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Anti-Terrorism Legislation in the United Kingdom and the United States: A Comparative Analysis

By

Rhian Mai Williams, LLB (Hons),
of the Inner Temple, Barrister

A thesis submitted in fulfilment of the requirements for the degree of Doctor

of Philosophy by the University of Wales, Swansea

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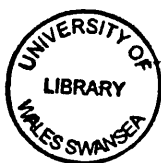
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Acknowledgements

I would like to express my gratitude to my supervisor Professor T. H. Jones for his guidance, support and assistance throughout this project. I am also extremely grateful to Ms R. S. Costigan for her assistance in reading drafts of various chapters and for her comments and suggestions. At this point, I would also like to mention the late Mr R. Townshend-Smith who was a source of constant support during my time at Swansea, expressing confidence in my ability and enthusiastic encouragement regarding my decision to pursue this research.

I would like to express my thanks and appreciation to my friends in the Examinations Office, Ifor Hughes, Jacqui Walsh and Sonja Hancock for keeping me from the breadline and for making work something I always looked forward to.

Thanks to all of those who provided the excuse to leave the library, for tea, lunch, basketball and the gym, amongst other reasons: Joey, Clare, Gareth P., Owen, Jon, Padders, Pat, Mas and Kath M. A special mention must go to Morty, Clem, Kay and Craig for the sangria nights, the rugby days and most of all their friendship.

I would also like to express my love and thanks to my parents, Dianne and Mansel and my sister, Caryl for their continued support throughout all of my studies, for being patient with my prolonged life as a student, for the financial assistance and the regular care packages. Finally, I must thank Steve for his love and support throughout, for his computer wizardry, the "crisis meetings", and for making everything so much fun.

In loving memory of Mamgu Moos, Annie Mary Lloyd, who always wanted a doctor in the family.

Abstract

The threat posed by terrorism and the need to counter it tends to produce a cycle of action and reaction in which democracies often find themselves. The on-going threat perpetuates this cycle with the effect that more legislation is enacted, often without achieving increased security. Instead what tends to occur is the normalisation of emergency measures, the erosion of rights and liberties and ultimately the risk of the country becoming less democratic.

This cycle can be said to be in existence in the United Kingdom and the United States in seeking to deal with the current terrorist threat. This thesis examines, in a comparative context, the extent to which the side effects of this cycle have occurred in both countries. This is done through examination of the extent to which the rights and liberties of the individual are restricted by the response to terrorism, namely the Terrorism Act 2000 and the Anti-Terrorism, Crime and Security Act 2001 in the UK and the Anti-Terrorism and Effective Death Penalty Act 1996 and the USA PATRIOT Act 2001 in the US. In so doing, it examines the hypothesis that with regard to the legislation in question, interference with the rights and liberties examined in the UK is greater than in the US due to the profusion of legislation enacted in response to the protracted domestic terrorist struggle and the subsequent erosion of these values.

Consideration is given to the previous terrorist threat and the response of each country in examining the condition of democratic values prior to the period under examination. This allows comparison with the impact of the current legislation on these values, whereby it can be seen that whilst some amount of restriction of fundamental rights and liberties has occurred in both countries, this cannot be said to be greater in the UK. The democratic foundation of each country remains intact, thereby providing the best form of protection against terrorism.

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Abbreviations

AEDPA	Anti-Terrorism and Effective Death Penalty Act 1996
ALF	Animal Liberation Front
ATCSA	Anti-Terrorism Crime and Security Act 2001
AUMF	Authorisation of the Use of Military Force
BLF	Black Liberation Front
CIRA	Continuity Irish Republican Army
CJTCA	Criminal Justice Terrorism and Conspiracy Act
CSA	Covenant, Sword and Arm of the Lord
DPP	Director of Public Prosecutions
ECHR	European Convention on Human Rights and Fundamental freedoms
ECPA	Electronic Communications Privacy Act
ELF	Earth Liberation Front
EPA	Northern Ireland (Emergency Provisions) Act
FAA	Federal Aviation Administration
FALN	Armed Forces of National Liberation
FARC	Revolutionary Armed Forces of Columbia
FBI	Federal Bureau of Investigation
FISA	Foreign Intelligence Surveillance Act
FISC	Foreign Intelligence Surveillance Court
FTO	Foreign Terrorist Organisation
GPO	General Post Office
HEP	People's Labour Party
HLP	Humanitarian Law Project
HRA	Human Rights Act 1998
ICCPR	International Covenant on Civil and Political Rights
INA	Immigration and Nationality Act
INLA	Irish National Liberation Army
IRA	Irish Republican Army
IRB	Irish Republican Brotherhood
IRSP	Irish Republican Socialist Party
JCHR	Joint Committee on Human Rights
LeT	Lashkar e Tayyabah
LVF	Loyalist Volunteer Force
M19CO	May 19th Communist Organisation
NAACP	National Association for the Advancement of Coloured People
NUPRG	New Ulster Political Research Group
OIRA	Official Irish Republican Army
OVRP	Organisation of Volunteers for the Puerto Rican Revolution
PACE	Police and Criminal Evidence Act 1984
PFLP	Popular Front for the Liberation of Palestine

PIRA	Provisional Irish Republican Army
PKK	Kurdistan Workers Party
PLO	Palestinian Liberation Organisation
PMOI	Peoples Mojahedin Organisation of Iran
POAC	Proscribed Organisations Appeal Commission
POW	Prisoner of War
PTA	Prevention of Terrorism (Temporary Provisions) Act
PUP	Progressive Unionist Party
RIPA	Regulation of Investigatory Powers Act
RSF	Republican Sinn Fein
RUC	Royal Ulster Constabulary
SDLP	Social Democratic Labour Party
SDS	Students for a Democratic Society
SHAC	Stop Huntingdon Animal Cruelty
SIAC	Special Immigration Appeals Commission
SIACA	Special Immigration Appeals Commission Act 1997
SLA	Symbionese Liberation Army
SNLA	Scottish National Liberation Army
TA	Terrorism Act 2000
TIPS	Terrorist Information and Prevention System
UDA	Ulster Defence Association
UFF	Ulster Freedom Fighters
ULDP	Ulster Loyalist Democratic Party
USA PATRIOT Act	Uniting and Strengthening America By Providing Appropriate Tools Required to Intercept and Obstruct Terrorism
USC	United States Code
UVF	Ulster Volunteer Force
WU	Weather Underground

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Chapter 1

Introduction

Introduction

The British political and social landscape has been scarred for decades by the phenomenon of terrorism and its use at the hands of different actors. Overwhelmingly, Irish Nationalist terrorism has played the dominant part in this violent history, with sporadic appearances from other, less prolific organisations. This bloodshed has not occurred in the United Kingdom in isolation. The United States has also experienced violence at the hands of domestic organisations, on an ever present, albeit small scale and more frequently by international actors both at home and abroad. Recent years have witnessed the expansion of international terrorism, with Al Qaeda and Osama Bin Laden becoming synonymous with the growth of Islamic fundamentalism. The latter part of the twentieth century and the early part of this saw this form of terrorism reach all parts of the globe, most notoriously, the United States, when on September 11th 2001 over 3,000 people lost their lives in the single worst terrorist atrocity. This threat has continued with the recent events of July 7th 2005 in London, which saw the use of the suicide bomber for the first time in Western Europe.

The response to this phenomenon varies from country to country. The United Kingdom has enacted various powers through specialist anti-terrorism legislation in an attempt to counter the threat. Indeed, in the latter half of the twentieth century, renewals of the Prevention of Terrorism (Temporary Provisions) Act 1974 (PTA) in 1976, 1984 and 1989 as well as the enactment of the Criminal Justice (Terrorism and Conspiracy) Act 1998 culminated in the permanent Terrorism Act 2000. This was followed by the enactment of the Anti-Terrorism, Crime and Security Act 2001 and more recently by the Prevention of Terrorism Act 2005 resulting in a comprehensive, and arguably draconian, body of law. Alternatively, in the United States terrorism on US soil was, until recently, dealt with under the ordinary criminal law, rather than by way of specialist legislation; indeed, the perpetrators of the World Trade Centre bombing in 1993 were tried and convicted under the regular federal law. It was only with regard to international terrorism that legislation was enacted. For example, jurisdiction was conferred on United States courts in cases where foreign nationals were involved in acts of international terrorism anywhere in the world against an

American citizen by way of the Omnibus Diplomatic Security and Anti-Terrorism Act 1986.[1] The Anti-Terrorism Act 1987[2] dealt with the closure of the Palestinian Liberation Organisation's (PLO) Permanent Observer Mission to the United Nations.

The traditional approach of each country changed with the United Kingdom enacting permanent anti-terrorism legislation, the Terrorism Act 2000, to replace the temporary status of its predecessors. In the wake of the Oklahoma City bombing of 1995, the United States enacted specialist anti-terrorism legislation for the first time, the Anti-Terrorism and Effective Death Penalty Act 1996 (AEDPA). However, the response of both countries went further than this following the events of September 11th, with both enacting far-reaching emergency legislation, in the form of the Anti-Terrorism, Crime and Security Act 2001 (ATCSA) and the USA PATRIOT Act 2001.[3] This tendency to legislate in the aftermath of a terrorist incident is similarly evident from the response to the July 7th attacks, where it is claimed that new legislative provisions are necessary despite the extensive body of law currently on the statute books.[4]

This abundance of legislation, as well as certain executive actions such as the detention of individuals as part of the war on terror, represents the current response of both countries to the ongoing terrorist threat. Terrorism is of course not unique to these nations, with attacks occurring all over the world. However, the high profile of the September 11th attacks and the position of the UK and US as leading world powers have placed the legislative and executive actions of each country subsequent to the attacks under scrutiny. Indeed, as leading democracies both countries stand as examples to less developed and democratic states, particularly with regard to upholding human rights and personal freedoms.

