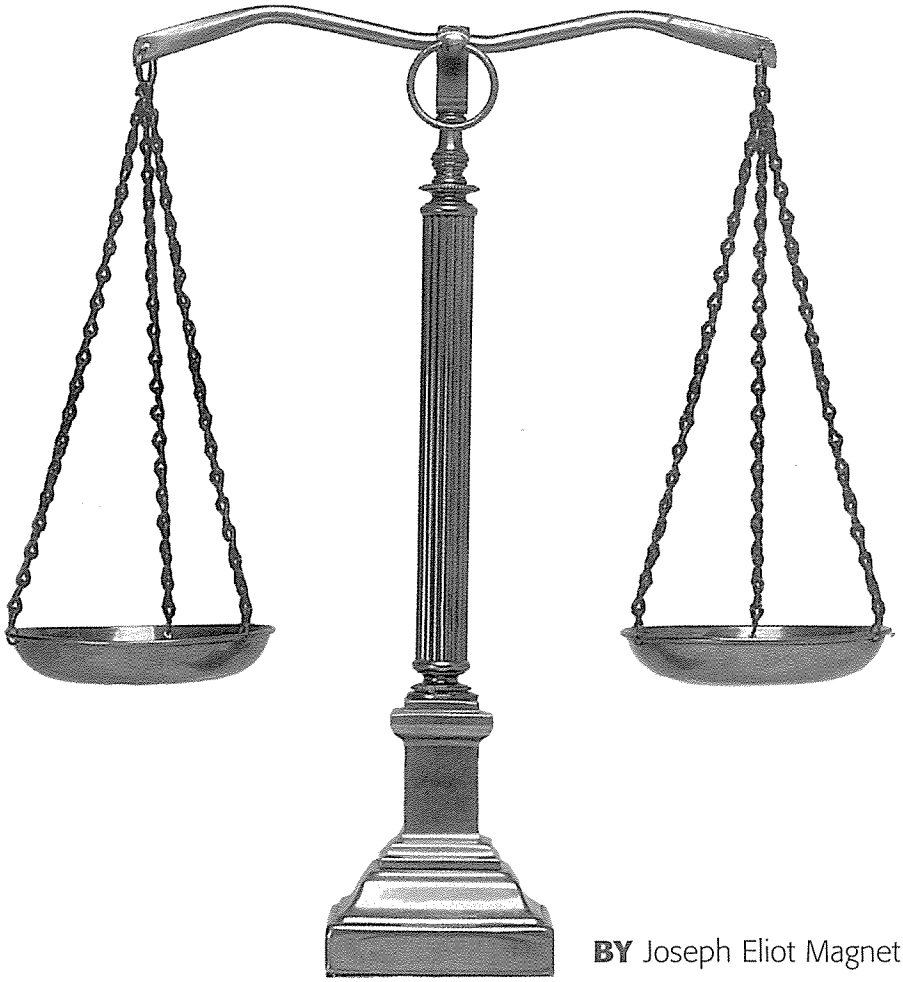
FIGHTING TERRORISM
in a Free Society



BY Joseph Eliot Magnet and Sina Ali Muscati

«OUR WAR ON TERROR IS WELL BEGUN, BUT IT IS ONLY BEGUN.» THIS WAS PRESIDENT BUSH'S STERN STATE OF THE UNION MESSAGE LAST JANUARY. HE SINGLED OUT IRAN, IRAQ AND NORTH KOREA AS STATES THAT «CONSTITUTE AN AXIS OF EVIL». IS THIS CHARACTERIZATION VALID? IS THERE ANY JUSTIFICATION FOR EXTENDING THE WAR ON TERRORISM TO THESE STATES? WHAT SHOULD CANADA DO?

The terrorists of the 1970s and 1980s hijacked and kidnapped to compel us to negotiate with them about quite limited objectives – release of political prisoners, broadcast of messages, ransom, safe passage. The September 11th suicide bombers do not want to negotiate. Their goal is to destroy our system. Mass casualty against civilians is their means. They have launched acts of war against us – more precisely, war crimes.

As the threat from war paradigm terrorists is different, so must be our response. War paradigm terrorists require zones where they can develop, plan and train for military action. Some of these zones are formally sovereignties – gangster regimes like the Taliban; some exist within normal sovereign nations as anarchic «no man's land». We are right to use military action to eliminate or shrink these zones. The justification for military action is active self-defence. To protect ourselves, we must destroy zones of anarchy that provide breeding grounds for war paradigm terrorists.

