

The Challenge of Fighting Terrorism While Maintaining our Civil Liberties
Remarks of the Right Honourable Beverley McLachlin, P.C. Chief Justice of Canada to the
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Eleven days ago, the world paused to mark the 8th anniversary of an event known to an entire generation simply as '9/11'—the suicide attacks that felled the twin towers of the World Trade Centre, killing more than 2,995 people, 24 of whom were Canadians. The events of 9/11 have come to represent a pivotal moment in history. They mark the time when many people first became consciously—fully conscious—of the phenomenon of terrorism.

For many, terrorism is still understood in terms of Osama Bin Laden Al Qaeda and Jihad-driven suicide bombers. But to narrowly define it by the events most recently stamped upon our collective imagination blinds us to two facts I believe are essential if we are to successfully contain terrorism and maintain our democratic values. The first is that terrorism is an historic, ongoing phenomenon that neither started nor ended with 9/11. The second, flowing from the first, is that our response to terrorism must be broad, systematic and effective. To succeed, it must achieve two goals: first, effectively containing terrorism, and second, all the while preserving our fundamental values and the rule of law. This afternoon, I wish to address these two realities and examine why the false dichotomy between safety and our ideals must be rejected.

First, the phenomenon of terrorism. Any discussion of terrorism must define the term at the outset. Precise definitions on which everyone agrees have proven difficult to formulate. However, there is a general consensus that terrorism is conduct which seeks not merely to harm and destroy—the effect and purpose of crime generally—but also attempts to use violence for the calculated purpose of instilling terror in the general populace, thereby injuring and destabilizing it. Terrorism targets not only the individual, but society generally.

Terrorism has diffuse roots in hatred, insecurity and fanatical beliefs and yet its singular peculiarity lies in its method of operation. Terrorism operates as a psychological weapon directed at both its immediate victims and society as a whole. The Nazi era and communist dictatorships that followed consciously used the arts of propaganda to 'brainwash,' as the term went, entire peoples. Terrorism is the negative counterpart of such brainwashing. Like the 'newspeak' language of George Orwell's novel *Nineteen Eighty-Four*, terrorism is an instrument used to change how people think and act.¹

Propaganda and terrorism are both designed to provoke reactions based not on reality—the true situation—but on false information and fear. These manufactured realities create manufactured reactions aimed at diverting the populace from effective action and continued adherence to democratic values. Therein lies their true danger. Terrorism and its accompanying dogma are the ultimate con-game. They seek to destroy the very fabric of civilized society.

Terrorism—violence aimed at general societal disruption—is not a new phenomenon. It has been the historic stock-in-trade of conquerors and revolutionaries, a tool used to paralyze existing governance and impose a new order. Though calculated acts of violence against the innocent may provoke broad organized social resistance, more often such acts destabilize effective counter-action and destroy the ability to resist.

In the modern era, terrorist tactics have assumed a new guise and taken on a new life. They have become the favoured tool of fanatical minority groups seeking to promote their particular world vision.

¹ Newspeak, as defined by the Merriam-Webster Dictionary of English Usage, is a 'propagandistic language marked by euphemism, circumlocution, and the inversion of customary meaning'. The official language of Oceania, a fictitious country in George Orwell's *Nineteen Eighty-Four* (Penguin Books, Harmondsworth, 1989), newspeak was 'designed to diminish the range of thought'.

Al Qaeda is such a group but it is far from the first. The Sinn Féin bombings in Northern Ireland were terrorist acts. The kidnapping and murder of Israeli athletes by the Black September Organization at the 1972 Munich Summer Olympic games were terrorist acts. Here in Canada, we witnessed the horror of the Air India bombing two decades ago. Just off the coast of Ireland, a bomb planted by members of a dissident branch of the Sikh religion exploded on a passenger jet carrying 329 innocent people. That was a terrorist act and we can expect more such acts, in yet unthought-of forms. The point is simple. Terrorism is not merely a series of isolated events that occurred when two planes flew into the twin towers of New York in 2001; or when youthful bombers exploded cars on the tube in London in 2005; or when plotters in 2007 almost blew up critical infrastructure in Toronto. Terrorism is an ongoing phenomenon that every democratic society must confront and must continue to confront.

This brings me to my second point. The ongoing phenomenon of terrorism demands an ongoing, broad and sustained response that is consistent with our fundamental values and the rule of law. One of the most destructive effects of terrorism is its ability to provoke responses that undermine the fundamental democratic values upon which democratic nations are built. The fear and anger that terrorism produces may cause leaders to make war on targets that may or may not be connected with the actual terrorist incident. Or perhaps it may lead governments to curtail civil liberties and seek recourse in tactics, like torture, which they might otherwise deplore— tactics that may not, in the clearer light of retrospect, be necessary or defensible.