The values which form the basis of liberal democracy equate to the antithesis of terrorism. These include the notions of freedom, tolerance and pluralism; equal treatment, the freedom to talk and worship freely, the right to be free from government interference, the ability to influence change through legitimate political

[1] Pub. L. No. 99-399, codified in various sections of 22 USC.
[2] 22 USC 5201-5203.
[3] The full title of this legislation is the Uniting and Strengthening America by Providing the Appropriate Tools Required to Intercept and Obstruct Terrorism Act 2001.
[4] HC Debs. vol. 436 col. 1253 – 1254 (20th July 2005).

dissent and the right to vote in democratic elections. These features help to prevent the growth of terrorism by providing an atmosphere which is not conducive to the growth of those tensions and conflicts which often incite terrorist violence. Indeed, maintaining the health of democracy is seen as paramount in defeating the threat posed by terrorism, as a means of guaranteeing fundamental rights and democratic values. However, attempts to protect the state against such violence through the enactment of legislation often result in the abrogation of these values. In this way terrorism not only challenges the security of the state but also threatens the fabric of democracy. Indeed in attempting to prevent the next attack, overcome the threat posed and be seen to be reacting, it is almost inevitable that the actions of democratic society will result in some degree of interference with the rights and liberties of the individual. In addition, the steps taken can have the effect of damaging those features of democracy, such as a free press or the opportunity to assemble and speak freely, which help to prevent the growth of terrorism. It is undeniable that a country must have the ability to defend itself in the face of such a threat so as to protect the mechanisms of the state, the rights of the citizenry and in this way, democracy itself. However, any response to terrorism must mitigate the impact on the rights and liberties of the individual by way of compliance, so far as possible, with recognised human rights standards. In addition, any resultant infringement must be justified by ensuring the efficacy of the measures enacted and their utility in preventing and punishing terrorist violence.

The nature of the threat posed by terrorism and the need to counter it tends to produce a cycle of action and reaction in which democracies often find themselves. This describes the United Kingdom's experience with terrorist violence over the past forty years. As this cycle continues, more measures are undertaken and more legislation is enacted in an attempt to counter the threat, often without the result of increased security. Instead what tends to occur is the normalisation of emergency measures into society and the legal system, the erosion of rights and liberties and ultimately the risk of the country becoming less democratic in taking actions which attempt to protect the democratic way of life and counter terrorism.

This cycle can be said to be in existence in both the United Kingdom and the United States in seeking to deal with what is currently a predominantly Islamic extremist

threat. This thesis seeks to examine, in a comparative context, whether, and to what extent, the side effects of this pattern have occurred in both countries with the result that the values of democracy have been curtailed. In both jurisdictions legislative measures play a role central to the response to the current threat. This thesis considers this response as an attempt to both counter the terrorist threat and protect the fabric of democracy in this contemporary context. This is done by examining the extent to which the rights and liberties of the individual are restricted by the response to terrorism in both countries and the extent to which an effective balance is struck with these values in an attempt to ensure the security of the nation through legislative action. This is considered in the United Kingdom by way of the Terrorism Act 2000 and the Anti-Terrorism, Crime and Security Act 2001, with some reference to the Prevention of Terrorism Act 2005. In the United States the legislation under analysis is the Anti-Terrorism and Effective Death Penalty Act 1996 and the USA PATRIOT Act 2001, with consideration also given to the power of executive detention utilised as part of the war on terror. It also examines the hypothesis that with regard to the legislation in question, interference with rights and liberties examined in the UK is greater than in the US due to the profusion of legislation enacted over the years in response to the protracted domestic terrorist struggle and the subsequent erosion of these values. An additional consideration is whether, in enacting specialised anti-terrorism legislation, the United States has learnt from the United Kingdom's experience with, and response to, a longstanding terrorist threat.

For a country such as the United Kingdom, with a long and troubled past regarding political violence and the appropriate response to it, it can be easy for consideration and analysis of the problem to be carried out from a somewhat insular viewpoint. Comparison with another jurisdiction provides a different perspective. In addition, analysis of the position in another country allows for a wider consideration of the use of the law in responding to terrorism. Several reasons are submitted as justification for the use of the United States as a comparator. Its position as a common law democracy allows comparison with the United Kingdom despite the differences in political culture between the two; indeed elected legislatures, a multiparty tradition and adherence to the rule of law form a foundation of political similarity. In addition, the derivation of the US legal system from its English predecessor results in further affinity, as does the strong tradition of fundamental rights and liberties. Further

justifications can be advanced in the form of differences between the two. Firstly, each country has had a distinct experience with regard to terrorism in the past, in source, form and prevalence, which is set out in Chapters 2 and 3. In addition, prior to the US enacting specific anti-terrorism legislation in a similar vein to that in place in the UK, there existed a divergence in the approach taken in each country with regard to terrorism.

Responses to terrorism have traditionally impacted upon the rights of freedom of expression and association, personal liberty, and due process. The experience of the United Kingdom in this area, with core powers such as that of arrest without warrant, extended detention, internment, exclusion orders and proscription verifies this. The modernisation of technology, specifically in the area of communication, and the use to which such technology has been put by terrorist organisations has extended the list of rights potentially affected by legislative measures to include the right to privacy.[5] It is against this backdrop that analysis of the legislation is carried out. Such an approach has been taken in order to consider the status of these rights in the face of attempts by democracies to counter the terrorist threat, given their existence as an intrinsic element of democratic society. Indeed, this allows a comparison to be drawn between both countries with these democratic values as the benchmark. It is this commonality of spirit which enables this analysis to be carried out in a comparative way. This is in spite of the fact that the human rights implications of legislative provisions and executive actions are assessed under different instruments in each country; namely the European Convention on Human Rights and Fundamental Freedoms (ECHR) by way of the Human Rights Act 1998 in the United Kingdom and the Constitution in the United States.

Chapter 2 provides an overview of the history of political violence in the UK, namely that emanating from Northern Ireland, indigenous, special interest and international terrorism, as the backdrop to the development of the law in this area. The chapter goes on to consider the main provisions of the legislation enacted between 1974 and 2000 in the United Kingdom, namely the Prevention of Terrorism (Temporary Provisions) Act 1974, as re-enacted in 1976, 1984 and 1989 as well as the Criminal

[5] Under article 8 ECHR, as conferred by the Human Rights Act 1998.

Justice (Terrorism and Conspiracy) Act 1998. In addition, consideration is given to internment and the suspension of the right to trial by jury utilised in Northern Ireland. This approach is mirrored in chapter 3 with regard to the United States. The chapter discusses the various waves of terrorism experienced in the US, namely left wing, right wing, special interest and international terrorism. The chapter then provides an overview of the measures utilised in the US prior to the enactment of the legislation under examination, namely international co-operation, the establishment of governmental committees, use of the military and the enactment of legislation. This enables consideration of the development of each country's approach to countering terrorism over the years and allows a correlation to be drawn between the threat faced, the measures utilised and the resultant condition of democracy.

The right to privacy is the lens through which the legislation is viewed in Chapter 4. This considers the United Kingdom legislation in the first half of the chapter, namely those provisions of the ATCSA relating to the retention of communications data in Part XI and the disclosure of information in Part III. The latter half of the chapter begins with an overview of the right to privacy in the United States and the Fourth Amendment with particular consideration to its status with regard to electronic surveillance. It goes on to analyse the extensive provisions of the USA PATRIOT Act in the field of surveillance and access to communications data.

The same structure is applied to Chapter 5 and examination from the perspective of the right to freedom of expression. The provisions of concern in this regard are the power of proscription and related offences contained in the Terrorism Act as well as that related to the disclosure of information, inserted into the TA by the ATCSA. The chapter goes on to consider those rights guaranteed by the First Amendment to the Constitution and the jurisprudence of the Supreme Court in establishing the standard against which restrictions on freedom of expression are tested. This is utilised with regard to the designation of foreign organisations and related offences under the AEDPA as well as the deportation and exclusion of foreign nationals under the AEDPA and the USA PATRIOT Act.

Chapter 6 examines the liberty of the individual and the procedure applied to those detained under the legislation in both countries. Detention following arrest without

warrant under the TA is considered, as is the potentially indefinite detention of non-British citizens under part IV of the ATCSA. This is followed by consideration of due process under the US Constitution. The chapter goes on to analyse the detention and removal under the AEDPA of aliens suspected of involvement in terrorism and the power of preventive detention of non-citizens, enacted in the USA PATRIOT Act in a similar vein to the ATCSA.

Detention and due process are discussed further in Chapter 7 in the context of executive action by the US government as part of the war on terror. Brief consideration of the "enemy combatant" classification is provided and of the use of this concept by the government with regard to those persons detained as part of the war on terror. The liberty of those classified under this label and the procedure applied is examined from the perspective of two such detainees, Yaser Esam Hamdi and Jose Padilla, both of whom are United States citizens. Hamdi was captured on the battlefield in Afghanistan and later transferred to detention in the US, whilst Padilla was seized on US soil. This chapter also considers the case of those detained at Guantanamo Bay, Cuba, fourteen of whom took legal action against the US government. All petitioned the Supreme Court and this chapter analyses the arguments in relation to their cases and attempts to predict the ruling of the court. An addendum to the chapter details the court's subsequent decisions in three cases and considers the flaws contained therein.

The concluding chapter draws together the threads of those preceding to produce a final consideration of the position of these fundamental rights and liberties and the condition of democracy in both countries, in light of both the legislative provisions and the executive action taken in recent years in the name of defeating terrorism. Following analysis of the conclusions of the antecedent chapters, consideration is given to wider issues. The chapter considers the use of legislation with regard to the current threat posed by militant Islamic fundamentalism. It contemplates the legal landscape since the attacks of September 11th 2001 and the current climate following the events of the 7th and 21st July 2005 and their aftermath.

Chapter 2

The Terrorist Threat and Anti-Terrorism Legislation in the United Kingdom Prior to 2000

The Terrorist Threat and Anti-Terrorism Legislation in the United Kingdom Prior to 2000

The experience of the United Kingdom with regard to terrorism has been one focused in the domestic arena, and dominated by the conflict in Northern Ireland. Threats emerged from other sources though they were never of such magnitude as to warrant the level of action taken in response to the violence emanating from Northern Ireland. Indeed the legislation enacted prior to 2000 was primarily confined to Northern Irish terrorism, with some later amendments taking account of other emerging threats, such as international terrorism. Legislative enactments dominated the United Kingdom's response to terrorism and resulted in an extensive body of anti-terrorism law, which had the effect of affecting fundamental rights and democratic values to differing extents in Great Britain and Northern Ireland.

