NATIONAL SECURITY – A POLITICAL CONCEPT

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Law, in its institutional form, has an intimate, although often unconscious, relationship with politics. When that relationship becomes explicit, when judges overtly acknowledge the influential role which political values and considerations play in the resolution of legal disputes, it often appears as if the judges have stepped out of their depth. The judges' apparent failure to identify the equivocal nature of political concepts, to articulate the content of those concepts, and to weigh contending political values has been acutely obvious when they have been confronted with the concept of "national security" in the course of resolving legal issues. Although this concept appears to have been conceded absolute primacy by courts in the United States, the United Kingdom, Canada and (with some reservations) Australia, its content has rarely been subject to judicial analysis; and there have been very few judicial attempts to address the contradictions inherent in the concept and in its invocation as a legal principle.

On the other hand, the concept of "national security" has formed the subject of quite careful analysis by several observers of the political process and, most helpfully, by the three commissions of inquiry which have reviewed the operations of security intelligence agencies in Australia and Canada.[1] It has also been given a substantial degree of definition through the enactment and refinement of legislative charters for security intelligence agencies.[2]

This paper explores the concept of "national security", particularly in its interaction with the legal process; it assesses the ambiguity which attends the concept, particularly in its use by judges; it exposes some of the critical tensions which use of the concept can generate for other values fundamental to the political and legal systems of contemporary liberal democracies; and it assesses the attempts which have been made, particularly through legislative initiative in Australia and Canada, to give some precision to the concept and to resolve the tensions.

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[1] Australia, Royal Commission on Intelligence and Security; Canada, Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police; Australia, Royal Commission on Australia's Security and Intelligence Agencies.

[2] *Australian Security Intelligence Organization Act* 1979, amended by *Australian Intelligence Organization Amendment Act* 1986; *Canadian Security Intelligence Service Act* 1984.

"NATIONAL SECURITY" IN THE COURTS

In November 1984 the House of Lords concluded[3] that the British government had been justified in acting unilaterally to proscribe trade union membership for employees at the Government Communications Headquarters – the establishment which, in cooperation with Australian, Canadian, New Zealand and United States agencies, intercepts and analyses electronic intelligence.[4] The House rejected the trade union's objection that the government should have consulted the union before deciding on the proscription: although the union had a legitimate expectation of such consultation and the government's failure to consult would, as a rule, vitiate such a radical variation in conditions of employment, the government's action was valid because it had been "based, on considerations of national security".[5] An essential element in the decision was the acknowledgment that it was for the government, not the judges, to determine what the interests of national security required:

> "National security is the responsibility of the executive government; what action is needed to protect its interests is . . . a matter upon which those upon whom the responsibility rests, and not the courts of justice, must have the last word. It is par excellence a non-justiciable question. The judicial process is totally inept to deal with the sort of problems which it involves."[6]

The Law Lords' refusal to apply rules of procedural fairness when the government played "the national security 'trump'"[7] had been anticipated in *R.* v. *Secretary of State for Home Affairs, Ex parte Hosenball,*[8] where the Court of Appeal asserted that "The balance between [national security and individual freedom] is not for a court of law. It is for the Home Secretary."[9]

The same deference to the interests of the state was expressed by the United States Supreme Court in *Haig* v. *Agee.*[10] Holding that the United States government could summarily cancel the passport of an active critic of the Central Intelligence Agency, the court declared that national security considerations outweighed a citizen's freedom to travel abroad, his free speech rights, and his right to due process. It was, the court said, "'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation".[11]

[3] *Council of Civil Service Unions* v. *Minister for Civil Service* [1985] A.C. 374.

[4] J.T. Richelson and D. Ball, *The Ties That Bind* (Boston, London and Sydney, Allen & Unwin, 1985).

[5] [1985] A.C. 374, 403 per Lord Fraser.

[6] Id. 412 per Lord Diplock.

[7] C. Forsyth, "Judicial Review, the Royal Prerogative and National Security" (1985) 36 *Northern Ireland Legal Quarterly* 25, 29.

[8] [1977] 1 W.L.R. 766.

[9] Id. 783.

[10] 453 U.S. 280 (1981)

[11] Id. 307.

The deference shown by American courts[12] to the bland "national security" concept is all the more remarkable because of the courts' summary displacement of constitutionally guaranteed interests – as if the invocation of national security interests made detailed consideration and careful balancing unnecessary.[13]

In Canada, the Federal Court has adopted the same deferential attitude to assertions of national security when determining government claims of crown privilege under s.36 of the *Canada Evidence Act*, 1970. Despite the Act's implicit invitation to the court to weigh such claims against the public interest in the administration of justice, the court has consistently treated a claim of privilege as conclusive, where the claim is asserted on the ground of national security.[14] "[T]here can," the Federal Court has said, "be no public interest more fundamental than national security".[15]

Australian courts have also accorded primacy to "national security" considerations, but have tended towards a more sceptical view of government assertions of the interest, generally insisting that such assertions are justiciable. In 1984, a majority of the High Court of Australia held that the Australian Security Intelligence Organisation was not obliged to comply with a subpoena to produce documents at a criminal trial,[16] upholding the Commonwealth Attorney-General's claim that the documents were privileged because their disclosure would endanger national security. That conclusion was reached after the court had inspected the documents and concluded (by a majority[17]) that the national security interest was indeed involved and that the public interest in the administration of justice was not compromised by withholding the documents. The problems which the concept of national security generates for the effective administration of justice were demonstrated by the majority's refusal to allow counsel for the accused to examine the documents and address the court on the documents' relevance to their clients' defence. Disposing of the claim to privilege "without the fullest argument" was, the court said – in a remarkable display of question-begging – "the inevitable result when privilege is rightly claimed on grounds of national security".[18]

[12] For other examples see *United States* v. *Marchetti* 466 F. 2d 1309 (1972); *Snepp* v. *United States*, 444 U.S. 507 (1980).

