Securing our Freedoms

Senator the Hon George Brandis QC
Attorney-General of Australia

Speech to the Center for Strategic and International Studies

Washington DC

Tuesday 8 April 2014

May I begin by thanking the Centre for Strategic and International Studies for its hospitality in hosting this address? This is one of the world's most famous and influential centres for the study of international relations and the contemporary challenges of international politics. I am honoured to have the opportunity to speak at so illustrious a venue.

Today, I want to make some observations on the challenges facing democratic nations in protecting their populations from, and thwarting, those who would do us harm. I want to do so, in particular, from the perspective of the importance of information. For there can be no doubt, as all of you know, that there is no more important capability in thwarting terrorism than the collection of intelligence which can anticipate and stop terrorist events - whether State-sponsored; sponsored by non-State actors; or so-called lone wolf events.

Before passing on to my topic, however, let me begin by saying a few words about the relationship between my country Australia, and the United States of America. Yours is the country most Australians most admire. It is not an uncritical admiration, for the admiration of close friends never should be. But the majestic, untidy, inspiring, frustrating, show-stopping spectacle that is American democracy is one of the greatest achievements of mankind in the modern age.

As, in the months ahead, we pause to mark a baleful anniversary - the centenary of the commencement of the First World War - we should never forget that, in the course of that century, Australians and Americans fought side by side in every major war: the First World War, the Second World War (the Pacific War was directed, during its most perilous period, from General Macarthur's headquarters in my own home town, Brisbane; and Macarthur was quartered in a stately home only a couple of blocks from where I live); the Korean War; the Vietnam War; the Gulf War; the Iraq War; the Afghan War. Alone among the nations, Australians have fought beside you in every one of those conflicts. For more than 60 years, our security has been underwritten by one of your most longstanding treaties - the ANZUS alliance - invoked by the Australian government, for the first time, in the dark days after September 11 2001.

So Australians and Americans have much to be grateful to one another for: as brave comrades and as close friends. As you know, last year there was a change of government in Australia, and my party - the party of Robert Menzies and John Howard - was returned to government. But the view of the alliance, which I have expressed, is completely bipartisan. There could be no better proof of that than the presence here today of Australia's much-loved ambassador to the United States, my friend Kim Beazley, who in his Parliamentary life led the other side of politics - the party of John Curtin and Bob Hawke - but today represents in Washington the whole of the Australian people on behalf of the new government of Prime Minister Tony Abbott.

I spoke just before of the great conflicts of the past century, in which our soldiers, sailors and airmen fought side by side and shed their blood for one another. In every one of those wars, our countries were reluctant participants. We fought to uphold the principles and values upon which our political systems are constructed and on which our societies are based: to defend them when we ourselves, or our allies, were attacked, and to extend them to the people of other lands.

Nobody has better captured those values than President Wilson, when he said in his speech to Congress on April 2 1917, seeking a Declaration of War against Germany:

> *"we shall fight for the things which we have always carried nearest our hearts - for democracy, for the right of those who submit to authority to have a voice in their own governments, for the rights and liberties of small nations, for a universal dominion of right by such a concert of free people as shall bring peace and safety to all nations and make the world itself at last free."*

As is true of every generation, today the threats to freedom come from many sources. And, as nobody knows better than the people in this room, there is none more pervasive and insidious than terrorism. It has become commonplace to speak of the 'war' on terrorism - a metaphor much used, although not invented, by the second President Bush. And while there are important commonalities between terrorism and conventional forms of war, there are obvious differences as well. The most important, particularly in the age of the Internet, is invisibility. Terrorists marshal no armies. Their organizations are amorphous and mutable. Their warriors are lonely fanatics, not professional soldiers. And, for that very reason, the task of anticipating them is much more challenging.

