

*One Nation Under Surveillance: A New Social Contract to Defend Freedom Without Sacrificing Liberty* BY SIMON CHESTERMAN [New York: Oxford University Press, 2011. xii+297 pp. Hardcover: US\$45.00]

Institutional efforts to deal with the terrorism threat are in essence a collective action challenge: How do societies prevent terrorist ideology from establishing and gaining traction within a community? Assuming a terrorist attack takes place, especially by “home-grown” terrorists, what can society do to cope with the aftermath? How can societies fortify themselves to come out resiliently against such forces that seek to divide and destroy? These questions perhaps mask the central questions and concerns surrounding surveillance and intelligence—not just what is collected and processed but also how this information is used—in many jurisdictions. Surveillance and intelligence are integral parts of the larger strategy employed to ensure that societies can come out on top of the collective action challenge posed by terrorism.

Simon Chesterman’s wide-ranging study of these issues and other related issues in *One Nation Under Surveillance* seeks to throw light on the rule of law concerns in the so-called ‘war against terror’. In this accessible book, Chesterman critically examines, *inter alia*, the dangers that accompany the collection and use of information sourced by intelligence agencies, both domestically and abroad. Although the analysis is considered against the backdrop of developments in the United States (and to a lesser extent, the United Kingdom), the discussion is of general applicability.

One of Chesterman’s abiding concerns throughout the book is that it is a categorical error to frame the terrorism threat as involving deep tensions between freedom and liberty, and security. Indeed, post-9/11, legal and ethical issues have been raised over the core issue of regulating the collection, mining, and use of intelligence information. Chesterman argues persuasively that there is a patent and urgent need to carefully examine the legislative and institutional frameworks by which the ever-growing surveillance powers of the state should be regulated. The touchstone of legality is not good enough in surveillance and intelligence. Chesterman urges not losing focus on legitimacy in the quest for a balanced calibration with regards to the limits of legality of state actions in surveillance of its citizens and in intelligence gathering.

Chesterman devotes the first part of the book to discussing the theoretical foundations, weaving in a historical overview of the regulation of spies both during peace and in conflict. The issues surrounding the executive’s use of emergency powers, their practice, and their legal standing are also examined in the first part of the book. What is clear is that there are limits to the rule of law in circumstances such as an actual terrorist attack. Alluding to the nature of the beast that surveillance and intelligence gathering is, Chesterman teases out their inescapable qualities, including the use of illegal and unethical methods.

In the second part of the book, Chesterman explores the variegated and nuanced practice in the US, the UK, and of the United Nations. For instance, he notes the growing reliance in the US on the outsourcing of intelligence-gathering to private contractors. The question of accountability features prominently in such a scenario, where the demand for intelligence is so high that the salient danger of the ends overwhelming the means is far too evident, and yet this danger has little effect on

regulated control. By contrast, in the UK, the role of the bureaucracy, judiciary, and civil society in maintaining regard for checks on the executive is different from the US, although the pressure for greater surveillance is mounting. Since it has no intelligence-gathering resources of its own, the United Nations relies on its member states' intelligence for the work that it does and for the decisions it makes.

With the issues and challenges well-articulated, part three of the book rightly zeroes in on how to secure proper accountability—not just in intelligence gathering but also in its use. In his final chapter, Chesterman puts forth the imperative of a “new social contract” with three defining elements to defend freedom without collateral damage to liberty. The first element is that special powers are to be granted only to the legal actors who are directly accountable to the public. Secondly, the scope of the special powers must be provided for by law—their exercise must be public. Thirdly, a “consequence sensitive” system has to be established to ameliorate and compensate for both intended and unintended consequences of the use of special powers. Collectively, these three elements undergird the social contract. The thrust of the message is that freedom, liberty, and security do not make for a zero-sum game, as even the Leviathan needs to be reined in.

For Chesterman, the new social contract points to a dynamic relationship between the government and the governed. The objective of a social contract is to ensure that the relationship is grounded in legitimacy; in turn, this entails a substantive measure of consent and trust between the government and the governed, despite the unequal relationship. The harsh reality is that surveillance and intelligence in connection with national security concerns vis-à-vis the terrorist threat are part of today's world. The concerns are more pressing notwithstanding that surveillance and intelligence are often not about obtaining evidence for the purposes of a criminal prosecution. While these executive measures may be necessary to respond to the terrorist threat, they must also strive to be covered by the principle of legality, rather than legal black holes or legal obfuscation that neither inspires accountability nor confidence.