[13] For criticism of the court's failure seriously to address the constitutional issues, see J.S. Koffler and B.L. Gershman, "The New Seditious Libel" (1984) 69 *Cornell Law Review* 816, 844-860; T. Emerson, "National Security and Civil Liberties" (1982) 9 *Yale Journal of World Public Order* 78, 99-100; H. Edgar and B.C. Schmidt, "*Curtiss-Wright* Comes Home: Executive Power and National Security Secrecy" (1986) 21 *Harvard Civil Rights-Civil Liberties Law Review* 349, 371-376, 380-384.

[14] *Re Goguen and Albert and Gibson* (1984) 7 D.L.R. (4th) 144; *Re Kevork and The Queen* (1984) 17 C.C.C. (3d) 426.

[15] (1984) 7 D.L.R. (4th) 144, 156; (1984) 17 C.C.C. (3d) 426, 431.

[16] *Alister* v. *The Queen* (1983-84) 154 C.L.R. 404.

[17] Murphy J. dissented from the final decision, arguing that the court could not rule in favour of the claim of privilege until it had given counsel for the defendants the opportunity of inspecting the documents and addressing the court on the documents' relevance.

[18] (1983-84) 154 C.L.R. 404, 469.

A POORLY DEFINED CONCEPT

Australian decisions[19] suggest a more robust approach, at least superficially, to government assertions of national security interests. But they share with the overseas decisions a superficial approach to the concept, and an uncritical adoption of an ill-defined justification for government action which would otherwise be without legal foundation. The several decisions also illustrate the versatility of "the national security 'trump'", which has justified dispensing with the rules of natural justice, suspending a constitutional right of free speech and withholding information from persons accused of serious crimes.

That the concept of "national security" has been pressed into service for such divergent ends provides one explanation for the sceptical criticism which it has attracted. Justice Black of the United States Supreme Court expressed this scepticism in an aside — "'national security', whatever that means";[20] and Martin Friedland, in his discussion paper for the Commission of Inquiry into the security activities of the Royal Canadian Mounted Police, excused his own ignorance of the meaning of "national security" on the ground that "neither does the government".[21] A similar, although unacknowledged, uncertainty pervades the judicial decisions where the concept has been employed — for in none of them has there been any serious attempt to give the concept substance, nor to resolve the ambiguities and contradictions which are embedded in the concept.

One explanation for the concept's lack of definition lies in the broad geopolitical and strategic factors on which some versions, at least, of the concept have been based. Murray Rankin has written of

> "the national security state . . . as a by-product of the second world war. It has arisen out of the fear of revolution and structural change [and] the development of nuclear weapons and advanced military technology."[22]

And a perceptive note in the *Yale Law Journal* described the conception as depending "both on a calculation of future contingencies and on an assessment of the priorities of the nation in foreign affairs . . . concerned with potential dangers . . ."[23] Thomas Emerson described the core of the concept as "limited to matters that threaten the physical security of the nation", a core which lacked firm edges:

[19] See, in addition to *Alister* v. *The Queen, Commonwealth* v. *John Fairfax & Sons Ltd* (1980) 147 C.L.R. 39; *A.-G. (United Kingdom)* v. *William Heinemann* (unreported, New South Wales Court of Appeal, September 1987).

[20] *Berger* v. *New York* 388 U.S. 41, 88 (1967).

[21] M.L. Friedland, *National Security: The Legal Dimensions*, (Ottawa, C.G.P., 1980), 1.

[22] Rankin M., "National Security: Information, Accountability, and the Canadian Security Intelligence Service" (1986) 36 *University of Toronto Law Journal* 249, 253; see also Raskin, M., "Democracy Versus the National Security State" (1976) 40 *Law and Contemporary Problems* 189, 189.

[23] "National Security and the Amended Freedom of Information Act" (1976) 85 *Yale Law Journal* 401, 411.

"Economic as well as physical factors play a part in national security and . . . it is hard to draw clear dividing lines between potential and actual use of physical force so far as national security is concerned."[24]

The elastic potential of the concept was expressed by the present Chief Justice of the High Court of Australia, Mason J., in *Church of Scientology Inc.* v. *Woodward,*[25] when he observed "that security is a concept with a fluctuating content, depending very much on circumstances as they exist from time to time".[26] Its elasticity was recognised as a serious threat to other values by the United States Supreme Court in *United States* v. *United States District Court*:[27] "Given the difficulty of defining the domestic security interest, the danger of abuse in acting to protect that interest becomes apparent."[28]

The Supreme Court there encapsulated the real difficulty presented for the administration of justice by the concept of national security: if that concept were isolated, if its dimensions had no impact on other societal and individual interests, then its problematic nature would not be the source of difficulty. But the concept has become entrenched in our political and legal discourse and is advanced by government to justify an expansion of its power to support constraints on private, individual and group interests and to excuse government from compliance with restrictions on its own functions. The purposes to which the concept is applied, and the acute tension between the concept and liberal democratic values on which our representative systems of government claim to be constructed, demand that the concept be defined with precision and that the interests served by the concept be identified and justified. Only then can the process of resolving the conflict between national security and other interests function effectively.[29]

SOME ATTEMPTS AT DEFINING THE CONCEPT

With characteristic and disarming simplicity, Lord Denning described the role of the United Kingdom Security Service as limited to "one purpose, and one purpose only, *the Defence of the Realm*".[30] This description assumes that national security is a defensive, rather than assertive or aggressive, concept;[31] but it offers little guidance as to the concept's content, and makes no attempt to limit its scope or its inroads onto other critical values. Indeed, many years later, Lord Denning argued that —

[24] Op. cit. p.79.
[25] (1982) 154 C.L.R. 25.
[26] Ibid 60.
[27] 407 U.S. 297 (1971).
[28] Ibid 314. Cf. the comments of Lord Denning, quoted at note 32 infra.
[29] Thomas Emerson asserts that "a clear-cut definition of 'national security' would be essential" if the concept is to be accorded substantial primacy in the legal process: Emerson, op. cit. p.79.
[30] Cmnd. 2152 (1963) para.230.
[31] Cf. the conception developed in M.G. Raskin, "Democracy and the National Security State" (1976) 40 *Law and Contemporary Problems* 189 — "the actualizing mechanism of ruling elites to implement their imperial schemes and misplaced ideals", 189.