Not that this is a new phenomenon. It was, after all, a single terrorist, Gavrilo Princip, who on June 28 a century ago precipitated the Great War in Europe when he assassinated the Archduke and Archduchess of Austria on a Sarajevo street. Margaret Macmillan, in her magnificent new study of the causes of the First World War - *The War That Ended Peace*, writes of the Young Bosnians and their terrorist organization, The Black Hand, as "mostly young Serb and Croat peasant boys who had left the countryside to study and work in the towns and cities. While they had put on suits in place of their traditional dress ... they nevertheless found much in the modern world bewildering and disturbing. It is not hard to compare them to the extreme groups among Islamic fundamentalists such as Al Quaeda a century later," Professor Macmillan writes. [pp. 513-4]

Of course, the Austro-Hungarian Empire had an extensive network of spies and informers. Its police kept the activities of The Black Hand under surveillance, and there is evidence that Princip was known to them. But they did not pick up his visit to Sarajevo that fateful Sunday.

Now, as then, information is the key. The difference between the world on the eve of the Great War, and the world of today, is that there is so much more information, and so much more communication. Terrorists no longer plan their crimes over hushed conversations in coffee shops (although no doubt some still do). The sheer volume of information, and the internationalization of terrorist networks mediated through modern telecommunications, poses huge challenges for national security agencies, in terms of resourcing alone. But intercepting and correctly analysing that traffic is at the heart of the global counterterrorism response.

Yet, as we are all well aware from the heated public debate in both of our countries, following the Snowden revelations, the question of the extent to which the state should invade the privacy of its citizens by the collection of intelligence will always be a controversial one. Some, usually those with a better informed appreciation of the capabilities and danger of sophisticated modern terrorism, would wish for fewer limitations on intelligence gathering, in the name of public

safety. Others, most commonly those who do not bear responsibility for the protection of the public and who have the luxury of approaching the question from a largely philosophical or legalistic perspective, argue that there should be much wider limitations upon the collection of intelligence. However there are few - very few - who take the absolutist position that either there should be no collection of intelligence, or alternatively no limitations on its collection.

The governments of both of our countries have struggled with this issue in recent months. By the way, it is only liberal-democratic states which *would* struggle with the issue at all: in the authoritarian systems which beget the terrorism from which we seek to defend our selves, there would be no such argument. But, as Aharon Barak, the former President of the Supreme Court of Israel, famously remarked in 2005, democracies fight terrorism with one arm tied behind their backs.

Australia has closely watched the evolution of this debate in the United States, and I have studied with care, and during my visit to Washington had many conversations about President Obama's Presidential Policy Directive of 17 January. Australia welcomes the President's clarification of American intelligence collection policies embodied in that directive. That is not to say, of course, that Australia would necessarily have resolve these policy choices in the exactly the same way. Every country's needs and circumstances are peculiar to it.

In the post-Snowden environment, one thing which remains just as critical as it has ever been – indeed, even more critical – is that longstanding allies remain committed to their close co-operation in intelligence-gathering and intelligence-sharing. Along with our friends in the United Kingdom, Canada and New Zealand, Australia and the United States are part of the quintet of Western democratic nations which have for many years collaborated intimately in such matters. That collaboration must continue unaffected by the Snowden fall-out and I am confident that it will.

I am not, in the course of theses remarks, going to attempt to tackle the deep ethical and legal issues at stake concerning intelligence-gathering, let alone to comment on domestic American politics. As a lawyer, I have a bred-in-the-bone respect for due process and civil liberties. But I must confess frankly that, as the minister within the Australian system with responsibility for homeland security, the more intelligence I read, the more conservative I become. The more deeply I come to comprehend the capacity of terrorists to evade surveillance, the more I want to be assured that where our agencies are constrained, the threat to civil liberty is real and not merely theoretical.

I turn, then, to address some of the policy issues which confront us in the collection and use of intelligence in the cause of defending our populations from terrorism. Those issues all point to the critical importance of Australia and the United States continuing to act as close and collaborative partners, as we always have done in the past.