Potentially, as President Bush has made clear, this anti-terrorism doctrine goes very far. American military operations in the Philippines, targeting Abu Sayyaf militants with alleged links to Al-Qaida is an example of extending the war on terrorism to true sovereignties that include anarchic zones of no man's land beyond control. So too is the deployment of American military advisers to Georgia and Yemen, where Al-Qaida militants are suspected to be hiding. The anti-terrorism doctrine could carry the fight to Somalia, Sudan or Colombia. What about countries on the U.S. list of state sponsors of terrorism? We are now rattling the sabre at Iran, Iraq, and North Korea. What about Cuba, Libya, and Syria?

Most of these governments differ markedly from Afghanistan. The Taliban regime was the most condemned and isolated government in the world. It was possible to build an international coalition against it. The same coalition probably cannot hold together for action against Iraq and certainly not against Iran. Iran recently re-elected moderates and is opening up to much of the world. Iran vehemently opposed Taliban rule in Afghanistan from the start.

Extending military action to the «axis of evil» will draw us into conflict with military powers significantly stronger than the Taliban militia. It also threatens to break up the international coalition allied to fight terrorism. European and Arab allies already have expressed concern over President Bush's «axis of evil» comments. So has Canada's Deputy Prime Minister. The consensus so far has been to fight Al-Qaida, an internationally condemned terrorist organization. Extending the war to «evil» states with whom the U.S. has personal grievances is an entirely different matter. The Taliban campaign is a poor guide to the risks or costs inherent in quick resort to the military option.

The truth is Canada is unlikely to exert overwhelming influence in decisions to extend the military campaign to other zones. We are not a major power, and cannot strut as if we were. We should concentrate our efforts where we can make a difference. We can work through diplomacy to deepen our network of common interests and understandings with moderate elements in states on the fringes of the community of nations. We need dramatic improvement in our counterterrorism measures. This includes enrichment of our capability to gather intelligence, particularly from abroad. Our infrastructure has to be hardened against major security lapses, such as the September 11th highjackings. We must crack down on the domestic funding of terrorism. We need to strengthen safeguards against the theft, manufacture, and sale of biological and nuclear agents, and the equipment needed to weaponize them. Terrorists needed to be rooted out, prosecuted, and punished.

We need to address the causes of terrorist hatred.

Why do so many in the Middle East resent us? Some perceive that our policy towards the region continues the oppression of the Islamic by the Christian world. They observe that those countries listed as state sponsors of terrorism are almost exclusively Muslim nations. Those Muslim countries we count as our friends are usually authoritarian and repressive Arab regimes. We prop up with our power dictatorial Arab regimes that repress the majority of Arabs. We support Israel, a kindred democracy. Israel is embroiled in conflict with Arab regimes and its own Palestinians – conflicts not of Israel's making alone. All of this leads some Muslims to perceive, erroneously, that our policies and power are targeted against them. John Kennedy noted in 1951 what remains true today: we have failed to deal with these perceptions by messaging or action. The rough edges of our foreign policy breed resentment of us. Propaganda of the Bin Laden variety nurtures that resentment into hatred.

Military action abroad will not deal with terrorism at home. Canadians propose to do that with the highly controversial Bills C-36 and C-42. Some have defended these measures as «human rights legislation», arguing that they protect our most basic rights to life and security, which terrorism threatens. This is turning language upside down. C-36 is an awesome intrusion into liberty. It derogates from the fundamental legal principle that ordinary citizens are under no legal obligation to assist the state in criminal investigations, a task that is the responsibility of the police; (Shaffer, p. 200). C-36 allows police to detain suspected terrorists without charge for up to a year. Powers of arrest without warrant are extended to situations where the police believe it would be necessary to prevent the commission of terrorism (s.83.3(4)). Suspects can be investigated by police and compelled to talk – investigations where they may be implicated. They may also be brought before a judge and forced to answer questions on pain of fine and/or imprisonment (s. 83.28). Such powers fly in the face of the right against self-incrimination and the right to silence. These rights are fundamental constitutional commitments in the democracies. They have hitherto been strenuously protected in Canada by judicial elaboration of section 7 of the *Canadian Charter of Rights and Freedoms.*

C-36 allows private communication to be intercepted without judicial authorization. The Canadian security apparatus can listen on conversations of Canadian citizens and track correspondence to or from a location outside Canada. Where judicial authorization is obtained, wiretap periods are extended from 60 days to 1 year. Secret evidence can be used against individuals. The Attorney General is empowered to issue certificates that prohibit the disclosure of information on the grounds of «protecting international relations» or «national security» (s. 38.13). These grounds are vague and difficult to con-

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trol post-facto in the courts.. The disclosure of information prohibitions override the *Access to Information* and *Privacy Acts*. These statutes are fundamental pillars in the democratic edifice; they protect the essential democratic machinery of public accountability and the right to privacy; (Cotler, p. 125).