"the words 'in the interests of national security' are not capable of legal or precise definition. The circumstances are infinite in which the national security may be imperilled, not only by spies in espionage but in all sorts of indefinite ways."[32]

It is just this refusal to give the concept firm boundaries which has been the weakness of judicial approaches to national security issues;[33] and which places other societal values, such as freedom of expression, association and political activity, at substantial risk.

In Australia, the first Hope Commission also offered a defensive expression of the concept of national security, when it accepted that Australia's security intelligence service was part of the country's defence system, dedicated to meeting clandestine threats of foreign or domestic origin.[34] The Commission went on to identify the types of activity which could pose such threats: espionage, foreign intervention (through "agents of influence" and "disinformation", for example), subversion, sabotage and terrorism.[35] Four years later in Canada, the McDonald Commission repeated this defensive conception and offered some elaboration, when it identified two elements in the concept, the "security of Canada":

"[F]irst, the need to protect Canadians and their governments against attempts by foreign powers to use coercive or clandestine means to advance their own interests in Canada, and second, the need to protect the essential elements of Canadian democracy against attempts to destroy or subvert them."[36]

A similar view was expressed, more obliquely, by the United Kingdom Home Secretary, Leon Brittan, when introducing the Interception of Communications Bill 1985, which authorised the interception of communications under ministerial warrant on several possible grounds, including that of national security. The term "national security", he said –

"is widely used elsewhere in the statute book, and . . . encompasses the protection of the country and its institutions from internal and external threats and the security of the realm, for example, from terrorists, espionage or major subversive activity."[37]

This account of the content of the term reflected the directive issued to the United Kingdom security service (MI5) by the responsible minister, the Home Secretary, in 1952. According to that directive, the task of the service –

"is the defence of the Realm as a whole, from external and internal dangers arising from attempts at espionage and sabotage, or from activities of

[32] House of Lords, *Debates*, 6 June 1985, col.869.
[33] See text at notes 3-19 supra.
[34] Royal Commission on Intelligence and Security, *Fourth Report: Intelligence and Security*, Canberra, 1977, Vol. I (hereafter, *Intelligence and Security*), paras. 32-34.
[35] Id. paras. 35-36.
[36] Commission of Inquiry into Certain Activities of the Royal Canadian Mounted Police, *Second Report: Freedom and Security Under the Law*, Ottawa, 1981 (hereafter, *Freedom and Security*), 40.
[37] House of Commons, *Debates*, 12 March 1985, col.158.

persons in organisations whether directed from within or without the country, which may be judged to be subversive to the State."[38]

PROTECTING "THE STATE"

In addition to their division of security threats into foreign and domestic elements, these conceptions share a common objective, that of countering threats to the state.[39] The width of such a conception, and the consequential narrowing of other values and interests, will depend upon the meaning attributed to "the state".

Buzan has written of the three "necessary attributes of statehood": a physical base — population and territory; governing institutions; and a political idea of the state, an ideology, establishing the state's authority in the minds of its population.[40] Territory and population are essential to any state, and threats to these physical bases of a state are not complicated by the ambiguity associated with the more amorphous attributes of statehood — political institutions and political ideas. It is only when a state's security is said to depend upon the protection of its governing institutions and legitimating ideology that the problematic nature of national security emerges.

The dominant view of the state in Australia is the liberal democratic conception, which regards the state as embodied in its formal institutions of government — in the legislature, the courts, the executive government and the processes which link them with each other and with the population. On this view, the state does not represent or embody a particular social or economic order, nor any specific distribution of power or resources. The state, as manifested by the institutions of government, is not committed to any distribution of resources or ideology — except the ideology of pluralism. There is, in Robert Dahl's words, a principle of "political equality"[41] which protects "the opportunity for those in a minority to persuade others and thereby to grow into a majority".[42] According to this view of the state, there are no dominant interest groups —

> "only competing blocs of interests, whose competition, which is sanctioned and guaranteed by the state itself, ensures that power *is* diffused and balanced, and that no particular interest is able to weigh too heavily upon the state".[43]

On this liberal or pluralist view, the development and dissemination of ideas which challenge the current social or economic order or which confront

[38] Quoted in M. Supperstone, *Brownlie's Law of Public Order and National Security,* (2nd edn, London, Butterworths, 1981) p.308.

[39] See also s.1(1), *Official Secrets Act* 1911 (U.K.), which penalizes the disclosure of government information for a "purpose prejudicial to the safety or interests of the State". Cf. s.78(1), *Crimes Act* 1914 (Cth.).

[40] B. Buzan, *People, States and Fear,* (Brighton, Wheatsheaf Books Ltd, 1983) p.40.

[41] R. Dahl, *After the Revolution: Authority in a Good Society,* (New Haven and London, Yale University Press, 1970) p.26.

[42] Id. p.15.

[43] R. Miliband, *The State in Capitalist Society,* (New York, Basic Books, Inc., 1969) pp.3,4.

received ideological wisdom cannot be regarded as a threat to the state or its security; for the essence of liberal democracy is the open contention of competing values and ideologies. Justice Holmes emphasised this competitive character of liberal democracy in 1925:

> "If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way."[44]

According to this view, the security of the state is only threatened by dissent and political agitation which are accompanied by violent action or prompted by foreign interference. Violence damages the principles of debate, consensus and majority rule which underpin the liberal democratic state. Foreign interference undermines the integrity of the state, and introduces a new and frustrating element into the state's political processes.