The events of September 11, 2001 reshaped the counter terrorism landscape. Amongst the many people who lost their lives that day were 10 Australians. While this pales in comparison to the number of American casualties, it demonstrates that this was an attack on Australia as well – as it was on the dozens of other nations whose citizens were murdered that day. Its effect was to profoundly challenge our own national security philosophies.

By a bizarre coincidence, the then Australian Prime Minister John Howard was in Washington on 9/11, to commemorate the 50th anniversary of the ANZUS Treaty, the bedrock of our alliance which had been negotiated between the Truman Administration and the Menzies Government half a century before. Three days later, in response to the September 11 attacks, the Australian Cabinet invoked Article IV of the ANZUS Treaty for the first time, signalling Australia's intention to support the US in efforts to bring those responsible to justice. In doing so, Prime Minister Howard declared the terrorist strikes to be an attack not only on the US, but on Australia and indeed against other Western nations in general.

Barely a month later, on 17 October 2001, 10 days after the US announced the commencement of "Operation Enduring Freedom" against Taliban Forces in Afghanistan, Prime Minister Howard committed 1550 Australian military personnel to assist in the international effort. Our partnership in Afghanistan and Iraq resulted in a new level of collaboration between Australia and the United States. In a July 2003 report, the Australian Strategic Policy Institute (ASPI) noted:

> " *...the events of September 11 mark a fundamental turning point in the dynamics of the US-Australia relationship, with a much strengthened trend to an even deeper and closer alliance than before*."

Over the decade or more since 9/11, some commentators began to suggest that terrorism no longer posed as significant a threat to national security as it once did. That view is simplistic and frankly wrong. While there is some evidence that we are witnessing a shift in terrorism tactics and techniques from large-scale, September 11 style attacks to 'lone-actor', smaller-scale, multi-mode attacks, a change of terrorist tactics if that is what is occurring, is not equivalent to a diminution of the terrorist threat.

In fact, such a shift in tactics creates significant new difficulties for law enforcement and intelligence agencies in identifying 'lone-wolves' who, due to their autonomous activities, are less likely to attract the attention of law enforcement and security agencies during the planning phases of their operations. Such tactics were vividly demonstrated in Boston as well as in the United Kingdom last year.

Countries must continue to work together against the global terror threat wherever it is originating, and not simply view threats and vulnerabilities as local versus international. There is much evidence to suggest that so called home-grown or regional threats are influenced, if not directly assisted, by offshore events and groups.

More than any other recent conflict, Syria - and the terrorist activity and training that are taking place behind the fog of the Syrian civil war - highlight not only that the global threat of terrorism remains undiminished, but that it will continue to evolve and leave a range of legacy issues over the short to medium term. Terrorists will continue to adapt and look to new technologies and changing, volatile global situations.

As terrorist tactics and operational doctrine evolve, security agencies must develop and maintain effective capabilities in order to mitigate the ongoing threat.

I am sorry to have to tell you that per capita, Australia is one of the largest sources of foreign war fighters to the Syrian conflict from countries outside the region. On 3 December 2013, two Sydney men were arrested and charged with foreign incursion-related offences as part of a Joint Counter Terrorism Team investigation carried out by Australian police and Australian authorities who continue to monitor recruitment, facilitation and financing of terrorist activity in Syria from Australian sources.

We also know that Australians are taking up senior leadership roles in the conflict. This shows that as a nation we need to address this issue early, in order to prevent individuals from travelling to participate in that and other foreign conflicts. This is, of course, not a new concern for Australia, nor other countries. Between 1990 and 2010, the Australian Government investigated at least 30 Australians who travelled to conflict areas such as Pakistan and Afghanistan to train or fight with extremists. 19 engaged in activities of security concern in Australia upon their return, and eight were convicted in Australia of terrorism-related offences and sentenced to up to 28 years in prison.

While not new, the difference is the scale of the problem. The number of Australians participating in the conflict in Syria is higher than we've experienced with previous conflicts, with assessments of between 120 and 150 Australians travelling to the greater Syria region to participate in the conflict. In mid-2013, the conflict reached a new milestone as the number of foreign fighters exceeded that of any other Muslim conflict in modern history.