The potential incursions into the citizen's privacy are worrisome. Respect for the individual's privacy is necessary for the achievement of personal autonomy. Without privacy, citizens would become slaves to public opinion and social pressures. It is in our private lives that we can think or act outside the box of sometimes stultifying social convention – where desire is whispered, beauty born. These deep sources of the self may are not fit for public consumption, but free people recognize that they are the foundation of what gives life depth and meaning. Our Supreme Court helped us to understand that «privacy is at the heart of liberty in a modern state;» (*R. v. Dyment*, [1988] 2 S.C.R. 417 at p. 427).

C-36 shrinks the zone of private life by allowing the state increased scope for wiretapping. We have to recognize the cost of these intrusive measures and the direction in which they go. Free people have to resist creating a society patrolled by thought-police. The cost of increased wiretapping is the sense in greater areas of the citizenry that «they are listening,» greater self-censorship, less private space. The risks of advancing towards thought control were described by U.S. Supreme Court Justice Louis Brandeis as long ago as 1928, when he commented that

> *«The progress of science in furnishing the government with means of espionage is not likely to stop with wire tapping. Ways may some day be developed by which the government [...] will be enabled to expose to a jury the most intimate occurrences of the home. Advances in the psychic and related sciences may bring means of exploring unexpressed beliefs, thoughts and emotions;» (Justice Brandeis, dissenting in Olmstead v. U.S., 277 U.S. 438 (1928)).*

C-36 provides a definition of terrorism similar to that found in the United Kingdom *Terrorism Act*. That *Act* was designed around the Northern Ireland question. There is no comparable context in Canada. The definition is also outdated in that it addresses a form of terrorism that is based on intimidation and coercive diplomacy. This runs at a tangent to the «war paradigm» inhabiting the mentality of modern terrorists. C-36's definition of terrorism is vague and liable to discriminatory application. This problem from the difficulty and lack of consensus regarding the meaning of the term «terrorist». The Senate Special Committee on Terrorism and Public Safety identified some 109 definitions of terrorism. The fluidity of the term 'terrorist' concentrates power in the bureaucracy to determine who is a terrorist, inviting the use of ethnic stereotypes and discriminatory application, particularly in the current racially-charged climate.

C-36's definition of terrorism is unnecessarily vague. It talks about acts or omissions committed in part for political, religious or ideological objectives with the intention of intimidating sections of the public and causing damage to health, safety or property. This concentrates too much power in the bureaucracy to determine what acts are sanctionable. A statement such as «Do not vote PQ or you will risk a substantial civil conflict», for example, may be deemed terrorism under this definition. The broad sweep of the definition ignores the fact that public protests are very frequently accompanied by the commission of unlawful acts, including civil disobedience, property damage or trespass. It is hard to see that free speech activists who trash the office of a University official deserve the label of «terrorists», with all the stigma that it entails.

Another problematic part of the definition relates to interference with «an essential service, facility or system», an inclusion that actually goes beyond what is covered by the UK *Terrorism Act* (s. 83.01(1)(b)(ii)(E)). This could mean that various forms of protest, such as road blockades by Aboriginal protesters, become terrorist activity. The definition does not distinguish between terrorist activity and legitimate acts of resistance. The commentators have shown how icons such as Nelson Mandela or Louis Riel could be classified as a terrorist under this Bill. Both led groups that engaged in violent resistance to repressive state policies.

Bill C-36 incorporates Bill C-16, the *Registration of Charities Act*, which provides that groups accused of sponsoring terrorism may be stripped of their charitable, tax-exempt status.

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CSIS or the RCMP are allowed to use classified intelligence to inform the government of evidence that a charity is raising money for terrorists. Once the charity is deregistered, the case is reviewed by a federal court judge in private. Details about the classified information used may be excluded. Charities have no due diligence defence for funds that mistakenly end up with groups deemed to be terrorist. This is problematic because many charities operate in politically unstable regions of the world, where careful delivery and monitoring of funds and/or supplies can be difficult. Unduly limiting the work of these charities will stymy their mission of helping to alleviate poverty and lack of education – conditions where terrorism breeds (Duff, p. 331).

C-36's definition of terrorism will impact on other legislation that deals with terrorism but does not define it. This includes Bill C-11, Canada's new immigration legislation. Clause 34(1)(c) of C-11 renders inadmissible to Canada those permanent residents and foreign nationals who engage in acts of «terrorism». The wide definition of C-36 will likely be read in here, vesting huge discretionary power in the bureaucracy. C-11 already has problems in this regard: clause 43 allows for a definition of terrorism to be created by regulation, without any requirement for parliamentary review. C-36 complicates the problem.

Bill C-36 provides for creating a list of terrorist groups, and criminalizes membership in them. This has raised concerns that people will be deemed guilty by simple association, rather than by the commission of actual criminal acts.