Irish Nationalist Violence

Irish Nationalist violence finds its fuel in the issue of partition of Northern and Southern Ireland. This dates back to the reign of James I and the colonization of North-Eastern Ireland by Protestants in the seventeenth century. The dispossession of Catholic landowners in favour of Scottish Presbyterian "planters" acted as a catalyst for the resultant religious flavour which pervades Irish affairs to this day.[1] It was the inequability of the situation in favour of the Protestants in terms of both land and politics that acted as a spark for the predecessor of the Irish Republican Army (IRA), namely the movement of United Irishmen inspired and led by Theobold Wolfe Tone. Their rebellion of 1798, which sought to " break the connection with England" failed dismally but, where it failed in tangible achievements, it succeeded in two respects. Firstly, the United Irishmen succeeded in laying the foundations for the struggle for independence from Great Britain.[2] Secondly, it established the concept of "physical force" republicanism which manifested itself at the heart of the modern republican

[1] T. P .Coogan, *The I.R.A.* (Pall Mall Press Ltd, 1970) p. 3.
[2] P. Bishop and E. Mallie, *The Provisional I.R.A.* (William Heinemann Ltd. 1987) p. 9.

struggle and continues today in some dissident factions which have not yet renounced violence.

The 1801 Act of Union further compounded the desire for independence by extending British rule across all 32 counties of Ireland leaving it a weak and extremely poor country which faced discrimination and therefore poverty at the hands of Great Britain. It was this climate which inspired the birth of groups both at home and abroad dedicated to restoring the independence of Ireland and with that its glory. Two such groups were the Fenian Brotherhood and the Irish Republican Brotherhood (IRB) both founded in 1858 and inextricably linked across the Atlantic by their commitment to the use of physical force in order to secure the overthrow of British rule. However, despite their ready use of violence, the abortive Fenian uprising of 1867 was a failure, albeit a majestic one.

Whilst discussions regarding Home Rule for Ireland continued over the years, to the extent that 1912 saw the introduction of a *third* Home Rule bill, it became clear to an extremist faction of the IRB that Ireland's independence would only be won through rebellion rather than through constitutional discussion and amendment.[3] It was the decision to mount an armed uprising whilst Britain was preoccupied with the war effort that continued to inspire the republican movement in to the 1990s. The uprising of Easter 1916 was a failure. At the time, the majority of the Irish population were not moved by this rebellious display of nationalism and more so were disgusted by this act of treason against a nation for which thousands of Irish sons were fighting. As a result, Irish passion for the rebels' cause was not ignited until the British execution of fifteen of the leaders.

Easter 1916 is still a date of significant commemoration in the republican calendar and this is due to the fact that it essentially signifies the beginning of the modern republican struggle with the IRA of today soon emerging under that title. The words of Padraig Pearse as he spoke from the dock can be seen as both a continuing inspiration to the republican movement and as a prophecy of the years of violence and struggle which were to follow: "If you strike us down now, we shall rise again and

[3] Coogan, n. 1 above p. 11.

renew the fight...You cannot extinguish the passion for Irish freedom. If our deed has not been sufficient to win freedom, then our children will win it by a better deed."[4]

The Easter 1916 uprising has been described as a "springtime of rebirth for Ireland"[5] both in the renaissance of passion for the nationalist cause but also by providing fuel to the vehicle which was to carry this revival through to later stages, namely Sinn Fein. Sinn Fein had not taken part in the events of Easter 1916; indeed whilst it was committed to the republican cause, its primary principles were not supported by any coherent means to achieve them. Despite this, the years immediately following the rebellion produced a dramatic change in both Sinn Fein and the republican cause, resulting in Sinn Fein gaining a huge majority of seats in the general election of December 1918. This provided Sinn Fein MPs the opportunity to formulate an Irish National Assembly, Dail Eireann and to issue a declaration of independence on January 21st 1919.[6] British forces were now considered to be an invading army and as such were the enemy against whom the newly re-titled IRA were to direct their attentions in an attempt to assert the independence of Ireland.

Thus began the Anglo-Irish war which raged from 1919 to 1921 and marked the beginning of a campaign of guerrilla warfare undertaken by the IRA in an attempt to achieve its objectives. During the war, the most consistent IRA successes were against targets chosen for their political sensitivity rather than for the amount of casualties which could be claimed. In this way, popular targets were such things as abandoned police stations as well as crushing blows dealt to the British judicial system by way of witness and juror intimidation.[7] That is not to say of course that fatal blows were not struck; indeed the war can be said to have begun with the killing of two police officers at Solohedbeg, Co. Tipperary. Moreover, the most oft-quoted example of brutality on both sides occurred on November 21st 1920, commonly referred to as "Bloody Sunday." The IRA struck first with the shooting of 14 intelligence officers in their beds. In retaliation for this, the Crown forces fired upon a

[4] R. Dudley Edwards, *Patrick Pearse: the Triumph of Failure* (London: Victor Gollancz Ltd, 1977) p. 291.
[5] Lord Longford, *Peace by Ordeal. The Negotiation of the Anglo-Irish Treaty 1921* (NEL MENTOR, 1967) p. 28.
[6] *The Irish Uprising 1916-1922* (CBS Legacy Collection, 1966) p. 87.
[7] *Ibid.* p. 94.

crowd of 15,000 spectators at an all-Ireland football match in Dublin. Twelve civilians were killed with eleven seriously wounded and 54 injured.

By the end of the war nearly 2,000 soldiers and civilians were dead and whilst in the ensuing treaty negotiations Home Rule was granted to Ireland, the fact that the island was to be partitioned into two states cancelled out any small points of victory gained by Sinn Fein. From a British point of view, it was felt that the Irish question had been resolved, and indeed perhaps it had been to the extent possible at the time, however acceptance of the treaty plunged Ireland back in to war, a civil war with battle lines drawn between pro and anti-treaty members of the IRA. The war raged for a little under a year and whilst the "Irregulars", as the anti-treaty members became known, were eventually defeated the principle for which they stood continued into the twenty first century.

Yet, whilst the spirit of republicanism lived on, the body did not and in the intervening years, the republican movement became a ghost of its former self. Sporadic revivals occurred in the following years with the IRA engaging in various activities in the mistaken belief that sympathy for physical force republicanism was much greater than it was. Despite various upsurges in IRA activity, it was known that the IRA did not have the military strength for a full uprising. IRA actions even had the effect of reducing sympathy for the cause and making the situation worse by inspiring such things as the Offences Against the State Act 1939, and prompting proscription of the IRA several times over the years.[8] Yet the IRA and the notion of a free Ireland were not consigned to the past. Indeed somewhat of a resurrection occurred placing the status of Ireland centre stage once again.

This resurrection occurred by way of a two-pronged attack with Sinn Fein enjoying success in the Westminster elections of 1956, which the IRA complemented with a military offensive, code-named "Operation Harvest." This strategy involved the use of so-called "flying columns", consisting of 25 men in each, which would move over the border in to the North and conduct operations by way of guerrilla warfare. The aim was to increase and maintain centres of IRA resistance in the North so as to force

[8] Coogan, n. 1 above p. 136.

withdrawal of enemy forces by cutting all communications and attacking military and police barracks as well as personnel. The night of 11th/12th December 1956 saw the beginning of a campaign of destruction consisting of over 500 incidents which was, by its end six years later, to have cost over £1million in direct damage alone as well as the lives of 18 people. However, despite majestic statements issued by Sinn Fein the uprising was in fact a failure, dogged by a lack of adequate weaponry, the absence of a wider political plan and perhaps more importantly by an apathetic public, tired of the notion of physical force republicanism.

By the time the IRA announced the end of the campaign, the prevailing view was of an organisation finally laid to rest. Indeed the New York Times published somewhat of an obituary for the republican movement: "The few young toughs who make up the tiny remnant that now lays down its arms used a grand and famous name for their organisation, but the Irish Republican Army belongs to history, and it belongs to better men in times that are gone. So does Sinn Fein. Let us put a wreath of red roses on their grave and move on."[9]

The emergence of the IRA of today essentially signals the beginning of what is known as "the Troubles." The years following the failed border campaign saw somewhat of a change in the thinking of the IRA leadership so that a more Marxist based policy, encompassing the social problems of the day, rather than physical force republicanism prevailed. This signalled a change in the fundamental thinking of an organisation which had based its whole ethos on the issue of partition and an independent Ireland, for hundreds of years. In this way following months of discontent and confrontation, fraction was inevitable. The final schism occurred in December 1969 and surprisingly was not over the failure of the IRA in defending Catholic ghettos, but rather over the long-held policy of abstentionism. This principle had been a stalwart of the republican movement from the beginning, despite the success of Sinn Fein in various elections, and of course the failure to recognise the legitimacy of the parliaments of Westminster, Dublin and Belfast went to the very core of the movement. As a result of the decision to abolish abstentionism, two organisations emerged, the Official IRA (OIRA) which involved itself in the social problems of the country, following a more

[9] *Ibid.* pp. 343-344.

socialist tradition and in this vein declared a ceasefire in 1972. The splinter group of traditionalists became known as the Provisional IRA (PIRA) and exclusive of various short-lived ceasefires, continued the fight for a 32 county republic by way of an armed struggle until 1997 when the group declared a ceasefire which continues to hold.[10]

1969 was essentially the dawning of a new era. In some respects the struggle remained traditional to the core, particularly following the split which removed those who were stepping away from such a long-held policy as abstentionism. In this way, the movement could not have been more in touch with its historical roots. However, in contrast to this, the next thirty years were to show that the republican cause had shaken off its mantle of failure to transform the IRA and Sinn Fein into formidable forces. Yet, throughout this time the aims of the republican movement remained unchanged, it was simply the means with which to achieve them which were altered. By far the most important aim of the organisation remained the removal of the British from the island and the creation of a 32 county republic. Initially, the weakened state of the PIRA prevented plans for a massive offensive against the British and instead operations took the form of what has been termed "psychological aggression"[11] as part of a campaign of sabotage against both Protestant and British power. This campaign involved 153 explosions[12] aimed at such targets as customs offices and telephone exchanges, but it is notable that at this stage in the campaign it was the location which was the target rather than people.

The introduction of internment under section 12 of the Civil Authorities (Special Powers) Act 1922 on 9th August 1971 marked a turning point. Over 300 people were arrested as part of "Operation Demetrius" on the first day but out of date information meant that few of them were active in the Provisionals, with the majority belonging to the Official IRA and indeed several being veterans of much earlier IRA campaigns. The operation proved to be doubly unsuccessful in that it served to encourage a huge amount of new recruits to the IRA as a result of the internment process. Moreover, it sparked a massive increase in the level of violence in the Province; indeed in the three

[10] As of July 2005 the IRA announced the organisation's intent to achieve its objectives using "purely political and democratic programmes through exclusively peaceful means." On 26th September 2005 John de Chastelain announced that all IRA arms had been decommissioned. See http://news.bbc.co.uk/go/em/fr/-/1/hi/northern_ireland/4283444.stm

[11] Note 6 above p. 208.

