizen, potentially rendering existing legislative frameworks regulating national security activities obsolete.

The third and arguably most significant development has been the rise of the threat of international terrorism, with violent individuals or groups able to engender global fear through the leverage of extensive real-time media

coverage. Terrorism explicitly seeks to elicit a disproportionate state response, catalysing major social and political change. The 'global war on terror' in response to 9/11, and the threat posed by Al Qaeda, effectively shifted the focus of national security activities in many countries to counter-terrorism. Under emergency 'wartime' conditions, traditional civilian/peacetime constraints on military and intelligence activities are largely subsumed.

In fact the threat of international terrorism was perceived as so serious that many long-standing international conventions governing the treatment of lawful combatants, use of torture, resort to extra-judicial killing, exceptional rendition and incarceration without trial were suspended.

In pursuit of terrorists, new military technologies have been developed enabling precision/surgical strikes against military and intelligence targets using remote-controlled drones or special operations forces. States have developed paramilitary capabilities that can be deployed covertly virtually anywhere in the world, unconstrained by the international laws of war. Recent revelations indicate that states have also developed powerful global surveillance capabilities under the auspices of counter-terrorism.

Australia's counter-terrorism responses post 9/11 have been significant. Beyond the commitment of military forces to conflicts in Iraq and Afghanistan, expenditure on our intelligence capabilities has quadrupled over the last decade to over \$1.4 billion. At the same time the legislation governing the operations of the intelligence agencies has been amended to add additional powers to respond to prospective terrorism threats.

It seems likely that a number of the careful security/liberties balances institutionalised by Hope have been compromised in a utilitarian response to the threat of terrorism. Pressures for the integration of military, police and intelligence functions and for the inclusion of secret intelligence as evidence in public legal proceedings directly challenge the essential checks and balances that are an integral part of Hope's intelligence model.

As noted earlier the goals of terrorism are to engender widespread fear and a disproportionate state response. In Australia counter-terrorism has proved to have powerful political connotations. Fear has great political currency here, and any suggestion of weakness on national security (or law and order) can be political poison.

This intense environment has made temperate and informed public discourse on appropriate risk-based national security priorities difficult, particularly in the context of the secrecy, misinformation and sense of urgency that inevitably accompanies consideration of counter-terrorism issues. Counter-terrorism remains a potent rationale for many of the state's most secret activities, with ongoing demands from agencies for additional resources and unfettered access to increasing circles of data.

The hyper-politicisation of national security finds voice in the current discourse on the issue of border security, turning a complex humanitarian and policing

challenge (asylum seekers arriving by sea) into an enormously controversial and expensive imbroglio. Government has legislated to add the protection of border integrity from serious threats to the definition of security, potentially enabling the deployment of intelligence and military resources against people desperately seeking humanitarian refuge in this country.

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