The Australian Government is currently considering a number of measures to discourage and deter Australians from travelling to Syria to participate in the Syrian civil war and undertake training. These measures broadly come under four headings:

1. **Disruption**—stopping individuals from travelling or facilitating the travel of others or otherwise providing support to the conflict;

2. **Response**—responding to individuals who have travelled to Syria;

3. **Risk management**—managing the risk of those who have been prevented from travelling, or those who have travelled and returned; and

4. **Prevention**—reducing the pool of those who might seek to travel or participate in the conflict.

I cannot stress enough that international engagement, intelligence collection and information sharing will continue to be vital to this effort.

The Syrian civil war is significant, not only because Syria has now become one of the most important centres of terrorist activity, but also because it reminds us of the pervasiveness, mobility and ambition of modern Islamist terrorism. It is yet another reminder to the democratic world of the intractability of the terrorist threat. This problem will not just go away and peaceful nations must never become complacent or lower their guard against the threat that terrorism posses. They must remain vigilant, committed and cooperative in their joint efforts to defeat it.

What does this mean for our future? Forecasting is an attempt to predict tomorrow from the ripples of the past and the events of the present. But the direction of history is never lineal, and it is often random, unpredictable events which change the course of history. Think of June 28 1914 in Sarajevo, or indeed September 11 2001 in New York and Washington. Some people call these events 'black swans'. While we justify their occurrence in hindsight, they profoundly change our calculations of risk. 'Unknown unknowns,' as Donald Rumsfeld might have said.

I believe that Australia and the United States are better placed than at any time to respond to hostile events both predictable and random. Experience from events like September 11 means that our national security structures are more agile, our information sharing mechanisms are more sophisticated and our policy is focused on building resilience and implementing prevention strategies instead of just responding to singular threats or mere responding to events after they have taken place.

We need to ensure our arrangements, capabilities, legislation and relationships are significantly well developed and maintained to enable us to deal with our future national security environment defined by both identified risks and unidentified contingencies.

The dangers which I have described are the principle reason why the compromise of our intelligence by Edward Snowden was so profoundly damaging to the interests of both of our countries. The massive damage which Snowden's disclosures caused was at two levels. Obviously, the revelation of intelligence content was hugely damaging to our interests. But no less concerning – indeed, arguably even more damaging – was what those disclosures potentially revealed about our capability. The problem of 'going dark' has been raised in recent years. 'Going dark' refers not to the absence of legal authority to conduct interception, but the practical difficulties in obtaining information.

People who pose national security threats are using disclosed information to update their methods and avoid detection by our agencies. Criminals similarly use the information to avoid detection and prosecution. Capability, which can be decades in development and expect to enjoy a significant operational life expectancy, may be potentially lost over night. Replacing capability after a set-back is not a fast process and attracts substantial cost. The harms of the Snowden disclosures will continue to be felt for an unpredictable time to come.

I know some people naively claim that Snowden is a whistleblower. That claim is profoundly wrong. As *The Economist's* senior editor Edward Lucas points out in his recent book *The Snowden Operation,* Snowden meets none of the criteria of a whistleblower. According to a widely-accepted series of tests developed by the Princeton scholar Professor Rahul Sagar, in his book *Secrets and Lies*, there are three principal criteria which define a whistleblower.

> **First**, a whistleblower must have clear and convincing evidence of abuse.
>
> **Second**, releasing the information must not pose a disproportionate threat to public safety.
>
> **Third**, the information leaked must be as limited in scope and scale as possible.

Lucas concluded: "*Snowden has failed all three of these criteria*". I agree.

Snowden is not a genuine whistleblower. Nor, despite the best efforts of some of the gullible self-loathing Left, or the anarcho-libertarian Right, to romanticize him, is he any kind of folk hero. He is a traitor. He is a traitor because, by a cold-blooded and calculated act, he attacked your country by significantly damaging its capacity to defend itself from its enemies, and in doing so, he put your citzen's lives at risk. And, in the course of doing so, he also compromised the national security of America's closest allies, including Australia's.