[12] Bishop and Mallie, n. 2 above p. 127.

days following the beginning of internment, 22 people were killed, and in the months following 9th August, 140 people died. This stands in huge contrast to the 34 people who had been killed in the first eight months of the year.[13]

In the wake of Operation Demetrius, the PIRA shifted its attention away from the unarmed Royal Ulster Constabulary (RUC) which had become the focus of the organisation in recent months and instead took up the offensive against the Army. An increase in the amount of weapons available to the Provisionals as well as the influx of new members had encouraged the first steps in a new chapter in the saga, that is the attempt to drive the British out by killing British personnel. This policy had already begun with the killing of Gunner Robert Curtis on 6th February 1971 in a riot in Belfast. The offensive gained momentum but much public support was lost following dubious tactics on the part of the IRA.[14] In spite of public condemnation, the offensive continued and in the year 1971-1972 the IRA were responsible for the deaths of over 100 soldiers.

However, again the Army was to play in to the hands of the Provisionals. The setting for this was a civil rights march in Derry on January 30th 1972. Eye-witnesses state the mood to have been good-humoured as the march began with over 10,000 participants. However, the day was to end in tragedy with 13 men shot dead and 17 injured by the Parachute Regiment. To this day it is unknown whether the Paras were fired upon first, as asserted at the time, but "Bloody Sunday" was to have two lasting effects. Firstly, it acted as oxygen to the slow-burning flame of republicanism visible amongst the young men of Ireland. As a result, PIRA experienced a massive surge in new recruits willing to fight against the "murdering" occupiers. Secondly, it added legitimacy to the role of the IRA as defenders of the nationalist people. The role of protector was as important to the PIRA as it was to the people, particularly following the inability of the IRA to defend nationalists in the riots of 1969, which inspired widespread ridicule. In this way Bloody Sunday provided the IRA not only with a need to act as defender but also provided the belief that such protection was needed.

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[13] P. Bew and G. Gillespie, *Northern Ireland. A Chronology of the Troubles 1968-1993* (Macmillan Ltd., 1993) p. 37.

[14] One particular incident which caused widespread public disgust was the targeting of three off-duty Highland Fusiliers, one aged 23 and two brothers aged 17 and 18, who were lured away from a Belfast pub with the promise of a party and then shot dead on a remote country road.

Another casualty of Bloody Sunday was the Northern Ireland Parliament, Stormont. On March 24th 1972 Edward Heath announced the imposition of direct rule from Westminster. Such news was seen as a victory for the IRA who felt that a united Ireland was now one step closer. Indeed, this was the view from the loyalist camp as well. Such news was particularly devastating given the inherent implication that IRA violence had succeeded. It seemed to give credence to the use of such weapons as the car bomb which had been used by PIRA for the first time only four days previously, killing six people with a 100lb bomb in the centre of Belfast. The IRA offensive continued, perhaps buoyed on by the feeling that the war was being won and that the British were being beaten. "Bloody Friday" was the worst day of violence since the imposition of direct rule. July 21st 1972 saw 22 bombs explode in Belfast, killing eleven people, injuring 130 and dissipating much of the support for the IRA and any justification for the cause gained since Bloody Sunday.

The might of the IRA was now clear. It had grown from virtual non-existence into an organisation with massive membership and strong connections, with its counterparts in the United States providing a sophisticated arms operation in a few short years. Indeed, its strength was tested in the year 1972-1973 by the arrests of a great number of figures in the PIRA leadership. Yet, rather than crumble as would probably have happened a few years previously, the organisation rallied and shifted its campaign despite the crisis point reached in its upper ranks. This showed a previously unseen maturity and indeed a versatility which has underlined the Provisional organisation throughout. Following Bloody Sunday, a widespread optimism amongst the IRA fuelled the belief that British withdrawal was imminent. This misconception led the IRA to realize that a campaign focused solely on Northern Ireland was not succeeding in achieving an independent Ireland. As a result of this, a new direction was taken with the decision to take the campaign to the mainland. The aim of the campaign was to hit at economic, military, political and judicial targets.[15] In this vein, London was chosen for both its symbolic value as well as its choice locations. On 8th March 1973, the chosen IRA unit placed car bombs outside New Scotland Yard, the Central Army Recruiting Office, the Old Bailey and the British Forces Broadcasting Services. Of

[15] Bishop and Mallie, n. 2 above p. 197.

the four, two of the bombs were defused but two exploded; 250 people were injured and one man died later of a heart attack. However, whilst the attack had succeeded in bringing the cause to the heart of Britain, all but one of the bombing team were arrested depriving the IRA of eight of its valuable operatives. It was not until 1974 that the IRA would try again.

This period in the history of the Troubles is one of the most well-known for three reasons. Firstly, the savagery with which the IRA became synonymous, secondly because of the miscarriages of justice which were to underline these tragedies and finally because the Irish cause was brought to the forefront of the British consciousness; they were no longer simply troubles over the water. February 4th 1974 saw the first mainland attack in which civilians were killed when a coach carrying soldiers to Catterick military camp in North Yorkshire exploded killing nine soldiers, one woman and two children. The conviction of Judith Ward was overturned by the Court of Appeal in 1992 due to concealment of evidence by forensic scientists. This began somewhat of a trend with regard to such bombings and the quashing of convictions on appeal. October 5th 1974 saw an attack by a unit soon to become known as the "Guildford Four." Two pubs in Guildford were bombed as "military" targets, the link being the fact that off-duty soldiers often drank there. These attacks saw a change in the IRA rules of engagement that off-duty soldiers were not legitimate targets.[16] Four soldiers and a civilian were killed and 54 people injured. Similarly, however, the 1975 convictions were quashed in 1989 due to police fabrication of confessions. The most infamous attack followed just a month later when 19 people were killed and 182 injured in the Birmingham pub bombings.[17] This provided the government with the opportunity to introduce the Prevention of Terrorism (Temporary Provisions) Act (PTA) 1974. Whilst commonly assumed to have been passed solely in response to the bombings, in actual fact the bill had long been in the making and was indeed based on both the Northern Ireland (Emergency Provisions) Act 1973 and further back than that, the Prevention of Violence (Temporary Provisions) Act 1939 and the Civil Authorities (Special Powers) Act 1922. This Act was to change the face of British anti-terrorism law and became the

[16] *Ibid.* p. 137.
[17] March 1991 saw the release of the "Birmingham Six" after sixteen years in prison following findings of possible forgery and false evidence as well as dubious forensic evidence.

catalyst for the creation of a system of anti-terrorism law which has been said to be one of the most draconian in Europe.[18] This "temporary" piece of legislation was consistently renewed until the enactment of the Prevention of Terrorism (Temporary Provisions) Act 1984, which was ultimately replaced by the 1989 Act of the same name. The year 2000 saw the PTA repealed and replaced by the Terrorism Act, in an attempt to place British anti-terrorism law on a permanent footing.

1974 also saw the emergence of another republican terrorist group, the Irish National Liberation Army (INLA). This organisation was founded as the military wing to the Irish Republican Socialist Party (IRSP) by Seamus Costello and was formed with the same backbone of national liberation as the IRA. However, the INLA's aim to create a revolutionary socialist republic was more in keeping with the Marxist objectives of the Official IRA, and indeed most of the original membership stemmed from the OIRA, especially since its ceasefire of 1972. Despite claiming over 700 members by early 1975 its formative years, in terms of acts of terrorism, were quiet and it never held the momentum of the IRA as a terrorist organisation at the forefront of the liberation struggle. However, the debut of the INLA in 1979 amounted to one of the most notorious assassinations of the Troubles. On March 30th Airey Neave, the Conservative Party spokesman on Northern Ireland was murdered when a bomb activated by a tilt switch exploded under his car in the car park of the House of Commons. This led directly to the proscription of the INLA by statutory instrument on 2nd July, where it joined the PIRA which was proscribed with the passing of the Prevention of Terrorism (Temporary Provisions) Act 1974.

Regardless of the convictions achieved at the time and of the subsequent reversals on appeal, the IRA managed to achieve their goal: the Irish cause had been brought to the forefront of the British consciousness. Simultaneously the ongoing campaign in both Northern and Southern Ireland was reinforced with Judge Ray Conaghan and Magistrate Martin McBirney killed as judicial targets in Belfast.[19] Lord Mountbatten was targeted in a 50lb explosion on his boat off Mullaghmore, which killed him and three others. On the same day, eighteen soldiers were killed by two IRA explosions at

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[18] J. Wadham, *Have Human Rights been Relegated to Second Place After September 11th?*, Cardiff Law School, 22nd May 2003.
[19] Bew and Gillespie, n.13 p. 93.

Warrenpoint, Co. Down bringing about the Army's greatest loss of life in one day of the Ulster Troubles. In a similar vein, the INLA was responsible for the deaths of 17 people, eleven of them soldiers, when it bombed the "Droppin' Well" disco in Ballykelly, Co. Londonderry. This incident provoked a passionate response from Margaret Thatcher, then Prime Minister, who described it as "...one of the most horrifying crimes in Ulster's tragic history."[20] Such incidents against British personnel compounded the organisation's reputation for ruthlessness which derived mainly from the many sectarian deaths perpetrated at its hands. One of the more ignominious was the 1983 Darkley massacre in which three church elders were killed and seven others injured when republican terrorists, claiming to belong to the Catholic Reaction Force,[21] burst into a Pentecostal church and began randomly firing with automatic weapons. More recently, the INLA was responsible for the murder of Loyalist Volunteer Force (LVF) leader Billy Wright inside the Maze prison in December 1997.