And yet, terrorism must be fought. Terrorists seek to achieve their ends by violence. They care nothing for individual liberties or democracy. If we prize our liberties and the history that enshrines them, we cannot let those who seek to destroy these very things prevail. It would mark the end of our ideals. As Justice Robert Jackson of the United States Supreme Court famously declared, the constitution is not a suicide pact.²

It is also clear, however, that it would be equally disastrous to jettison our liberties in the name of fighting terrorism. That too would constitute loss of the fight against terrorism. We may lessen terrorism, but the terrorists will have effectively deprived us of what we hold most dear and what they seek to attack—our democratic liberties. As Benjamin Franklin once pronounced, ‘Those who would give up essential liberty to purchase a little temporary safety, deserve neither liberty nor safety.’³

It follows from what I have said that we cannot view the problem in terms of ‘either-or’—either rights or terrorism. Our only option is to fight terrorism while maintaining our constitutional rights and freedoms to the maximum extent possible. The Canadian Minister of Justice in 2005, Irwin Cotler, referred to this two-pronged approach when he described the government of the day’s national security legislation as ‘human security legislation, which seeks to protect both national security—or the security of democracy if not democracy itself—and civil liberties’.⁴

The result is a compromise. The fight against terrorism may require some limitations on our freedoms, such is the price of vigilance, but those limitations should not go further than is required, having regard to the particular threat. Lawyers have words for this. They say that limits on basic rights must be justified, and assert that constraints on rights must ‘minimally impair’ those rights. That is, constraints must go no further than is actually necessary in the pursuit of security.

In brief, terrorism confronts democratic societies with a formidable challenge. On the one hand, terrorism must be prevented, fought and contained. Terrorists must be brought to justice. On the other hand, states combating and prosecuting terrorists must remain true to the fundamental principles upon which democratic governance and a free society are based, including the presumption of innocence

² *Terminiello v City of Chicago*, 337 US 1 (1949) at 37, dissenting

³ Benjamin Franklin, Pennsylvania Assembly: Reply to the Governor, November 11, 1755, cited in Benjamin Franklin, *The Papers of Benjamin Franklin*, LW Labaree (ed) vol 6 (Yale University Press, New Haven, 1959) 242.

⁴ Irwin Cotler, ‘Thinking Outside the Box: Foundational Principles for a Counter-Terrorism Law and Policy’ in RJ Daniels, P Macklem & K Roach, *The Security of Freedom: Essays on Canada's Anti-terrorism Bill* (University of Toronto Press, Toronto, 2001) 112.

and a fair trial. As the Supreme Court of Canada stated in a recent case,⁵ '[i]n a democracy not every response is available to meet the challenge of terrorism'. A case from the Israeli Supreme Court makes the same point. Democracies must respond to terrorism, noted the court, in a way that appropriately recognizes the fundamental values of the rule of law. As President Aharon Barak of the Israeli Supreme Court [stated], preserving the rule of law and recognition of individual liberties constitute an important component of [a democracy's] understanding of security.⁶

The first line of any response to terrorism must come from the legislative branch of government. Duly elected law-makers must lay down the rules by which terrorism is fought in clear compass. They must trace the difficult line between combating terrorism and preserving liberties in a way that is effective, constitutional and gives clear guidance to those charged with combating terrorism on the ground. Few laws were directed to the issue of terrorism prior to 9/11. After the twin towers fell, law-makers responded. Britain passed the Anti-terrorism, Crime and Security Act⁷ 2001, the Prevention of Terrorism Act 2005,⁸ the Terrorism Act 2006⁹ and the Counter-Terrorism Act 2008.¹⁰ The US Congress has been active as well setting limits on interrogation practices via the Detainee Treatment Act of 2005.¹¹ In Canada, Parliament passed the 2001 Anti-terrorism Act.¹²

The second line of response must come from the executive branch of government. In Canada, this responsibility ultimately lies with the Minister of National Defence, the Minister of Public Safety, the Minister of Justice and is filtered down through various agencies, including the RCMP, CSIS and the Immigration and Refugee Board.

The executive branch of government seeks to prevent terrorist acts and to bring their perpetrators to justice. As every follower of current events is aware, the task of preventing terrorist attacks is particularly challenging. The identification and detention of individuals who pose a risk to national security is fraught with complexity and legal difficulties. In some countries, state reliance on torture and extraordinary rendition have become issues as has the denial of captured individuals to the right to due process of law.¹³ The courts are inevitably called upon to review executive conduct to ensure that it remains lawful.