So I agree Hillary Clinton's assessment of the consequences of his Snowden's conduct, when she said recently:

> "*It puts people's lives in danger, threatens our national security, and undermines our efforts to work with other countries to solve shared problems*."

Despite these threats and setbacks, it remains the case that liberal democracies like the US, UK and Australia lead the way in upholding values of individual liberty.

Significantly, the fundamental principles of governments upholding individual freedoms and ensuring national security do not have to be mutually exclusive. Instead, they should be seen as mutually complimentary – without security there can be no freedom. In his Jefferson Oration in Virginia on 4 July 1963 entitled 'The Battle for Freedom', Sir Robert Menzies, the Prime Minister of Australia stated:

> "*American history has reconciled both conceptions. For it has been your glorious destiny, notably in the turbulent years of the twentieth century, to evolve a system in which national power has grown on the basis of a passionate and Jeffersonian belief in individual freedom*."

That attitude should always be the starting point in any debate about the perennial question of where, particularly at times of threat and danger, the balance is to be struck between the protection of public safety and the freedom of the individual. And it remains liberal democracies that continue to achieve that balance correctly today. No matter what the era, the most stable, open and transparent countries are liberal democracies, not those under authoritarian rule.

Many of the threats we face today are variations of known themes—military conflict, terrorism, crime or espionage. But globalisation and technological advancements mean the threats have evolved and that the challenge is now about international security, not just national security. Once more, we can expect them to continue evolving into the future. Most likely in ways we cannot entirely envisage today.

So, in the face of ever changing circumstances, how can we make a real difference in shaping our national security environment?

First, we must realise that no nation, no matter how large or powerful, can disrupt and prevent threats to global security alone. We must continue to work together and build large partnerships to counter the threat posed by those who would do us harm, whether offline or online. Our strength lies in our alliances and relationships with close and trusted partners. I believe there is no more important partner for Australia than the US and that the US has no readier or better friend than Australia.

However, the partnership cannot afford to only react to threats. In the current global environment, and post-Snowden period, there is a risk democratic states will play a waiting game. We cannot afford to simply wait for the next world-changing event and then espouse how similar it really was to previous moments – this will only play into the hands of our adversaries, most likely be more expensive in the long term and risk the individual freedoms for which we have worked so hard.

The Australian Government is strongly committed to ensuring that Australian national security agencies have the resources they need to continue to achieve the significant outcomes we have experienced in protecting our most fundamental human rights—the right of our people to life, liberty and security of person.

We must continually work to address the gaps between technological progress and policy. This is true for all work of governments, but particularly so in the area of national security. Just as the technology employed by terrorists, agents of espionage and organised criminals adapts and advances, so too must the capabilities and powers of our law enforcement and security agencies. But this must always be done with the highest regard to ensuring proportionality to the threat and continued testing and maintenance of oversight mechanisms.

While our countries have different systems, we both share a commitment to individual freedoms. Progress in this area does not have to diminish our collective security, but can ensure appropriate oversight and smallest necessary encroachment on individual rights.

In a 2005 interview, former US National Security Adviser, Brent Scowcroft, said:

> *"America has never seen itself as a national state like all others, but rather as an experiment in human freedom and democracy."*

Australia is a much younger nation than the US, but our societies have evolved from common traditions. We share the same fundamental democratic values. Prime Minister Tony Abbott said of the United States during President Obama's visit to Australia in 2011, "*no country on the earth has done more for the world*".

For both of us, the liberty, as well as the security of our peoples, lie at the heart of national policy. We Australians will continue to work in close partnership with the American friends and allies to protect those values and to thwart those who would make it their cause to destroy our freedoms and to tear down our democracy.

For as Australians and Americans both know, we whose societies and systems had their inception in the values and optimism of the enlightenment will always prevail over the dark forces which would seek to do us harm.