Despite the increased strength of the IRA, in comparison to the IRA of the border campaign and earlier, fighting two enemies began to take its toll. Sectarian violence has been an inherent part of the conflict in Northern Ireland and the Troubles have been complicated further by the religious allegiances which colour the political waters. Sectarian killings began in 1966 and have continued beyond the 1997 ceasefires, and coupled with the constantly updated tactics of the British as well as stringent security measures such as detention orders and prolonged interrogation, the effect on the IRA was draining. Gerry Adams captured the mood in 1986 when he wrote: "The tactic of armed struggle is of primary importance because it provides a vital cutting edge. Without it the issue of Ireland would not even be an issue...armed struggle has been an agent of bringing about change...At the same time, there is a realisation in republican circles that armed struggle on its own is inadequate and that non-armed forms of political struggle are at least as important..."[22]

In keeping with the words of Gerry Adams, it was clear that the fight could not continue as it was. The IRA and Sinn Fein had been following a joint policy of the

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[20] HC Debs. vol. 33, col. 708 (6th December 1982).
[21] One of the synonyms used by the INLA. Others include the People's Liberation Army (PLA) and the People's Republican Army (PRA).
[22] P. Taylor, *Provos* (Bloomsbury Publishing Plc. 1997) p. 289.

armalite and the ballot box since 1981, but following republican tradition, Adams refused to take up his seat when he was elected as MP for West Belfast in June 1983. However, by 1986 the issue of abstentionism reared its head again. Following the split of 1969, it remained a contentious issue and again traditionalists fought against its abandonment. However, it was clear to a Northern faction of the organisation, in particular those who had spent years thinking about the movement inside Northern Ireland's most notorious prisons that abstentionism had no place in twentieth century politics and the pursuit of a solely military policy was making PIRA's aims even harder to achieve. Again, a split was inevitable. Ironically, it was one of the founders of the Provisionals in 1969, Ruari O'Bradaigh, who walked out and formed Republican Sinn Fein (RSF).[23] The aim of RSF is a democratic socialist republic with 32 county elections and a federal government based on the four provinces of Ireland. Whilst in 1988, RSF voted to support an armed struggle to bring about achievement of this objective, the existence of a military wing was denied for many years. Indeed, it was not until the day of the PIRA ceasefire in 1994 that O'Bradaigh hinted about the existence of such an organisation: "...the Provisionals have no monopoly on resistance to British rule."[24] Yet, despite probable formation in the mid 1980s, Continuity IRA (CIRA) did not come to prominence until 1996.

By the 1990s, it was clear that neither side could "win". Over twenty years of fighting had achieved nothing but the deaths of nearly 3,000 people. Peace was the next step, but on terms agreeable to all. The period preceding the Downing Street Declaration was one of the worst of the Troubles. The IRA carried on the war, perpetrating such atrocities as the bombing of the Nat West tower in London. Over a ton of explosives killed one person, injured over thirty and caused more than £1 billion worth of damage. Three year old Jonathon Ball and twelve year old Timothy Parry were killed and 56 others injured when two bombs exploded in Warrington. Such public revulsion was felt that Warrington became somewhat of a high water mark- a Birmingham of the 1990s. In Northern Ireland an increase in sectarian killings meant that the peace process was fighting for survival in one of the bloodiest

[23] *Ibid.* pp. 289-291.
[24] www.ulsternation.org [22/01/03]

periods since the 1970s. Indeed October 1993 saw 27 people killed in Northern Ireland, the most in a single month since October 1976.[25]

It was against this backdrop that some sort of a peace was born. The Downing Street Declaration though "not a solution"[26] was at least a step in the right direction and indeed acted as a precursor to a complete cessation of military operations on the part of the IRA in 1994. The Troubles had been punctuated, albeit scarcely, by brief ceasefires since 1972. However, the 1994 ceasefire marked the start of new hope. The Downing Street Declaration provided real potential for peace and the longevity of the ceasefire allowed reconciliation to be discussed without the echoes of explosions colouring the situation. Furthermore, for the first time, the IRA ceasefire was matched by the loyalists who announced a cessation of violence on the 13th October 1994. The same cannot be said for the republican dissident groups. The INLA went as far as to announce a "no first strike" policy but it continued to act in retaliation and against the RUC. However, despite the steps forward, the negotiations were dogged from the start with the issue of decommissioning proving to be the major obstacle. A death knell was tolled on the talks by the decision to hold elections for a Forum to accompany the all-party talks.[27] February 9th 1996 saw the end of the IRA ceasefire by way of an explosion in Canary Wharf, London which killed two, injured over 100 and caused £85 million worth of damage. However, the loyalist ceasefire held because of the realisation of the benefits of being included in the peace process.

As the peace process was crumbling, a new paramilitary group came to prominence following the announcement by RSF of the existence of "a reborn Irish republican army" known as Continuity IRA (CIRA). The emergence of CIRA and its claims to hold the "moral high ground" of republicanism came at a critical time in the all-party talks and it has been suggested that this prompted the end of the PIRA ceasefire. July 1996 saw CIRA's debut on to the terrorist stage when it planted a 1200lb bomb at the Killyhelvin Hotel in Enniskillen. The building was destroyed minutes after it had been evacuated, and fortunately nobody was hurt, however it provided the opportunity

[25] Taylor, n. 22 above p. 339.
[26] T. Hennessey, *A History of Northern Ireland 1920-1996,* (Macmillan Press Ltd, 1997) p. 288.
[27] Taylor, n. 22 above p. 354.

for RSF to crow that it was the "first major bomb attack in the six counties since the Provisionals' unilateral ceasefire of August 1994."

1997 saw the roots of peace planted once more. The IRA ceasefire was renewed on 20th July 1997, and has held since then, heralding the longest period of peace from IRA violence since the beginning of the Troubles. However, acceptance of the Mitchell Principles and continued participation in the peace process was anathema for some members of Sinn Fein and so a split in the ranks occurred once more, which was mirrored by the departure of some members from the IRA. In December of that year the existence of a new republican organisation was announced, the 32 County Sovereignty Committee, which opposed the position of Sinn Fein in the peace process. Associated with this committee was a new republican paramilitary organisation, known as the Real IRA, which mainly consisted of dissident IRA members. In keeping with this notion of representing the *true* IRA, the group announced in early 1998 that the ceasefire was over and that terrorist attacks would resume. However, various bomb and mortar attacks pre-dating this announcement have been attributed to the group. Initially, many of the earlier incidents consisted of various bomb and mortar attacks, mirroring the tactics of the IRA in the mid 1980s, which were directed against RUC stations and security personnel. Fortunately, there were few injuries. However, this changed on 1st August 1998 when the Real IRA claimed responsibility for a 500lb car bomb which exploded in Banbridge, Co. Down, injuring 33 civilians and two RUC officers. This was swiftly followed two weeks later by an incident which was to change the dynamic of the peace process. The afternoon of August 15th 1998 saw the single worst terrorist incident within the six counties since the start of the Troubles. Twenty-nine people were killed (as well as two unborn children) and 220 were injured when a car bomb exploded in the centre of Omagh, Co. Tyrone. A warning was telephoned to a Belfast news agency 40 minutes before the explosion but misleading information meant that shoppers were directed towards the bomb instead of away from it.

In much the same way as occurred following the Birmingham pub bombings, the bombing in Omagh provoked such intense public outrage as to prompt the passing of more anti-terrorism legislation. The Criminal Justice (Terrorism and Conspiracy) Act 1998 was rushed through Parliament on September 4th 1998 following an emergency

sitting of just two days. It was intended to work in conjunction with existing anti-terrorism legislation and in this way it adds another layer to British anti-terrorism law.

So strong was the disgust at this act of terrorism in Omagh that it went so far as to prompt a response unprecedented in its denunciation of republican terrorism from Gerry Adams who stated "I have condemned it without equivocation."[28] Furthermore, from the point of view of the perpetrators, a group firmly opposed to the Good Friday Agreement, it had the perverse effect of strengthening the peace process. Indeed, it was said: "We have to work politically to make the Omagh bombing the last violent incident in our country, the last incident of this kind. Sinn Féin believe the violence we have seen must be for all of us now a thing of the past, over, done with and gone."[29] Moreover, the revulsion felt was enough to prompt the 32 County Sovereignty Committee to deny association with its paramilitary wing, whilst also forcing the Real IRA to declare a suspension of all military activities as of September 1998. In addition, the political wing of the INLA, the Irish Republican Socialist Party (IRSP), called on the INLA to declare a ceasefire, stating that in light of Omagh, the armed struggle was no longer justifiable.[30] As a result of this, the INLA proclaimed the beginning of its ceasefire as of midday on 22nd August 1998.

However, since this time, there have been various incidents for which both organisations are thought to have been responsible. The INLA has been involved in several clashes of both a sectarian nature as well as relating to the internal disputes which have swamped the organisation for years. However, in March 2000 the IRSP proposed a charter for non-aggression to loyalist groups under which rival groups would work together to reduce sectarian tensions and protect the working class. So far no response has been forthcoming.[31]

In contrast, the Real IRA reneged on its ceasefire promises in early 2000 and since then is thought to have been responsible for a huge number of attacks both on the British mainland as well as in the six counties; indeed as many as 21 attacks between

[28] Keynote Statement by Gerry Adams on the Current State of the Peace Process, 1 September 1998 http://cain.ulst.ac.uk/events/peace/docs/ga1998.htm
[29] *Ibid.*
[30] http://cain.ulst.ac.uk/othelem/chron/ch98.htm
[31] http://irelandsown.net

the months of February and November 2000 alone. The early stages of this recent campaign involved such incidents as a missile attack on MI6 Headquarters in September 2000 as well as a series of bombings against other strategic targets in London such as railway stations and Hammersmith Bridge. However, more recently the organisation has reverted to its republican roots, by targeting Post Office depots in North London, in a reflection of the Easter 1916 rising when the rebels seized the GPO in Dublin and issued their declaration of independence on its steps. In 2001, Colin Powell, then Secretary of State in the United States, designated the Real IRA as a foreign terrorist organisation, in accordance with section 219 of the Immigration and Nationality Act, as amended by the USA PATRIOT Act 2001.[32]

Whilst other republican organisations reaffirmed their commitment to the peace process, though some for a short time only, the CIRA campaign was gathering momentum. The organisation was responsible for a 400lb bomb which exploded in Markethill, Co. Armagh in September 1997 causing extensive damage to surrounding buildings; indeed this has been described as CIRA's most high-profile attack ever.[33] This was followed by a car bomb in Enniskillen, Co. Fermanagh, in which there were again fortunately no injuries. However, eleven people were injured when a 500lb car bomb, claimed to be the work of CIRA, exploded outside the RUC station in Moira Co. Down. Indeed, in its short life, the CIRA has been responsible for many such bombings, but has not been widely blamed for any murders in the province. Furthermore, the failure of CIRA to mount a prolonged campaign, coupled with several failed bombings suggests problems of a technical nature.[34] However, it is notable that CIRA is the only dissident republican organisation not to have declared a ceasefire and this has led to reports that members of both the Real IRA and the INLA have offered assistance to CIRA. The group was designated on the Terrorism Exclusion List in December 2001 by Colin Powell, then Secretary of State in the United States.[35] It seems therefore that it is too soon to say that the Troubles are over

[32] This has, *inter alia,* the effect of making it unlawful to knowingly provide "material support or resources" to such an organisation. It also requires any US financial institution that becomes aware that it has possession of or control over funds in which a designated foreign terrorist organisation its agent has an interest, to retain possession of or control over the funds and report the funds to the Treasury. www.state.gov/s/ct/rls/fs/2003/17067.htm

[33] *Irish Times* 17th September 1997.