A wider conception of the state sees it as the organised political community with its associated political and social structures — the ruling political party, the established divisions of society and national priorities, whether ideological, economic or social. On this view of the state, any threat to the political and social structures and their underpinning ideology, to the "authoritative allocation of value", is a threat to the state, which the state is fully justified in suppressing. This broader view of the state, and the notion that the state should eliminate threats to its political and social structures, are common aspects of authoritarian and totalitarian regimes.[45]

Some political critics argue that nominally pluralist, liberal democratic systems, such as that found in Australia, fit this wider and value-laden conception of the state. Marxist critics of contemporary industrialized societies and some conservative ideologies argue that the state, as for example in Australia, can only exist when the institutions of private property and a market economy flourish. Miliband expressed the Marxist view of the state which claims to be a liberal democracy as follows: "[T]he state might be a rather special institution, whose main purpose is to defend the predominance in a society of a particular class."[46] Protection of the security of the state, on this analysis, would demand protection for the political, social and economic elites and for the values on which their power is founded.

Any attempt to define the concept of national security and to achieve an accommodation between that concept and other societal values needs to acknowledge and choose between these competing views of the state, the liberal democratic and the authoritarian. Over recent years, the courts have failed to make that choice. That failure has, in turn, often led to a failure to articulate and resolve the tension between the asserted interest of the state ("national security") and the interests of individuals. In the result, the courts have, by default and perhaps unconsciously, endorsed the authoritarian view of the state at the expense of the liberal democratic, pluralist, view.

[44] *Gitlow* v. *New York* 268 U.S. 652, 673 (1925).
[45] See C.E.S. Franks, *Parliament and Security Matters* (Ottawa, C.G.P., 1979) 6.
[46] Miliband, op. cit. p.3.

The work of three commissions of inquiry, two in Australia and one in Canada, and the consequential legislative attempts to define and balance the "national security" interest of the state, provide an illuminating contrast to the courts' activities. It appears that the commissions have been relatively successful in placing the interest within a liberal democratic conception of the state and, as a result, developing a more precise definition of the interest. That definition offers some scope for the accommodation of that interest with a variety of political and industrial interests, and for the pluralism which is fundamental to liberal democracy.

THE HOPE AND McDONALD COMMISSIONS

In its description of the activities which threatened Australia's security, the first Hope Commission appears to have had in mind the liberal democratic conception of the state — although the Commission articulated neither that conception nor any coherent definition of national security. The activities listed by the Commission were, with one exception, limited to foreign-directed activities: they were "Espionage . . . Active Measures [by foreign powers] . . . Subversion . . . Sabotage".[47] The one exception, "Subversion", was described by the Commission as "activity whose purpose is, directly or ultimately, to overthrow constitutional government, and in the meantime to weaken or to undermine it".[48] The emphasis on protecting the state against foreign interference and against violent, domestically inspired, overthrow was repeated in the second report of the McDonald Commission, *Freedom and Security Under the Law,*[49] and in the Australian and Canadian legislation which followed the respective Commissions' reports.[50]

THE NATION-STATE: INTEGRITY AND AUTONOMY

The two perceived threats to security of the state, then, were divided into external and domestic threats to security. If we conceive of the state as embodying three elements — physical, institutional and ideological[51] — the perception of external threats to state security, focuses on the state's identity with a particular territory and with autonomous institutions of government; and it seeks to preserve the territory's integrity and the institutions' autonomy. Because these elements of the state are essentially physical and concrete, state security responses to external threats will emphasise the physical. Armed force, espionage and sabotage will be identified as the major external threats to the state, and the state's response will involve the development of military

[47] *Intelligence and Security,* op. cit. para.35.
[48] Ibid.
[49] *Freedom and Security* op. cit. p.40.
[50] *Australian Security Intelligence Organization Act* 1977 (Cth.), s.4 definition of "security"; *Canadian Security Intelligence Service Act* 1984, s.2 definition of "threats to the security of Canada".
[51] See Buzan, op. cit. p.40.

and diplomatic defence capacity, together with counter-espionage and anti-sabotage capacities. These responses are unlikely to present the full range of contradictions inherent in responses to domestic threats to state security, because those domestic threats are more ideological and polemical than concrete and physical.[52]

However, the identification of "foreign interference" as a threat to the security of the state does raise some ambiguity. The second Hope Commission stressed the "affront to Australian sovereignty and independence" where a foreign power, acting clandestinely or deceptively, intruded into Australia's political processes, for example "by promoting or supporting a political party, or seeking to influence government decisions or policy making".[53] The Commission identified several classes of objectionable "foreign influence", including the recruitment and operation of "agents of influence", and the distribution of "disinformation".[54] The first of these is particularly problematic because of its tendency to confuse foreign interference with legitimate domestic political activity. The first Hope Commission attempted to draw the necessary distinction:

> "A person is not to be regarded as an agent of influence merely because he does or says things, publicly or privately, favourable to a particular foreign power or because he has been persuaded to do so by the available material about that power. Clandestinity of persuasion is a hallmark of this type of operation, coupled with secrecy about its success on the part of the 'agent'."[55]

The Commission proceeded to argue that an agent of influence could be "unwitting" – that is, unaware that he or she was being manipulated by the foreign power – and still constitute a threat to Australia's security.[56] The danger posed by this identification of individual activity with foreign interference was neatly illustrated by Buzan, who asked whether American communist party members in the United States should be treated as Soviet agents and therefore a national security problem or as legitimate players in the domestic political process:

> "The Soviet Union cannot help influencing and encouraging such individuals, even if it does not do so by channelling resources to them. Its very existence acts as a stimulant and inspiration to those who share its ideology, just as the existence of the United States motivates dissidents within the Soviet Union."[57]

The risk is that the ruling political interest (the current government) will invoke national security to defend its own sectional interests, rather than the interests of the state, "by identifying domestic political opposition with the policies

[52] See text at notes 62-82 infra.
[53] Royal Commission on Australia's Security and Intelligence Agencies, *Report on the Australian Security Intelligence Organization*, Canberra, 1985 (hereafter, *Report on ASIO*), at para.3.39.
[54] Id. para.3.16.
[55] *Intelligence and Security,* op. cit. para.47.
[56] Id. para.48.
[57] Buzan, op. cit. 58.

of some foreign state",[58] thereby discrediting the opposition or legitimating the use of force in the domestic context.

