

## **National Security and Parliamentary Democracy**

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## National Security and Parliamentary Democracy

Lustgarten, Laurence, and Ian Leigh. *In from the Cold: National Security and Parliamentary Democracy*. Oxford, UK: Clarendon Press, 1994.

Though the British intelligence literature is voluminous, it has, until recently, been dominated by historical treatments, concerned with scandals and 'moles,' and, with the exception of two rather slim volumes,<sup>1</sup> been devoid of serious studies of the Intelligence Community as an arm of government. Fortunately, the recent work of political scientist, Peter Gill,<sup>2</sup> and now Laurence Lustgarten and Ian Leigh's *In from the Cold: National Security and Parliamentary Democracy* have gone a long way to fill the gap. In the latter work, the authors, both academic public lawyers, pose questions about policy-making, the discretion individual political actors possess, the effectiveness of existing controls, the negative impact on citizens that intelligence agencies cause, and the available forms of redress against inappropriate intrusions on rights and liberties.

*In from the Cold* is divided into five main parts. The first sets out the book's conceptual foundations. Here the authors attack the metaphor of balance. They argue that there is no polarity between human rights and national security. In strong democracies like Britain, political and civil rights are at the core of national security *itself*. This leads Lustgarten and Leigh to adopt an uncompromising strategy of limitation in their subsequent critique of existing internal national security arrangements. Instead of the familiar all-encompassing definition, they reduce national security to its absolute minimum — what they call a *democratic conception of national security*. This encompasses responses to political violence and covert attempts to influence the political process, as well as measures to protect both specific categories of defence information and the state's territory against invasion or insurrection. The use of extraordinary measures in the name of national security *for any other purpose* is, therefore, deemed highly suspect. This means the authors draw a clear distinction between national interests — the pursuit of economic objectives, for example — and national security, the latter being reserved for matters that go to the heart of the state and which provide roughly equivalent benefit to all citizens.

A conception of national security, which sees the threat as not merely encompassing the personal security of citizens but also the good order of political institutions, necessarily leads to a view of the democratic state as both protector against, and contributor to, the threat. In the latter regard, the authors claim that the cry of 'security' has functioned politically "as a sort of intellectual curare," permitting the executive to stifle criticism, maintain political orthodoxy, and prevent debate by claiming knowledge — which cannot be revealed — to support what were essentially arbitrary political initiatives, (p. 20)

The second and third parts examine the relationship between national security and human rights, and national security and the concealment of public information and dissent respectively. Here the authors argue passionately for the development of a legal regime and moral climate that specifically recognizes and encourages a general principle of privacy inherent in all citizens. In their view, the judicial record reveals an inadequate respect for human rights. This leads them to conclude that the law should be more explicit, thus preventing the judiciary from indulging in *ad hoc* balancing exercises. (p. 44) The authors also posit that any invasion of privacy should be guided by specific principles. Here they elaborate on those first enunciated by Canada's McDonald Commission, of legality, proportionality, the use of the least obtrusive effective means, and the need for layered control of discretion. Furthermore, they believe all forms of surveillance should be governed by legal regulation and not open to bureaucratic discretion. When such principles are considered, the extant legislative regime in Britain covering technical surveillance and the use of informers appears deficient. Similarly, they conclude that the vetting system is substantively and procedurally unsatisfactory and that access to personal files requires more independent and fairer procedures.

Lustgarten and Leigh also find the Official Secrets Act unpalatable. Given Britain's current political culture, they believe it is inconceivable that politicians would not manipulate the internal and citizens' complaint mechanisms. They argue with admitted unscholarly bluntness that:

the people who ensured that the issues raised by Cathy Massiter remained largely uninvestigated: who prosecuted the Tisdalls and the Pontings for revealing chicanery whilst leaving those guilty of it untouched: who granted effective immunity to organized law-breaking and violence in the Royal Irish Constabulary; and who deceived Parliament and would have countenanced, and indeed actively assisted in, the imprisonment of the Matrix Churchill defendants, cannot be trusted to allow a full and independent investigation of such grievances, (p. 245)

Cognizant of the lack of political support for abolition, they outline how more ideal legislation might be framed. Setting parameters is required not merely for reasons of legality but to force the government to define what genuine national security interests are at stake. Similarly, they understand the importance of making the potential harm involved explicit. In this regard, they suggest individuals should be provided with legal defences where disclosure enhances democratic or constitutional values.

The fourth part explores how the courts have approached national security cases. Here the authors focus on procedural fairness. Apparently, broad prosecutorial discretion has led to inconsistencies in who is tried. With regard to judicial decision-making, the authors consider that there has been "a striking pattern of judicial self-abnegation." (p. 353-54) Not only has the judiciary failed to stimulate and invigorate responsible government, but it has too often claimed that Parliament can still pursue security matters where it has declined to act. The irony of the resulting situation is not missed. Not only can such protestation not be taken seriously, but the court's failure to act has disabled those who could have provided informed criticism.

Finally, in what are perhaps the most significant chapters, the authors attend to the problem of how Britain's national security institutions are controlled and made accountable. They offer three general principles for effecting better control over security and intelligence organizations. First, controls should be placed over *both* the agencies involved and their masters. They argue that this must be accomplished by elected representatives *or* those acting on their behalf. The authors are not believers in parallel control mechanisms for different agencies. Rather, they hold that they should vary with the context. Finally, Lustgarten and Leigh point to the mandate as the critical element of control. Mandates not only protect individual privacy by establishing the parameters of legitimate action but help shape appropriate organizational cultures for intelligence operatives and provide protection for agency employees.