[34] *Ibid.*

[35] This has the effect of excluding members or supporters from the States and also deters collection of funds in the country. www.state.gov/s/ct/rls/fs/2002/15222.htm

and peace remains tenuous, threatened by both the Real IRA and this slightly amateur yet uncompromising organisation.

Irish Loyalist Violence

In contrast to the republican desire for an independent Ireland, the roots of the first loyalist paramilitary organisation in Northern Ireland, the Ulster Volunteer Force (UVF), were planted in opposition to the likelihood of "home rule" being granted to Ireland. The third Home Rule Bill was introduced into Parliament in 1912 but met fierce opposition from both Unionists and Conservatives who attempted to defeat the bill by demanding that the North-East of the island be omitted from home rule on the grounds of the separate identity of the Ulster Protestants. In order to ensure that the whole of the island was not swallowed by home rule, the unionist leader Sir Edward Carson and Sir James Craig established the Ulster Volunteer Force in January 1913 as a form of military insurance against total Irish independence. The huge membership of this early organisation highlights the strength of feeling of the masses at the time, with numbers exceeding 200,000. The discipline and training of this organisation as well as the arms available to it gave the impression of a private army,[36] as opposed to the later paramilitary organisation of the same name. Indeed, it was the role played by the UVF as the 36th Ulster Division in the First World War, and the massive sacrifice made in the Battle of the Somme that was to move the government into eventually partitioning Ireland in 1920, in order to accommodate the Unionist desire for Ulster to remain British.

The Anglo-Irish war led to a revival of the UVF and further its legitimisation by the government as part of the Ulster Special Constabulary[37] as a means of protection against the campaign of guerrilla warfare undertaken by the IRA. However, the end of the war and the Government of Ireland Act 1920 secured the position of the province to the extent that the need for such a protective loyalist force was dissipated. Indeed this period of inactivity on the part of the UVF coincides not only with the years in which the IRA was a marginal organisation on the verge of disintegration, but

[36] S. Bruce, *The Edge of the Union* (OUP, 1994) p. 2.
[37] *Ibid.* p. 3.

also with the fact the constitutional status of Northern Ireland was not threatened at this time. Whilst there is a certain "tit for tat" mentality with regard to republican and loyalist violence, it is important to appreciate that constitutional change was the foundation for terrorist violence in the Province. Indeed, for republicans it was the desire *for* constitutional change, whilst for loyalists the spur for violence was the threat to the status of the six counties. In this way, had it not been for the challenge posed by the civil rights movement in the late 1960s, there would have been no need for a revival of the UVF or indeed the creation of the Ulster Defence Association (UDA). This stands in direct contrast to republican terrorism, which because of the change it sought, overcame virtual defeat in order to continue the fight for independence.[38]

A revival of the UVF occurred in 1966, led by Gusty Spence, but it met with much public disapproval and the resultant convictions of four of its members prompted the group to once again lapse in to obscurity. However, as said previously, the instability prompted by the 1969 civil rights campaign and its demands for, *inter alia*, a fair voting system, an end to religious discrimination, an end to gerrymandering, dispersal of the B-Specials and equality for all the people of the Province, threatened the constitutional security enjoyed by the protestants of Ulster and so allowed the UVF to entertain the role of protector once more. In contrast to the disciplined "army" of 1913, this was a paramilitary organisation whose debut on the terrorist stage consisted of a series of bombings throughout 1969 aimed at electricity sub stations and water supplies.

1971 saw the emergence of what was to become the largest loyalist paramilitary group, the Ulster Defence Association (UDA) from the amalgamation of a wide range of protestant vigilante groups in Northern Ireland. It was deemed that a vacuum had been left by the abolition of the B-Specials in April 1970 that had not been filled by the creation of the Ulster Defence Regiment.[39] In light of this, the UDA was designed as an organisation which could be mobilised should a complete breakdown in law and

[38] *Ibid.* p. 10.
[39] Bew and Gillespie, n. 13 above pp. 39-40.

order occur and in this way aimed to defend Ulster under the motto *Cedant arma togae,* "Let war yield to peace."[40]

In contrast to republican paramilitary organisations that aim to bring about constitutional change and therefore must attempt to exert political influence, the loyalist desire to maintain the status quo has not often been threatened and has therefore not required political change. However, 1974 saw somewhat of a collaboration of the UVF and the UDA, as well as others, in protest at the power-sharing executive established under the Sunningdale Agreement, which was seen as weakening the union with Great Britain. Loyalist paramilitary groups offered support to politicians opposing the agreement by way of the Ulster Army Council. Furthermore, their participation in the combined leadership of the Ulster Workers' Council general strike, which began on 15th May 1974, led to the collapse of the power-sharing executive in just fourteen days.[41]

In general the mainstay of the UVF's actions can be categorised as sectarian assassination rather than a continuation of these early examples of political agitation. The political initiative of the UDA contrasts with the lack of such a direction in the UVF, and in acknowledgement of this, the UDA was a legal organisation from its birth until 1992. However, whilst it has been said that neither organisation specifically planned to embark on a campaign of sectarian violence, *per se*, this was a path which both organisations were inevitably to follow. Whilst its primary aim was protection of the Protestant population, there existed a faction for which attacking Catholics was also of primary importance. In order to accommodate both these aims as well as maintaining its place as the more acceptable face of loyalist paramilitarism, the UDA adopted a cover name, the Ulster Freedom Fighters (UFF), in order to claim responsibility for sectarian attacks.[42] The UVF had no such qualms and did not use a *nom de guerre* in claiming its attacks. Indeed, the UVF bombing of McGurk's Bar in North Belfast in December 1971, which killed fifteen Catholic civilians, underscored the brazen sectarian nature of the organisation. Loyalist paramilitary strategy was founded on the premise that killing members of Sinn Fein and the IRA would drive

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[40] Hennessey, n. 26 above p. 201.
[41] Ibid. pp. 228-229.
[42] S. Bruce, "The Problems of 'Pro-State' Terrorism: Loyalist Paramilitaries in Northern Ireland" in P. Wilkinson, *Terrorism: British Perspectives* (Dartmouth Publishing Co. Ltd., 1993) p. 203.

republicans to forsake their campaign and the notion of a united and independent Ireland. However, the notion of "guilt by implication" pervaded this line of attack. In the eyes of rank and file members of loyalist paramilitary organisations, Catholics became republicans and therefore legitimate targets through the Eucharist rather than through political persuasion, resulting in massive civilian bloodshed.

There were of course non-civilian deaths claimed by and attributed to loyalist paramilitaries. Over the years there were several attacks by the UFF in particular on members of Sinn Fein and the Social Democratic Labour Party (SDLP). In June 1973 the SDLP Stormont senator, Paddy Wilson and his secretary, Irene Andrews were stabbed to death in Belfast by UDA/UFF member John White.[43] In October 1976, the UFF were responsible for the horrific murder of Sinn Fein Vice-President, Marie Drumm, as she lay in hospital receiving treatment for cataracts. In March 1984, the intended victim was Sinn Fein President, Gerry Adams, who was shot and wounded in a UFF attack in which three other Sinn Fein members were killed. Aside from loyalist feuding, which accounted for 56 deaths between 1969 and 2001, loyalist paramilitarism will long be remembered for the massive amount of civilians killed in the name of the Union. Indeed, sectarian violence overtook the strategy of loyalist paramilitaries and this is emphasised by telling figures for the period 1969-2001, which show that loyalist paramilitaries were responsible for the deaths of 73 republican paramilitary personnel and nationalist/republican politicians. However, this contrasts markedly to the 713 sectarian killings of Catholic civilians at loyalist hands.[44]

As opposed to a great deal of republican violence which utilised bombs to a great extent, the vast majority of loyalist terrorism manifested itself in gun attacks, such as the "Castlerock killings" in March 1993 in which the UFF shot dead four Catholics and injured a fifth, and individual shootings. This *modus operandi* has been said to result from the notion of claiming specific "legitimate targets" rather than targeting many people by blowing up various locations.[45] This contrast in the tactics of republican and loyalist paramilitary organisations is exemplified by consideration of

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[43] R. Cowan, (2003) Too Many Chiefs Led to Loyalist Bloodshed, *The Guardian*, February 4th.
[44] M. Sutton, *An Index of Deaths from the Conflict in Ireland*, http://cain.ulst.ac.uk/sutton/
[45] Bruce, n. 36 above p.107.

the events of October 1993. On October 23rd 1993, an IRA bomb exploded prematurely as it was planted in a fish and chip shop on the Shankill Road. Ten people were killed in the blast, nine of those were Protestant civilians and the tenth was one of the IRA bombers, 57 people were also injured. In the days that followed this attack, loyalist paramilitaries shot and killed five Catholic civilians, a revenge which culminated in the infamous "Greysteel killings" on 30th October 1993. UFF gunmen opened fire on Halloween celebrations in the "Rising Sun" Bar, Co. Derry, with one of the gunmen, Torrens Knight, shouting "Trick or Treat" before opening fire. Six Catholic civilians and one Protestant civilian were killed and thirteen others injured in what the UFF claimed was an attack on the "nationalist electorate." However, large-scale bombings, whilst less common, were not unheard of. May 17th 1974 saw the highest death toll for a single day during the Troubles when 33 civilians were killed and more than 250 injured in the Republic of Ireland in a series of bombings perpetrated by loyalists. Three car bombs exploded in Dublin killing 23 people immediately with a further three dying subsequently from their injuries. That same day, a fourth car bomb was responsible for an ultimate death toll of seven civilians when it exploded in Monaghan. Such was the outrage at news of these attacks that no organisation admitted responsibility. It was not until July 1993 that the UVF finally admitted responsibility for what has been termed "...the greatest, most lethal crime in the history of Ireland and Britain."[46]

In contrast to the blatant sectarian violence perpetrated by the UVF and UFF, and despite its somewhat surreptitious connection with the latter, the UDA was an organisation grown from political roots. In this way, distance with the UFF was necessary in order to maintain a degree of political credibility but it also allowed the UDA to play more than one role in the conflict. As stated previously, the amount of loyalist violence correlates with the perceived threat to the union on the part of the unionist and loyalist population. This "threat" was deemed to be considerably less in the late 1970s and 1980s and so led to a massive decline in loyalist violence. Indeed, the amount of killings by loyalist paramilitaries dropped from an all-time high in the years 1972-1976, which saw 559 deaths at loyalist hands, to 130 such deaths in the

[46] J. Bowyer Bell, *In Dubious Battle. The Dublin and Monaghan Bombings 1972-1974* (Poolbeg Press Ltd, 1996) Chpt. VIII.

following decade.[47] The relative security felt by loyalists at this time allowed the UDA to return to its roots and focus upon various political initiatives, as well as attempting to disassociate itself from the sectarian hatred of the preceding years.