Worst of all, C-36 is unlikely to be effective. Our most important vulnerability is lack of intelligence. C-36 is not responsive to that problem. C-36 is tough, but not where needed. It seems to be doing something, but not what needs to be done. And it has potential to undermine our free society.

Bill C-42 raises similar concerns. Clause 260.1(1) gives the Defence Minister authority to order the creation of temporary «military security zones». These zones can be established if, in the Minster's opinion, they are necessary for «the protection of international relations or national defence or security» – grounds similar in vagueness to those that allow for prohibiting the disclosure of information under Bill C-36. Under clause 260.1(5), «any authorized person» is empowered to remove forcibly any «person found in a military security zone without authorization, and any...thing under the person's control».Who are these authorized persons? C-42 does not say. The Minister need not consult Parliament before creating a 'military security zone'. Nor is there any requirement for an emergency before such an order can be made. The extent of the discretion conferred, coupled with the vagueness of the provision, has potential for broad and abusive application. This threatens the structure of constitutional liberty, which will be suspended within these security zones.

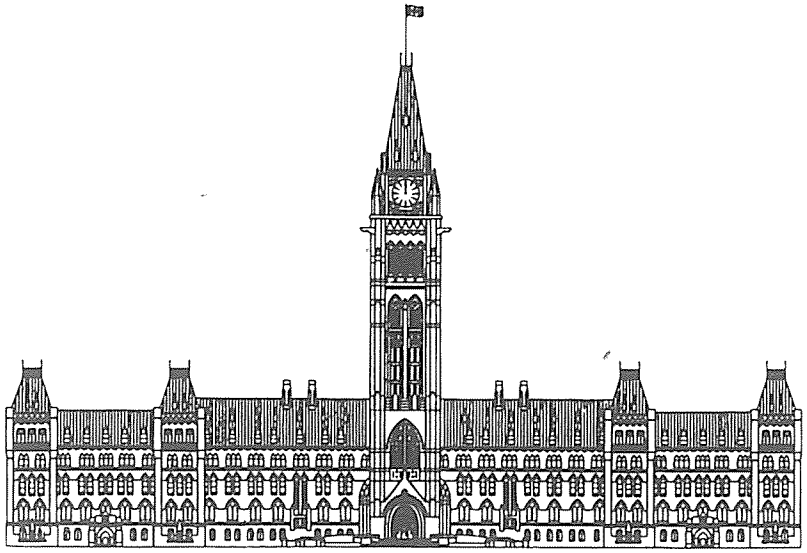
How does C-42 address these concerns? Subsection (2) (a) - (d) lists those properties in relation to which a military security zone may be designated. These include any property, place or thing «that the Canadian Forces have been directed to protect in order to fulfil a duty required by law». This opens the Bill up to potentially unlimited application. The designation of any property as a military security zone under C-42 would itself create the condition of «a duty required by law»; (www.savedemocracy.ca). Court control of these broad ministerial powers is limited and theoretical. Clause 260.1(9) relieves government against accountability because «no action for loss, damage or injury lies by reason only of the designation of a military security zone or the implementation of measures to enforce the designation».

It is hard to see that egregious application of these extraordinary powers will be tempered by the Canadian Charter of Rights and Freedoms. The fact is that the complexity involved in measuring risks to national security and the effectiveness of counter-terrorism practices is in most cases beyond the capability of the courts.

There is a long-term danger that the executive branches of government may grow accustomed to using the powers conferred to them by these Bills (Gross, p. 50). This might mean that exercising these powers might someday become the norm rather than the exception. The broad scope of these powers may serve to legitimize previously-used emergency measures that are less-drastic, but nevertheless intrusive.

It is hard to see that egregious application of these extraordinary powers will be tempered by the *Canadian Charter of Rights and Freedoms.* The fact is that the complexity involved in measuring risks to national security and the effectiveness of counter-terrorism practices is in most cases beyond the capability of the courts. Quite properly, courts view security decisions of the executive with considerable deference, regarding the executive as more qualified to decide security matters (Stewart, p. 229). Even if a *Charter* right is found to be violated, courts are likely to relax the conditions for justification under section 1 of the *Charter*, when confronted with a government plea of 'national security necessity'.

It is hard in these anxious times to sound notes of caution. The threat of mass destruction is real. Nevertheless, we need to focus on and calculate our interests carefully. We need to communicate better who we are to the Muslim world. We need to deepen our diplomatic contacts and shared interests with moderate elements. We need better sources of intelligence. We need to prepare for possible military action, implement modern counter terrorism measures and harden our infrastructure against terrorist attack. We need to balance domestic espionage with our commitment to constitutional liberty. Most of all, we have to find a proper equilibrium between security and the freedom that makes us the envy of all.



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