The authors pay considerable attention to the paradoxical feature of the "Westminster model" of government, namely that it relies on the majority of elected representatives in the legislature, whose principal function is to maintain the government in power, to control and make the executive accountable. They posit that Parliament has few resources to rein in an errant executive and that security and intelligence agencies have all the well-known problems associated with quasi-independent agencies insulated from direct ministerial direction to prevent political manipulation. Furthermore, once intelligence agencies were found to have abused their mandate in the 1970s, countries like Canada had no suitable model to effect better control and accountability. Rather, they had to be constitutionally innovative. The authors believe that though desirable — because they are less likely to damage organizational efficiency — reliance on internal and secretive controls is no longer a feasible option. The numerous scandals, the revelations of misconduct, the visible lowering of ethical standards in public life, and the many examples of incompetence have made the public unwilling to put further faith in blind trusts. As a result, Lustgarten and Leigh advocate a two-pronged approach — new measures to enhance executive accountability and public exposure through the legislature.

Besides its contribution to the understanding of constitutional affairs and the workings of the British government, *In from the Cold* should be of interest outside the United Kingdom because of its comparative approach. During their research, Lustgarten and Leigh visited Australia and Canada. The book, therefore, contains useful commentaries on the systems and institutions in those countries and how they compare with Britain's. While one recognizes the magnitude of their efforts and the fact that it is not possible to cover all dimensions, one must question why the authors so readily dispensed with American intelligence oversight. True, their study concerned national security and *parliamentary* democracy and as such *congressional* oversight was technically off limits. However, the argument has another side. Comparing parliamentary mechanisms with congressional systems could have revealed the strengths and weaknesses of the Westminster model, particularly regarding committee effectiveness. In the case of intelligence, it is notable that Congress' oversight role differs from that provided for other departmental functions. As with

parliamentary systems, congressional oversight was constitutionally innovative when it came to intelligence. While it is true that some lessons are not applicable to parliamentary systems, others are. In this regard, this reviewer must confess to being a convert. As Director of Research of the Special Parliamentary committee that reviewed Canada's CSIS Act he recommended against the committee going to Washington, advocating instead the examination of systems in other parliamentary democracies. Fortunately, the committee thought otherwise. Congressional briefings not only showed the singular importance of having a discrete staff possessing broad intelligence knowledge and experience with special access to secret information, but also Congress' recognition that intelligence needed special oversight provisions. While Lustgarten and Leigh are, of course, correct to focus on whether parliament can be an effective check on the executive, their conclusions about the potential capacity of parliamentary oversight may be jaded and limited by examining the familiar instead of opened by looking at dissimilar options and rationales.

While readers interested in placing further legal limitations on government's use of special national security measures will be well satisfied by this volume, those with a broader view of national security or also concerned about the efficacy of intelligence methods may find it wanting. Arguably, those who have put forward the need for balance between the interests of the state to protect itself and the protection of individual rights and liberties have also been cognizant that propriety and efficacy interests are indelibly intertwined. The McDonald Commission, for example, emphasized that the purpose of national security was to protect democracy and enhance democratic principles. While it was uncompromising in not balancing off the interests of national security at the expense of those governing responsible government, the rule of law and legitimate dissent, it did recognize that the right to privacy was not inviolable and that sticking absolutely to norms of procedural justice in every case could sometimes threaten not only ongoing intelligence operations but the lives of those involved. Thus, while Lustgarten and Leigh place their faith somewhat idealistically in explicit principles, more refined mandates and explicit law, and permit oversight by parliamentary surrogates, the commission went further. It also proposed broad-ranging measures geared to developing an effective institution with an appropriate organizational culture for a democratic society as well as the direct and mandatory involvement of Parliament in after-the-fact review.

Every book has its specific infelicities. In the case of *In from the Cold*, one is of particular interest. The authors observe that the McDonald Commission had recommended the establishment of Canada's Security Intelligence Review Committee (SIRC), but with a narrower range of competence. However, they suggest that SIRC's present form resulted from a Senate Committee report chaired by Michael Pitfield, the Cabinet Secretary during the Trudeau years. This information was presumably based on information provided by Senator Pitfield when the authors interviewed him as they cite him as saying that he drew on the model of the Comptroller and Auditor General in designing SIRC. True, the McDonald Commission had recommended a body akin to SIRC, but far from having a narrower range of competence it intended the review committee both to have purview over Canada's entire Intelligence Community and to be directly accountable to a statutorily established parliamentary committee. In fact, SIRC was already an integral part of the draft legislative framework for establishing CSIS, long before the Pitfield Committee considered Bill C-157. While that committee clarified SIRC's role and was responsible for increasing its size, it did not significantly change its mode of accountability. Moreover, it came out strongly against having a parliamentary committee directly involved or in SIRC reporting directly to Parliament as the Auditor General does. Thus, when Pitfield was talking about designing SIRC, he was probably referring to the period when he was Canada's most senior public servant. If this was the case, it is interesting indeed as many people thought during the Senate hearings that he had been too closely involved in framing the legislation to pursue Parliament's interests effectively as the legislative committee's chair.

Despite these criticisms, *In from the Cold*, is an important book that merits careful attention. It is both thoughtful and thought-provoking on an impressively wide range of theoretical and practical issues. Furthermore, it is well-written, carefully documented, meticulously researched, and supported by an extensive bibliography. As a result, the authors will likely encourage deep reflection about both the processes and the principles of national security governance in parliamentary democracies.

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## Endnotes

1. See Richard Norton-Taylor, *In Defence of the Realm: The Case for Accountable Security Services* (London: Civil Liberties Trust, 1990) and Patrick Birkinshaw, *Reforming the Secret State* (Milton Keynes, UK: Open University Press, n.d.).
2. See Peter Gill. *Policing Politics: Security Intelligence and the Liberal Democratic State* (London: Frank Cass, 1994).