The political lines along which the UDA was now working led to the establishment of a think tank known as the New Ulster Political Research Group (NUPRG) in January 1978. The idea behind this was to lay down a foundation for negotiated independence based on the common denominator of all men as Ulstermen, rather than segregating the community on the basis of religion. The final document, "Beyond the Religious Divide", though favourably received, ultimately made no real political impact. The Ulster Loyalist Democratic Party (ULDP) was established in 1981 to replace the NUPRG and it was clear that a step backwards had been taken by the UDA and its political involvement, by way of the move from a proposed constitution based on cross-religious co-operation to a new party which in name alone left no doubt as to its position and outlook. The political position of this party was that of independence for Northern Ireland within the EC and the Commonwealth, and in 1987 the party's plans for a future political agreement were outlined in its document "Common Sense." However, in similarity to its predecessor, it too achieved no political influence. In 1989 the party adapted its name to become the Ulster Democratic Party (UDP), but this change in nomenclature did not change the fortunes of the party.

Whilst, the policy of the NUPRG had been to reassure the Catholic population that sectarian violence was a thing of the past, the political climate did not aid this attempt at pacification. The Anglo-Irish Agreement of 1985 was fiercely opposed by loyalists and this opposition manifested itself in increased levels of terrorist violence; indeed in the years 1986-1990, loyalists were responsible for on average 18.6 deaths per year as opposed to 8.5 deaths per year for the preceding seven years.[48] This increase in violence continued in to the 1990s where a massive upsurge resulted in 183 deaths at the hands of loyalists in the years leading up to the 1994 ceasefire. The UDP played an instrumental role in contributing to the loyalist ceasefire of 1994, by arranging support for it from the loyalist population in the Maze prison. On account of this ceasefire, which began on October 13th 1994, the UDP gained a place in the multi-

[47] Sutton, n. 44 above.
[48] Hennessey, n. 40 p. 290.

party talks which culminated in the Good Friday Agreement of 1998, as did the Progressive Unionist Party (PUP) which has close links to the UVF. This stands in contrast to Sinn Fein whose absence from the talks was due to the recommencement of IRA hostilities in February 1996 by the bombing of Canary Wharf. However, the loyalist ceasefire became increasingly fragile in the latter months of 1997 and in early 1998, with various attacks blamed on the UVF and UFF despite claims by the political parties that the loyalist ceasefire remained intact. In spite of this, the UFF and UVF continued to play a part in this renewal of loyalist violence with a spate of sectarian killings. The admission by the UFF that it had been responsible for the deaths of at least three Catholic civilians, in the reaffirmation of its ceasefire led to the withdrawal of the UDP, ahead of its expulsion, from the peace talks in January 1998. Sinn Fein was similarly expelled from the discussions in February 1998 because of two killings attributed to the IRA, however both were readmitted on March 23rd 1998 following continued adherence to the Mitchell principles. The UDP was dissolved on November 28th 2001 due to disagreements between it and the UDA with regard to the Good Friday Agreement and the involvement of the UDA/UFF in violence in spite of its self-proclaimed ceasefire. Arguably, this returned the UDA to a role with which it seemed to be more familiar: bloodshed. Indeed, it would be easy to forget the political foundations of the UDA given its majestic performance on the stage of violence.[49]

In the period between the 1994 ceasefires and the cessation of hostilities in 1997, and whilst the first tentative steps toward peace were being taken by organisations on both sides of the religious divide, a further loyalist paramilitary group emerged as a dissident faction of the UVF. The Loyalist Volunteer Force (LVF) was established in February 1997 by expelled commander Billy “King Rat” Wright in order to frustrate any possibility of a settlement with nationalists by attacking supporters of the peace process, be they Catholic or Protestant. In its relatively short-lived career as an active paramilitary organisation, the LVF was responsible for many attacks which earned it a reputation as a particularly vicious group; indeed it was proscribed, along with CIRA, only four months after its emergence on the Northern Irish stage in June 1997. The majority of attacks by the LVF have had a grounding in sectarian hatred and it can be

[49] Cowan, n. 43 above.

said that the group has not shied away from any opportunity to stir up sectarian tension in the all too fragile climate of the time. The group's reputation spread following the murder of an 18 year old Catholic girl who was shot four times in the head as she slept at her Protestant boyfriend's house in Co. Antrim. This ruthlessness was compounded with the "Poyntzpass killings" in which two life-long friends, one Catholic and one Protestant, were executed in a bar in Co. Armagh.

The LVF announced a ceasefire in May 1998 and despite doubts as to the authenticity of the group's intentions, it became the first and only organisation to voluntarily decommission a small amount of its weapons in December of that year. However, the violence continued as a result of a feud between the UVF and LVF which persisted into 2001. In September 2001, Martin O'Hagan, was the first journalist to be killed in Northern Ireland since the start of the Troubles when he was shot and killed in front of his wife as they returned to their home in Lurgan, Co. Armagh. The Red Hand Defenders, a cover name used by both the UDA and the LVF, claimed responsibility for the attack. However, it is widely believed that the LVF was responsible for his murder.

In October 2001, the LVF, the UDA and the UVF were all specified following repeated breaches of their respective ceasefires. Loyalist violence continued in terms of feuds against each other as well as against the Good Friday Agreement despite the small degree of progress that continued to be made in terms of peace. However, as of February 21st 2003, the UDA/UFF announced a twelve-month ceasefire in order to reaffirm their commitment to achieving a political solution to the Troubles. Such a statement will obviously be treated with caution given the past history of such groups in this area, and of course decommissioning remains as a seemingly insurmountable obstacle.[50] Whether the UVF and LVF deign to follow suit remains to be seen.

[50] As of September 2005 the status of the loyalist paramilitary groups stands as follows: the UDA/UFF was de-specified on 12th November 2004, though some elements continue to engage in violence. The LVF was specified on 12th October 2001. The UVF was specified on 14th September 2005 following three days of violence across Northern Ireland in September 2005. The Red Hand Defenders and the Orange Volunteers remain active. See http://cain.ulst.ac.uk/issues/violence/paramilitary.htm [16/09/05].

Indigenous Terrorism

Whilst English nationalist terrorism is a very rare occurrence, there is a small but identifiable core of nationalist groups in both Wales and Scotland, which have turned to terrorism in the name of their countries. In Wales, the most well known of these groups is Meibion Glyndwr which, in pursuit of its aim of protecting the Welsh language and culture, has targeted English-owned holiday homes and businesses with incendiary devices and well as sending letter and parcel bombs to various political figures. Its campaign was taken a step further in its assassination attempt on Prince Charles on his return from the coronation in 1969; fortunately, the attempt was not successful but two members of the organisation were killed when the bomb detonated prematurely.

The situation in Scotland is similar. Scottish nationalist politics is dominated by the Scottish National Party, yet there has been for many years a small faction of marginal nationalist groups which have turned to violence in attempting to drive the English from Scotland. In the early 1970s the Army of the Provisional Government of Scotland, also known as the Tartan Army, rose to prominence after bombing an oil pipeline in protest at the English "theft" of Scottish oil, but the campaign was very short-lived and the group quickly dissolved.[51] More recently, Scottish nationalist terrorism has followed similar Welsh groups in its use of violence to prevent cultural dilution. Whereas action by such groups as Scottish Watch and Settler Watch has consisted solely of poster campaigns to highlight the destruction of Scottish culture and language by English settlers, as well as meetings and leafleting, the Scottish National Liberation Army (SNLA) has gone much further than this, engaging in what has been termed an "unpleasant campaign of ethnic hatred."[52] This has consisted of intimidation of estate agents to prevent English immigrants finding homes north of the border, as well as the sending of toxic packages through the post to the Prime Minister and other politicians. Each envelope sent contained a bottle purporting to be a sample of face cream, but which was actually sodium hydroxide, a highly corrosive chemical

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[51] P. Wilkinson, *Report of an Investigation into the Current and Future threat to the UK from International and Domestic Terrorism (other than that connected with the affairs of Northern Ireland) and the Contribution which Legislation can make to Measures to Counter that Threat* (London: HMSO Cm. 3420 1996) p. 31.

[52] *Ibid.* p. 35.

which can cause scarring and blindness. The organisation has also threatened death to English MPs who do not leave the country within thirty days, as well as plotting to kill the Queen and making threats against Prince William.[53] However, no deaths can be said to be attributable to the actions of either Welsh or Scottish nationalist groups.

Linked to the cultural guardianship undertaken by Welsh and Scottish nationalist organisations is the desire to establish respective independent republics.[54] However, whilst this desire for constitutional change is somewhat akin to that of the Irish republican organisations, the fire of nationalism has not burned so strongly as in Ireland. Indeed whilst other Welsh nationalist groups, such as Cadwyr Cymru and Mydiad Amddiffyn Cymru have desired the same objectives as Meibion Glyndwr, such nationalism can not be said to be a mass movement in Wales. Similarly in Scotland it continues to be a marginal phenomenon. Furthermore, in both countries nationalism has a legitimate outlet in the form of Plaid Cymru and the Scottish National Party, the dominant nationalist political parties.[55] Moreover, since devolution and the establishment of the Welsh Assembly and the Scottish Parliament, it can be argued that some degree of fulfilment of the desire for an independent republic has been achieved and that this has dissipated Welsh and Scottish nationalist violence somewhat.