The ambiguity inherent in the "agents of influence" aspect of foreign interference appears to have been recognized by the second Hope Commission. The Commission emphasised that the national security interest lay in "the activity of the foreign power, that is, the taking by it . . . of clandestine or deceptive action to interfere in Australian affairs";[59] and acknowledged that "[t]he unwitting involvement of a person in an operation by or on behalf of a foreign power should not, by itself, result in any adverse security opinion or assessment about [that person]".[60] This clearer delineation of the threat to security posed by agents of influence could reduce the risk of abuse of political freedom. But sufficient ambiguity remains in the processes associated with the assessment of such a threat to allow for the possibility of abuse: establishing the "witting" character of the actions of a suspected agent of influence might, the Hope Commission said, be established by inference;[61] and, the decision that a person was "unwitting" would not protect that person against being caught up in the active investigation of, and measures against, a foreign power or its agents.

DEFENDING POLITICAL VALUES – SUBVERSION

The second perceived threat to the security of the state, that of domestic subversion, identifies the state with the values and institutions of a particular political system ("the constitutional system of government of the Commonwealth"[62] or "the constitutionally established system of government in Canada"[63]) and seeks to protect those institutions and values. At one level, this perception is not controversial: historically, liberal democratic systems of government have faced a variety of opponents from both left and right, some of whom have been prepared to use violence to destroy those systems; and a self-defensive posture may be no more than an indication of the vitality of the system. But the notion, that activities subversive of political values and institutions involve a threat to state security, can be used to justify repressive state action, which inhibits political change and the pursuit of political interests. If we concede that the state may protect its governing institutions from violent attack, we are confronted with the difficulty of distinguishing subversive activity from the legitimate political activity which is fundamental to a liberal democracy. The risk of confusion is substantial,

[58] Id. p.59.
[59] *Report on ASIO*, op. cit. para.3.18.
[60] Id. para.3.32.
[61] Id. para.3.29.
[62] *Australian Security Intelligence Organization Act* 1979, s.4, definition of "politically motivated violence".
[63] *Canadian Security Intelligence Service Act* 1984, s.2, definition of "threats to the security of Canada".

as experience should have taught us.[64] Speaking on the introduction of the Interception of Communications Bill 1985, United Kingdom Home Secretary Leon Brittan defined subversion as —

> "Activities which threaten the safety or well-being of the state, and which are intended to undermine or overthrow Parliamentary democracy by political, industrial or violent means."[65]

This indiscriminate view of subversion is not unusual amongst those who occupy positions of authority within the state apparatus. Brittan's predecessor and political opponent, Merlyn Rees, offered an almost identical definition of subversion in 1978.[66] As one commentator has pointed out, the view that such activities are subversive of the state and, therefore, should be suppressed is incompatible with liberal constitutional government because, at the least, it "requires that political freedom ought not to seek reform of the sovereign" and may go so far as to require "that political freedom ought not to obstruct government policy".[67] The confusion of political or industrial activity which threatens the "well-being of the state" with the violent overthrow of Parliamentary democracy should be contrasted with the sensitivity shown by the first Hope Commission:

> "[I]n the case of subversive activities of domestic origin, there is an inherent potential danger of intrusion into proper political activity and the resultant infringement of basic democratic and legal rights. Democracy thrives on non-violent differences of opinion and attitudes and ASIO must be careful to avoid mistaking mere dissent or non-conformity for subversion."[68]

The Commission proposed that subversion, as a threat to Australia's security, should be confined to activities involving (currently or in prospect) the use of force, violence or other unlawful acts for the purpose of overthrowing constitutional government in Australia, or of interfering with measures taken by the government in the interests of the security of Australia.[69] This limitation, which was adopted in the *Australian Security Intelligence Organization Act* 1979,[70] illustrated a dilemma posed by the distinction between tolerance of dissent and intolerance of subversion. The dilemma is: if the state should tolerate dissent and the advocacy of ideas which challenge even its fundamental values, but is justified in repressing or fore-

[64] To take one example, the 1976 inquiry into the New Zealand Intelligence Service found that the Service took a broad view of its countersubversive role, so that "[v]irtually every form of protest and dissent . . . falls within the Service's net", and that the Service had assessed individuals as subversive "on the basis of inadequate evidence and from a standpoint of perhaps political naivety": *Security Intelligence Service: Report by Chief Ombudsman,* Wellington, 1976 (hereafter, *Report by Chief Ombudsman*), pp. 27, 29. See also U.S. Senate, *Final Report of the Select Committee to Study Governmental Operations with respect to Intelligence Activities*, Book III, Washington, 1976; White A.J., *Special Branch Security Records,* Adelaide, 1977; *Freedom and Security Under the Law*, Ottawa, 1981, pp.448-511.

[65] House of Commons, *Debates*, 12 March 1985, col.155.

[66] House of Commons, *Debates*, 6 April 1978, col.618.

[67] R.J. Spjut, "Defining Subversion" (1979) 6 *British Journal of Law and Society* 254, 261.

[68] *Intelligence and Security*, op. cit. para.62.

[69] Id. para.66.

[70] s.5(1); see text at note 87 infra.

stalling physical threats to its institutions, at what point in its development can a threat be described as moving beyond legitimate dissent to illegitimate action? Where is the line to be drawn? And what degree of surveillance can the agencies of state security be permitted to apply to legitimate dissent in order to identify those dissenting activities which may mature into physical action?[71]

The chilling effect of security intelligence activity on political activities was recognized by the second Hope Commission, which observed that, if subversion were too broadly defined, the security service would assume the role "of keeping the government of the day informed of the activities and thinking of those whose views are different from the government's",[72] a point made by the United States Supreme Court in 1972, when it stressed the danger of abuse in the protection of national security:

> "The price of lawful public dissent must not be a dread of subjection to an unchecked surveillance power . . . For private dissent, no less than open public discourse, is essential to our free society."[73]