This brings us to the judiciary, the third branch of governance involved in responding to terrorism. The courts do not initiate the laws that govern how terrorism is fought, nor do they execute them. However, under our system of constitutional governance and the rule of law, the courts may be called on to review national security laws passed by Parliament as well as actions taken by the executive branch of governance. From time to time, however, the courts are called upon to interpret laws on terrorism, to rule on the constitutionality of their provisions and to preside over the prosecution of terrorists and hear complaints that the State has unconstitutionally abridged the constitutional rights of individuals. In addition, the Immigration Act gives the Federal Court special responsibilities to monitor the detention of non-nationals who pose security risks and cannot be immediately deported because, for example, there is no country to receive them or they would be subject to torture in the receiving country.

⁵ Application under s 83.28 of the Criminal Code (Re), [2004] 2 S.C.R. 248, para 7.

⁶ H.C.5100/94, Public Committee Against Torture in Israel v Israel, 53(4) P.D. 817, 845, cited in A Barak, 'Foreword: A Judge on Judging: The Role of the Supreme Court in a Democracy' (2002) 116 Harvard Law Rev 16, 148, cited in Application under s 83.26, *ibid* para 7.

⁷ 2001 c. 24.

⁸ 2005 c. 2.

⁹ 2006 c. 11.

¹⁰ 2008 c. 28.

¹¹ Div. A, tit. X, §§ 1001-1006, 119 Stat. 2680, 2739-44 (2005). Note that Congress went on to pass the Intelligence Authorization Bill in 2008, which Bush vetoed, that was far more restrictive. Congress did not have enough votes to override the veto. The bill would have limited all American interrogators to techniques allowed in the Army Field Manual on Interrogation, which prohibits using physical force against prisoners.

¹² S.C. 2001, c. 41.

¹³ In *Hamdi v Rumsfeld* 542 U.S. 507 (2004), for example, the U.S. Supreme Court reversed the dismissal and heard the habeas corpus petition of a U.S. citizen who was being indefinitely detained as an 'illegal enemy combatant'.

Courts approach this review with an attitude of respect for the difficult role of Parliament and the executive in combating terrorism. Yet they must also be vigilant to ensure that laws are constitutional and that government agents have not overstepped their lawful powers. The judiciary must stand ready to protect the rights of, not only the majority, but the poor and marginalized—the people who without the courts have no voice. In doing so, courts may, as my colleague Justice Binnie has put it, be called on to question the ‘idiom of the war on terrorism’ wherein the destructive power of war and the need for deference to the executive are both emphasized.¹⁴

The Canadian Charter of Rights and Freedoms sets the template for how Courts go about difficult work. The Charter guarantees to every person—not just citizens—liberty, mobility, freedom of expression and religion, and basic criminal law procedural protections like the presumption of innocence. But the Charter also provides that these rights can be limited when justified by the broader public interest. Rights, it states in section, 1 are:

subject only [and the “only” is important] to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

The single big idea driving section 1 is that limits on rights must be justified as proportionate. Proportionality means a fair and justified balance between the exercise of a guaranteed right and a broad conflicting public goal. Our laws and regulations must meet the proportionality requirement. And when Canadians challenge the balance that has been struck, the courts’ role is to review the balance that Parliament or the executive has reached, between rights on the one hand and fighting terrorism on the other. Due deference is accorded in view of the fact that Parliament or the executive may be better positioned than judges to determine precisely where the balance should be struck in a particular case. Nevertheless, the state bears the burden under the constitution of justifying intrusions on guaranteed rights. If the state fails to provide this justification, the court is required to declare that the government action is unconstitutional.

This, in brief outline, is a description of the branches of governance and how they engage in issues involving the clash between individual rights and freedoms and measures aimed at combating terrorism. The task of maintaining the balance between fighting terrorism and conserving our rights and freedoms is shared by the three branches of democratic governance—Parliament, the executive and the courts.

Each has a critical role to play. In the remaining few minutes, let me give a few examples of how this balance has been struck—one under the detention provision of the Immigration Act, one concerning torture and one regarding extra-territorial interrogation by Canadian officials. The Canadian Immigration and Refugee Protection Act¹⁵ creates a scheme for the detention and deportation of non-citizens certified to be inadmissible to Canada on the grounds of national security.

Two years ago, in *Charkaoui*,¹⁶ the Supreme Court of Canada held that aspects of the procedure reviewing security certificates did not comply with the Charter. The law failed to provide a fair hearing because it allowed the government to base its case on secret evidence and summaries of evidence. It did not ensure that all relevant facts would be put before the detained person, and indeed, even the reviewing judge. The Court acknowledges that in the face of terrorist threats, some information must remain secret. However, it pointed to measures not found in the Act that could have been taken to intrude more minimally on the fair trial right, such as the use of special advocates to review the evidence. Parliament responded by amending the legislation to introduce special advocates empowered to provide an independent perspective on the evidence against the detained person.