Chesterman's overarching concern is that the rule of law must be maintained. In this regard, the role of an active citizenry is critical. This can help secure buy-in from the people for the measures that need to be put in place to counter the terrorism threat. To be sure, governments have tended to inflate, if not exaggerate, national security threats—both domestic and external. It cannot be adequately emphasised how an unaccountable national security machine would ultimately fail to protect the country and the people.

Given the nature of the terrorism threat, the intersection of rights, responsibilities, and regulation invariably expands the role of the state even as it seeks to attend to the interests and concerns of the key stakeholders (*viz.* citizens, the Muslim community, and policy-makers) with nuanced sensitivity. Civil society can be meaningfully inducted to enhance a society's capacity to deal with the harm, as well as to infuse legitimacy and confidence in the measures taken.

'9/11' has become a powerful yet divisive meme in our overall discourse in the twenty-first century. It is powerful because it evokes fear brought about by terrorism. Terrorism itself works not merely through directly causing physical damage and human carnage, but it also has a more powerful effect of generating widespread fear and suspicion within and between communities. Social fabric and cohesion are

strained. Often, behaviour changes dramatically in reaction to existential threats, and may lead to powerful over-reactions. It is clear that endowing the surveillance and intelligence infrastructure with legality is necessary but insufficient.

Today's governments possess far more information about the citizens and people living within and without their national boundaries than at any point in human history. Even so, technological advancements in surveillance mean that other actors such as individual citizens, non-governmental organisations, and media players (traditional and new media), can also possess the ability and power to subject the powers-that-be to surveillance and gather intelligence about them! While the book was probably completed prior to the Wikileaks' (online: WikiLeaks <<http://www.wikileaks.org>>) release of diplomatic cables, the episode demonstrates the double-edged sword that surveillance and intelligence presents. In particular, developments and advancements in the area of investigative analysis, which seek to combine information and data from a variety of publicly available, private, commercial, and intelligence sources to construct a composite picture of the thinking, activities, and trends of an individual or group being surveyed. Perhaps Chesterman could have discussed this in an epilogue, to give a more complete analysis to the issues and concerns that he had already adroitly fleshed out.

Terrorism is an asymmetric threat, which requires a multi-faceted response that is cognisant of the societal complexities inherent in multicultural polities. The tendency to manage the terrorist threat through a harsh regulatory regime often promotes executive power and relegates rights to a secondary role. Too often, this results in a drastic reshaping of the law, in which civil liberties are given short shrift, undermining the very basis of legitimacy that these laws need. Yet, such regulation can be more effective if citizens' rights are taken seriously, recognised and respected. In so doing, they clothe the legal and political processes at work not just with authority and legality, but also with legitimacy and trust.

Of course, a rights-only framework is manifestly inadequate against terrorists who do not operate under similar rules and have a wanton disregard for the rights, safety, and liberty of others. While rights underpin the foundation of modern democracies, a key challenge posed by terrorism is how to balance rights against responsibilities—as well as fear and insecurity against liberty and security—within a regulatory framework.

On the other hand, as Chesterman takes pains to highlight throughout the book, the rights and responsibilities of the various stakeholders, if properly honoured and executed, can contribute to efficient and effective governance of counter-terrorist measures. Such responsibilities contribute to the overall accountability and collective effort to maintain and enhance society's well-being. Thus, rights and regulation are not antithetical to each other. They are integral to the entire process of managing socio-political risks that present a real danger of an incivility spiral where distrust, fear, and suspicion conspire towards societal breakdown. Trust matters even in hard times.

In a situation of ever-increasing security, the initial focus on the terrorism threat alerted policy-makers and the citizenry to the futility of conventional law-enforcement techniques in dealing with the complexities of terrorism. It has contributed to an increase of ambient doubt and created an atmosphere of fear. In such a climate, it is perhaps not surprising that any new policy or initiative may be

perceived as a covert instrument of surveillance, or tacit support for the statist imperative of resilience, harmony, and security. Confidence-building is needed to ensure that society builds a stock of adequate social capital and resilience, so as to withstand threats to its social fabric posed by terrorist acts. Surveillance and intelligence can and should be mobilised to this end as well.

Simon Chesterman's *One Nation Under Surveillance* is a timely and commendable addition to the evolving discourse on the role of law and policy in crafting the architecture of legality and legitimacy in surveillance and intelligence. It should be read not just by those interested in the interface of law and intelligence but also by bureaucrats. The book is succinct and the recommendations on the new social contract, while seemingly self-evident, point to how the terrorism threat has more often than not overwhelmed us and blinded us to the centrality of the rule of law in gathering intelligence and its subsequent use. To focus on the former to the neglect of the latter will also result in less than optimum freedom and liberty.

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