These considerations were influential in the drafting of the United States Attorney-General's "Guidelines on Domestic Security Investigations", issued in 1976, and their 1983 replacement, the Attorney-General's "Guidelines on *General Crimes, Racketeering Enterprise and Domestic Security/Terrorism* Investigations".[74] Similarly, they persuaded the second Hope Commission to recommend that subversion, as a threat to Australia's security, be defined by reference to violence, considerably narrowing the range of dissenting activities which, as a result of the first Hope Commission's report, had been defined as threats to security.[75] In its 1984 Report on the Australian Security Intelligence Organization, the Commission recommended that the legislation defining ASIO's functions be amended so that domestic activities would only be regarded as a threat to security if those activities involved violence or were intended or likely to lead to violence and were directed to the overthrow or destruction of the government or the constitutional form of government. Excluded from this proposed definition were activities "likely ultimately" to involve or lead to violence and activities involving or likely to lead to unlawful acts: "In the absence of the requisite intention or likelihood of violence", the Commission said, "and assuming no foreign influence is involved, the ordinary political processes should be left to deal with the position."[76] In order to stress this point, the Commission proposed that the Australian Security Intelligence Organization Act be amended so as to expressly exclude,

[71] "[T]he activities of identifying and forestalling threats to the state . . . will . . . involve investigation of a much broader spectrum of potential targets than the narrower [liberal democratic] definition of 'the state' would suggest": Franks, op. cit. p.7.

[72] *Report on ASIO* op. cit. para.4.10.

[73] *United States* v. *United States District Court* 407 U.S. 297, 314 (1972).

[74] See J.T. Elliff, "The Attorney General's Guidelines for FBI Investigations" (1984) 69 *Cornell Law Review* 785, 789-790, 794, 798-799, 804-805, 808, 811.

[75] See notes 47, 48 supra.

[76] *Report on ASIO* op. cit. para.4.47.

from the definition of "activity prejudicial to security", the exercise of "the right of lawful advocacy, protest or dissent".[77]

In its discussion of the concept, "the security of Canada", the McDonald Commission appeared to have grasped immediately the dilemma and potential contradiction inherent in maintaining the security of a state which is conceived in liberal democratic terms. Having identified two basic needs of security — to protect Canadians and their governments against foreign exercise or clandestine activity and to protect the essential elements of Canadian democracy against subversion — the Commission cautioned:

> "Put very simply, [the] challenge is to secure democracy against both its internal and external enemies, without destroying democracy in the process. Authoritarian and totalitarian states do not have to face this challenge . . . Only liberal democratic states are expected to make sure that the investigation of subversive activity does not interfere with the freedoms of political dissent and association which are essential ingredients of a free society."[78]

The preservation of democratic processes was the fundamental purpose of security activity, the Commission said; but it was also "a major problem of public policy". The Commission referred to three "essential requirements of our systems of democracy" — "responsible government, the rule of law, and the right to dissent";[79] and insisted that security intelligence operations must be conducted within a framework of political accountability, within legal constraints and in a fashion which did not inhibit citizens who sought basic social, economic or political change from expounding their viewpoint and seeking adherents.[80] This last consideration was particularly sensitive when defining domestic subversion as a target for security intelligence activity:

> "If [the term] is used loosely so as to embrace the legitimate political dissent which is the life blood of a vibrant political democracy, the gathering and dissemination of security intelligence will impair rather than secure Canadian democracy."[81]

The McDonald Commission proposed that, for security intelligence purposes, subversive activity be confined to "the attempt to undermine or attack through violent or unlawful means, the basic values, processes, and structures of democratic government in Canada."[82]

LEGISLATIVE DEFINITIONS

Early legislative attempts to define the national security interest were rather crude, reflecting no doubt an insensitivity to the ambiguities and tensions outlined above. The *Australian Security Intelligence Organization Act* 1956 defined "security", the term which prescribed the functions of the Organiza-

[77] Id. para.4.84.
[78] *Freedom and Security* op. cit. p.43.
[79] Id. 44.
[80] Id. 45-46.
[81] Id. 416.
[82] Ibid.

tion, to mean "the protection of the Commonwealth and the Territories from acts of espionage, sabotage or subversion, whether directed from, or intended to be committed within, the Commonwealth or not". None of the elements of the term was defined by the legislation. The *New Zealand Security Intelligence Service Act* 1969 offered an almost identical definition[83] but did attempt some elaboration of its elements. It defined subversion in very broad terms, including "advocating, or encouraging . . . . [t]he undermining by unlawful means of the authority of the State in New Zealand". The potential of this definition for justifying intrusions into political, industrial and even speculative activity is obvious; and the 1976 New Zealand inquiry into the Security Intelligence Service acknowledged the legitimacy of the view that "suspicion of the Service [was] continuing to have an inhibiting effect on free expression of political views in New Zealand".[84] Yet the inquiry claimed to see "no reason to modify our own statutory definition, which will suffice for all practical purposes".[85]

The *Australian Security Intelligence Organization Act* 1979, which followed the report of the first Hope Commission, offered a more sophisticated definition of national security interests, one which was no doubt intended to reflect the liberal democratic concept of the state. However, the definition carried several ambiguities. Section 4 defined "security" (the focus of the Organization's functions)[86] to include protection against espionage, sabotage, subversion, active measures of foreign intervention and terrorism. The extended meaning given to "active measures of foreign intervention" and those "activities of foreign origin" which were to be regarded as subversive[87] concentrated on the element of foreign sponsorship rather than on the possible damage to Australian interests. The definition of "subversion" was even more diffuse and further removed from the central concern of preserving the state's governing institutions against violent destruction. According to s.5(1), domestic subversion included interference with the defence or security functions of the Defence Force; the promotion of inter-communal violence or hatred "so as to endanger the peace, order or good government of the Commonwealth" and the following broadly cast description of activities which might lead to the violent overthrow of Australia's system of government:

> "activities that involve, will involve or lead to, or are intended or likely ultimately to involve or lead to, the use of force or violence or other unlawful acts (whether by those persons or by others) for the purpose of overthrowing or destroying the constitutional government of the Commonwealth or of a State or Territory . . ."