¹⁴ Justice Binnie, remarks made during the opening lecture in ‘Liberty, Security and Privacy’ in S Cohen, *Privacy, Crime and Terror: Legal Rights and Security in a Time of Peril* (LexisNexis/Butterworths, Markham, Ont, 2005) 540 [Cohen, *Privacy, Crime and Terror*].

¹⁵ 15R.S.C. 2001, c. 27.

¹⁶ 16[2007] 1 S.C.R. 350.

Torture, or rendition to torture—familiarized to many by Justice O'Connor's inquiry into the Arar case—is another issue raised in the fight against terrorism. At common law, evidence obtained by torture is inadmissible in court on the basis that such evidence would not be voluntarily given by the individual. The concerns behind admitting evidence obtained by torture rest on the issues of fairness to the individual and the reliability of evidence obtained by torture.

International law supports this position as does Canadian.¹⁷ In *Suresh*¹⁸ the Supreme Court of Canada held that deportation of a person to a State where there is a substantial risk the person will face torture violates section 7 of the Charter. The Court left open the possibility that in 'exceptional circumstances' deportation to face torture may be justified; however, what would constitute 'exceptional circumstances' has not been addressed by the courts and would necessarily be very rare.

Finally, in the recent decision of [the Supreme Court of Canada] in *Khadr*,¹⁹ the Supreme Court ordered Canadian authorities to disclose to Mr Khadr the content of the interview and related documentation obtained by CSIS from Mr Khadr held at the US prison in Guantánamo Bay. Taken to Guantánamo Bay at the age of 15, Khadr, a Canadian citizen, was interrogated repeatedly and at length in circumstances that appear to have involved sleep deprivation by both US authorities and CSIS. Mr Khadr's claim to be returned to Canada has been upheld by the Federal Court of Canada and is currently before our Court. Accordingly, I will not provide further comment.

CONCLUSION

I return to the two observations with which I began. First, terrorism is an historic and ongoing phenomenon that neither started nor ended with 9/11. We must be vigilant to contain it. Second, our response to terrorism must be one that preserves our fundamental values and the rule of law. Canada, and indeed all democratic societies, are struggling with how to balance the concern for national security against the need to protect basic rights and liberties.

Canada has developed its own unique approach to the challenges posed by terrorism, an approach founded on the primacy of rights and an insistence that those rights can be limited only where the state can justify those limits. We recognize the gravity of the threat of terrorism and the need to combat it with vigilance; yet, we also recognize that intrusions on rights must be justified as minimally impairing and proportionate in effect.

The current modalities of terrorism seem new to us but the ongoing challenge of balancing securities against liberties is as old as Western thought. Chief Justice Warren put it well in *United States v Robel*. Speaking in 1967 at the height of the Cold War, another era where people feared for their security, he wrote,

...implicit in the term 'national defense' is the notion of defending those values and ideals which set [the United States] apart....It would indeed be ironic if, in the name of national defense, we would sanction the subversion of ...those liberties...which makes the defense of the Nation worthwhile.²⁰

¹⁷ Canada, the U.S. and the U.K. are all parties to the UN Convention against torture and other cruel, inhuman or degrading treatment or punishment. The Convention against torture provides, among others things, that parties to the convention shall take legislative, administrative and judicial measures to prevent torture within their jurisdiction, and shall not send or extradite a person to a state where there are substantial grounds for believing that he or she would be in danger of being subjected to torture. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1465 UNTS 85, Arts 2, 3 (entered into force 26 June 1987).

¹⁸ 18[2002] 1 S.C.R. 3.

¹⁹ *Canada (Justice) v Khadr*, 2008 SCC 28, [2008] 2 S.C.R. 125.

²⁰ 20389 U.S. 258 (1967) at 264.

Or as articulated by Richard Posner paraphrasing the philosopher John Rawls, 'it is liberty that first commands our attention. Human security may be the precondition to liberty, but it should not be valued above liberty for, when so weighted, it is capable of destroying liberty.'²¹

Terrorism is far from conquered, but if we follow the path of balance and justification charted by our most fundamental laws, I for one believe we will not go astray. It may seem, as former Chief Justice Barak of Israel has said, that democracies fight terrorism with one hand tied behind their back. Yet, as he also asserted, for that very reason they are likely to prevail in the end—not only in containing terrorism, but in preserving our most cherished liberties.

²¹ 21 SA Cohen, 'Liberty and Security—Can We Have Both?' in Cohen, Privacy, Crime and Terror, (n 14) 546.