Such a definition could only compound the difficulties of distinguishing between subversion and political dissent. The reference to "activities . . . likely ultimately to . . . lead to . . . unlawful acts (. . . by others) for the purpose

[83] s.2.
[84] *Report by Chief Ombudsman* at 29.
[85] Id. 30.
[86] s.17(1).
[87] See s.5(2).

of overthrowing . . . the constitutional government" almost appears to have been calculated to encourage an intrusion into the type of political, industrial and even scholarly activity whose tolerance is fundamental to a liberal democracy.

This ambiguity was largely avoided in the *Canadian Security Intelligence Service Act* 1984. The s.2 definition of "threats to the security of Canada" covers both "covert unlawful acts" and "violence" directed toward undermining or destroying Canada's constitutional system of government; but its reference to an ultimate intention is confined to "activities . . . intended ultimately to lead to" the *violent* destruction or overthrow of constitutional government; and the definition carries a rider which excludes, from security threats, "lawful advocacy, protest or dissent, unless carried on in conjunction with" espionage, sabotage, foreign interference, terrorism or subversion. However, the definition's reference to "activities directed toward undermining by covert unlawful [but non-violent] acts" Canada's constitutional government raises many of the problems inherent in the 1979 Australian legislation. The second Hope Commission took the view that activities of this kind would not have a significant impact on the constitutional system of government, until they were accompanied by, or translated into, violence.[88]

The Canadian definition might be defended on the basis that only those unlawful activities associated with violence could endanger the constitutional system of government; and that the alternative in the definition ("covert unlawful acts, or . . . violence") should be read as conjunctive, excluding non-violent unlawful activity from the range of "threats to the security of Canada". However, the definition is clearly framed in the alternative and there remains a real danger that it will be taken to mean just what it says — that non-violent unlawful activities are the appropriate concern of the security service. The danger for liberal democratic values, in extending a security service's terms of reference to such activities, is that of repressing industrial or political activity or philosophical inquiry which pose no threat to fundamental elements in the governmental system.

In the United States, guidelines developed and issued by the Attorney-General for the control of the Federal Bureau of Investigations insist that an activity is a proper subject for domestic security investigation only if it contains an element of violence. The "Attorney-General's Guidelines on Domestic Security Investigations", issued in 1976 by Attorney-General Levi, authorized domestic security investigations of the activities of individuals or groups which involved or would involve "the use of force or violence and . . . the violation of federal law" for such purposes as overthrowing the national or a state government, interfering in the United States with the activities of a foreign government and depriving persons of their civil rights.[89] These guidelines were replaced in 1983 by Attorney-General Smith, in the "Attorney-General's Guidelines on General Crimes, Racketeering

[88] *Report on ASIO*, op. cit. para.4.42.
[89] See Elliff, op. cit. 796-797.

Enterprise and Domestic Security/Terrorism Investigations". The Smith Guidelines authorised a domestic security investigation of an enterprise (involving two or more persons) "for the purpose of furthering political or social goals wholly or in part through activities that involve force or violence and a violation of the criminal laws of the United States".[90] This emphasis on violence and breach of federal law has markedly narrowed the scope of domestic security investigations, whose investigations of the civil rights and anti-war movements during the 1960s was simply an example of the Bureau's longstanding political orientation.[91]

The second Hope Commission acknowledged that the Australian definition of subversion was drawn too widely. It noted that, as the legislation stood, the security service could assume the role of keeping the government of the day informed of the activities of its opponents;[92] and that mere contemplation of the overthrow of the government was sufficient to constitute subversion.[93] The Commission adopted the narrow, liberal democratic, concept of the state, arguing that, in the absence of violence or a foreign element, activities which might undermine the "established order" in the broad sense were not the business of a security service: "In a free democratic society they are matters to be addressed and worked out in the general social and political process."[94] It stressed the adequacy of the "ordinary political processes" to deal with non-violent dissent and opposition;[95] and recommended that "activities relating to the overthrow of the constitutional system of government which it is proper for ASIO to investigate should be defined by reference to violence".[96] The Commission recommended that the word "ultimately" be excluded from the definition of subversion because it encouraged the security service to ignore the remoteness of the prospect of violence.[97] And it proposed that the legislation carry an express exclusion, from the ambit of security threats, of "lawful advocacy, protest or dissent".[98]

The Commonwealth government accepted these recommendations, designed in the Prime Minister's words "to allow ASIO's functions and activities to be more carefully defined and limited".[99] The amending legislation, enacted on 2 December 1986, implemented this commitment. The principal Act now defines "security" (the key term in the functions of ASIO) as meaning –

"(a) the protection of, and of the people of, the Commonwealth and the several States and Territories from –

(i) espionage;
(ii) sabotage;

[90] Id. 798.
[91] Id. 793-4.
[92] *Report on ASIO*, op. cit. para.4.10.
[93] Id. para.4.50.
[94] Id. para.4.34.
[95] See, for example, id. paras. 4.9, 4.47.
[96] Id. para.4.46.
[97] Id. para.4.56.
[98] Id. para.4.91.
[99] House of Representatives, *Debates*, 22 May 1985, 2889.

(iii) politically motivated violence;
(iv) promotion of communal violence;
(v) attacks on Australia's defence system; or
(vi) acts of foreign interference,

whether directed from, or committed within, Australia or not; and

(b) the carrying out of Australia's responsibilities to any foreign country in relation to a matter mentioned in any of the sub-paragraphs of paragraph (a) . . ."

Each of the terms, "politically motivated violence", "promotion of communal violence", "attacks on Australia's defence system" and "acts of foreign interference" is defined in s.2 of the principal Act. The last of these, for instance, is defined in such a way as to shift the focus from the interests of the foreign power which might be advanced to the interests of Australia which might be damaged.[100] According to s.2, the phrase means "clandestine or deceptive" activities directed or undertaken by, or undertaken in active collaboration with, a foreign power which have a negative impact on Australia's interests or involve a threat to any person.

However, from the perspective of the liberal democratic values on which Australian governmental system is overtly constructed, the most significant definition is that of "politically motivated violence", which replaces "terrorism" and "subversion" as an object of security concern. The definition includes activities which are offences under federal legislation dealing with recruitment and preparation for foreign insurrections, aircraft hijacking and attacks on internationally protected persons;[101] and —

"(a) acts or threats of violence or unlawful harm that are intended or likely to achieve a political objective, whether in Australia or elsewhere, including acts carried on for the purpose of influencing the policy or acts of a government, whether in Australia or elsewhere; [or]

(b) acts that —

(i) involve violence or are intended or are likely to involve or lead to violence (whether by the persons who carry on those acts or by other persons); and

(ii) are directed to overthrowing or destroying, or assisting in the overthrow or destruction of, the government or the constitutional system of government of the Commonwealth or of a State or Territory . . ."

Accordingly, in what amounts to the new definition of subversion (although that term has been excised from the legislation), the emphasis is now on violence directed to the overthrow or destruction of the constitutional system of government: in the absence of violence, current or in prospect, activities which might disturb the equanimity or tranquility of that system do not raise a security concern. This point, that non-violent political activity is neither

[100] See *Report on ASIO*, op. cit. para.3.43.

[101] *Crimes (Foreign Incursions and Recruitment) Act* 1978; *Crimes (Hijacking of Aircraft) Act* 1972; *Crimes (Protection of Aircraft) Act* 1973; *Crimes (Internationally Protected Persons) Act* 1976.

a threat to national security nor of concern to the security service, is emphasised by a new s.17A. Given the new and considerably narrower definitions of key elements in "security", s.17A may add little to the protection of political activity. But the statement is to be applauded, if only because it amounts to a clear assertion of the liberal democratic values within which the security service is obliged to operate:

> "17A. This Act shall not limit the right of persons to engage in lawful advocacy, protest or dissent and the exercise of that right shall not, by itself, be regarded as prejudicial to security, and the functions of the Organization shall be construed accordingly."

CONCLUSION

The inquisitorial and legislative attempts at a definition of national security discussed above have focused on a specific problem, defining the terms of reference of security intelligence agencies. On the other hand, the courts have been concerned with a wider range of problems — controlling the publication of government information,[102] upholding the government's industrial policies[103] and supporting the government's attempts to restrain a citizen's freedom of movement.[104] Why have the courts failed to define the concept, or even to recognise its contradictory aspects; when the more overtly political processes of commissions of inquiry and legislating have shown some sensitivity to those contradictions and attempted to resolve them? It may be that the relative success of the legislative attempts to define the concept has resulted from their narrower focus, on the terms of reference of security intelligence organisations; and that the courts' failure in this area has been due to the diversity of the issues presented to them for resolution. There are also significant differences in the processes through which such issues are raised for decision: the political process is more diffuse, bringing to account a wider range of interests, participants and arguments than the process of litigation; and the political process offers a wider range of options for resolution of conflict (between competing interests, conflicting ideologies or contending parties) than the courts can call upon in the context of litigation. The institutional constraints under which a court operates — in particular, the demand that it resolve the dispute between the parties currently before the court by issuing one of a limited range of remedies — structure and confined legal discourse, inhibit the development of a politically sensitive approach to politically complex issues.

Considerations such as these lay behind Lord Diplock's observation that "[t]he judicial process is totally inept to deal with the sort of problems" involved in the context of national security; and that the concept was "par excellence a non-justiciable issue".[105] This denial of institutional competence

[102] As in *Snepp* v. *United States* 444 U.S. 507 (1980); and in *Commonwealth* v. *John Fairfax & Sons Ltd* (1980) 32 ALR 485.

[103] As in *Council of Civil Service Unions* v. *Minister for Civil Service* [1985] A.C. 374.

[104] As in *Haig* v. *Agee* 453 U.S. 280 (1981).

[105] *Council of Civil Service Unions* v. *Minister for Civil Service* [1985] A.C. 374, 412.

appears to require that the courts decline to accept, as a legal justification for government actions, the invocation of national security: how can the concept be simultaneously non-justiciable and conclusive? But this is not the approach which the courts have adopted. Rather than decline to entertain ("non-justiciable") claims of "national security", the courts have accepted that, when invoked by government, this undifferentiated term is the solution to the legal issues before them.

The courts' refusal to explore the complexities of the concept, and to attempt the difficult task of balancing the interests reflected in the concept against other values implicit in liberal democracy, may be due to judicial unwillingness to explore "political" issues. Or it may be explained, as I have suggested, by the institutional constraints within which the concept is presented to the courts. But one consequence of the courts' reaction to the invocation of "national security", to their acceptance of this undifferentiated concept as conclusive of the issues before them, has been to endorse a wide, authoritarian view of the state – one in which state institutions and ideology are closely connected. That is, the failure to approach the concept more sceptically, to require governments to identify the state interests at risk in a particular situation, has allowed governments to "exploit the linkage between their own security and that of the state in order to increase their leverage over domestic politics".[106] The courts' extension of the protective umbrella of national security to a wide range of institutional, ideological and political values may be unconscious. Or it may support a radical critique of the role which the courts, as state institutions, play in defending those values.[107]

On the other hand, the definition of "national security" which has been developed through the legislative processes, at least in Australia and Canada, comes close to reflecting a liberal democratic and pluralist conception of the state. The legislatures have shown considerable sensitivity to the dangers (from the liberal democratic perspective) inherent in the extension of the concept which the courts have tolerated, if not encouraged. Why is it that overtly political institutions, governments and legislatures, have recognised the political perils of a broad, sweeping concept of national security; while the nominally apolitical judicial institutions have ignored those perils and adopted an approach to the concept which could well be employed to justify authoritarian, anti-democratic policies and actions on the part of governments? Do the courts suffer from an institutional inability to explore and resolve political issues, an inability which reflects the curial processes and the pressures of litigation? Can the courts transcend those limitations and treat the concept of national security as fully justiciable, insisting that, if it is to have legal consequences, it must have a meaning – a meaning which does no violence to other fundamental values? Or is there a more subtle, and more powerful, limiting factor at work here – the commitment of the courts to maintaining not only the institutions, but also the current ideology, of the state?

[106] Buzan, op. cit. pp.58-59.
[107] See, for example, Miliband, op. cit. p.5.