In contrast, non-nationalist indigenous terrorism is a much less common phenomenon. Over the years, there have been various short-lived campaigns by groups such as the Angry Brigade whose desire for anarchist revolution led to a bombing campaign in the early 1970s. Another example is that of the Black Liberation Front (BLF) an organisation which emerged following the death of a man held in police custody in 1987. The BLF claimed responsibility for various incidents involving parcel bombs in the Wolverhampton area.[56] The sporadic attempts at action of such groups have resulted in few injuries and indeed such "campaigns" have proved to be very short-lived.

[53] L. Smith and R. Ford, "Security alert for politicians after acid sent to Blair" Times Online 2nd March 2002.
[54] Wilkinson, n. 51 above p. 31.
[55] *Ibid.*
[56] *The Times*, 21st December 1988 p. 2.

Special Interest Terrorism

In comparison, the campaign undertaken by animal rights activists and liberationists has been underway for more than 25 years and is said to be a continuing domestic problem in the UK;[57] indeed it has been said by a leading expert that since the IRA ceasefire, animal rights is the cause most likely to incite violence in the UK.[58] The Animal Liberation Front (ALF) was established in 1976 and is thought to be somewhat of an umbrella organisation for other groups such as the Animal Rights Militia, and the Justice Department. The short-term aim of the ALF is to save as many animals as possible and disrupt the practice of animal abuse. The long-term aim is to put animal abuse companies out of business thus ending animal cruelty. The tactics used by such organisations include freeing animals from laboratories, damage to property, arson, letter bombs and threats to contaminate consumer products thereby forcing a withdrawal of that product from sale,[59] for example in 1984 activists claimed to have poisoned Mars Bars in a protest at dental research being carried out by the company. However, violent attacks have been perpetrated by such groups and in a way very similar to that of the UDA using the UFF as a pseudonym in order to carry out violent attacks, the ALF is said to use the Justice Department as a façade for its violence. Considerable damage to property has resulted from both arson and bombs planted in buildings ranging from laboratories and breeding facilities to shops and department stores.[60] In 1990, a thirteen month old baby was injured by shrapnel in a car bomb attack aimed at a psychologist at Bristol University and in February 2001, the managing director of Huntingdon Life Sciences, Brian Cass, was badly beaten by three assailants believed to be members of the organisation Stop Huntingdon Animal Cruelty (SHAC).[61] Indeed the persistence of animal rights groups and the increasing ferocity of their attacks led to the establishment of the Animal Rights National Index in 1984, which is responsible for the collection, evaluation and dissemination of intelligence related to animal rights terrorism. Furthermore, the definition of terrorism in British law has been extended to encompass the actions of animal rights activists. Previously the Prevention of

[57] Wilkinson, n. 51 above p. 37.
[58] P. Wilkinson, Are Britons Still Animal Crackers? *BBC News Online* 11 th March 2000.
[59] Wilkinson, n. 51 above p. 31.
[60] *The Times*, 21st December 1988 p. 1.
[61] W. J. Smith, Terrorists, Too, *National Review Online*, 2nd October 2002.

Terrorism (Temporary Provisions) Act 1989 defined terrorism simply as the "use of violence for political ends [including] any use of violence for the purpose of putting the public or any section of the public in fear."[62] However, this definition changed with the passing of the Terrorism Act 2000 so that, *inter alia,* action which involves serious violence against a person or involves serious damage to property constitutes terrorism.[63] This places animal rights activists firmly within the framework of anti-terrorism law.

International Terrorism

Aside from the United States, the UK has been a popular target with regard to international terrorism. However, it has often been the case that the UK has been chosen as a stage for terrorist attacks by one country on another, rather than being a direct target in itself. This is a great difference to the selection of American targets both at home but more commonly abroad simply because of their nationality. In contrast to the threat posed by terrorism connected to the affairs of Northern Ireland and the huge number of deaths resulting from that conflict, the threat posed by international terrorism to the UK is actually quite small. Indeed omitting the deaths caused by the destruction of Pan Am 103, international terrorism could be said to be responsible for only 36 deaths between 1985 and 2001.[64]

It has often been the case that a great deal of the international terrorism experienced by the UK has stemmed from affairs of the Middle East. This has been identified as resulting from the fact that the United Kingdom has a large population of expatriates from the Middle East, a large Moslem community as well as the largest range of Arab

[62] Section 20 PTA 1989.

[63] Section 1 Terrorism Act 2000 The full definition reads: 1. - (1) In this Act "terrorism" means the use or threat of action where-(a) the action falls within subsection (2), (b) the use or threat is designed to influence the government or to intimidate the public or a section of the public, and (c) the use or threat is made for the purpose of advancing a political, religious or ideological cause. (2) Action falls within this subsection if it- (a) involves serious violence against a person, (b) involves serious damage to property, (c) endangers a person's life, other than that of the person committing the action, (d) creates a serious risk to the health or safety of the public or a section of the public, or of the public, or (e) is designed seriously to interfere with or seriously to disrupt an electronic system.

[64] N. Whitty, T. Murphy and S. Livingstone, *Civil Liberties Law: The Human Rights Act Era* (Butterworths, 2001) p. 126. This figure obviously excludes the British citizens killed on September 11th 2001.

political groupings and newspapers outside the Arab world.[65] As a result of this, the main protagonists have tended to be countries such as Libya, Palestine, Syria, Iran and Iraq. Various trends have developed over the years with regard to the means used to perpetrate acts of international terrorism. Plane hijackings were particularly popular in the late 1960s and early 1970s; indeed there were sixty such incidents with Middle Eastern connections between 1968 and 1973 in various countries all around the world.[66] The prevalence of such attacks led to a tightening of airport security and increased searches, which contributed to a decline in this form of terrorism.[67] Though of course, the events of September 11th 2001 serve to exemplify the extent to which airport security can still be breached and that this method resulted in the worst ever act of terrorism.

In the UK, international terrorism has often been played out on a very public stage, with incidents involving diplomatic personnel and the hijacking of embassies conducted under the glare of massive publicity. In April 1980, six terrorists declaring themselves to be part of a group known as the Democratic Revolutionary Front for Arabistan[68] took 26 hostages in the Iranian embassy in London in protest at the oppressive regime of the Ayatollah Khomeini. The siege lasted for five days only ending when the SAS stormed the building, killing all but one of the terrorists.[69] Another such incident was the death of WPC Yvonne Fletcher and the wounding of eleven others when shots were fired on to an anti-Gadaffi protest, allegedly with the permission of the Libyan leader, Muammar Gadaffi,[70] from the Libyan People's Bureau in London. Diplomatic relations were broken off with the country and the embassy staff allowed to leave the country freely. However, Libya finally accepted "general responsibility" for the incident and offered to pay compensation to the family of WPC Fletcher in 1999.[71]

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[65] Wilkinson, n. 51 above p. 36.
[66] Jewish Virtual Library, *A Division of the American-Israeli Cooperative Enterprise*, http://www.us-israel.org/jsource/Terrorism/incidents.html
[67] Wilkinson, n. 51 above p. 24.
[68] Otherwise known as the Iranian province of Khuzestan.
[69] Six Days of Fear, *BBC News*, 26th April 2000.
[70] *The Times*, 6th April 1984 p. 1.
[71] Diplomatic Links with Libya Restored after Compensation Deal for Dead PC's Family", *The Guardian*, 7th July 1999.

The bombing of Pan Am flight 103 is probably the most well known incident of international terrorism to occur on British soil, but 1986 saw an attempt at what might well be classified as almost a precursor to that tragedy. The attempt to blow up the plane was conducted by Syrian Nizar Hindawi who smuggled a bomb on board an El Al flight from London, in the luggage of his pregnant girlfriend. Fortunately, the device was discovered and the tragedy averted. However, the Syrian embassy then attempted to smuggle Hindawi from the country, providing more than enough suspicion of state-sponsored terrorism to justify the expulsion of the Syrian embassy staff from the UK.[72] December 21st 1988 saw the worst act of international terrorism ever to occur in Great Britain. A semtex bomb stored in the forward hold of flight 103 exploded over the Scottish town of Lockerbie mid-flight killing all 259 people on board and eleven people on the ground. The explosion ultimately proved to be the work of a Libyan intelligence operative, Abdelbasset al-Megrahi, who was found guilty of murder in January 2001.[73]

An international terrorist phenomenon which first emerged in the late 1970s and which is of massive concern today is terrorism emanating from religious extremism. It has been said that over one third of active terrorist groups in the world fall in to this category. This brings in to play a devastating notion, which makes the actors involved in such terrorism particularly dangerous, namely suicide terrorism.[74] This concept was demonstrated to the world, centre stage, on September 11th 2001, with the use of four hijacked planes as, essentially, guided missiles. Indeed, it posed the question of how to stop such terrorists who believe such actions to be a holy mission which will certainly result in their admittance to heaven.[75]

The attacks of July 7th 2005 in London demonstrated the use of suicide bombers for the first time in Western Europe. Four bombs were detonated in London; three on the Underground and one on a bus. 52 people were killed and over 700 injured. On 19th September 2005 Al Qaeda claimed responsibility for the attacks for the first time in a

[72] Wilkinson, n. 51 above p. 30.
[73] Lameen Fhimah was acquitted of all charges.
[74] Wilikinson, n. 51 above p. 25.
[75] *Ibid.*

video-taped message featuring the organisation's deputy leader Ayman al-Zawahri.[76] Two weeks later on 21st July 2005 four would-be suicide bombers attempted to detonate devices again on the London transport network. Three bombs were to have been detonated on the Underground with a fourth planned to explode on a bus. Fortunately all four bombs failed to detonate. The four suspected bombers were arrested and charged as were numerous other individuals in relation to the failed attacks. These incidents highlight the fact that the country continues to remain at risk from international terrorism particularly that stemming from religious fundamentalism. In comparison with the effect that thirty years of terrorism emanating from Northern Ireland had on the UK, international terrorism has played a much smaller part in British terrorist history. However, the events of September 11th as well as, more recently, July 7th, demonstrated all too clearly the effect that the phenomenon and the response to it can have on a state, in terms of both the national security of the country as well as with regard to the status of fundamental rights and liberties.

The United Kingdom's Response to the Terrorist Threat prior to 2000

The ongoing terrorist history in the United Kingdom, especially that in relation to Northern Ireland, resulted in the enactment of a great deal of emergency legislation in various forms. In relation to the province itself, such legislation can be traced back to the Civil Authorities (Special Powers) Act 1922, which enacted such provisions as internment, proscription of assemblies and certain books as well as the imposition of curfews. This piece of legislation which was originally enacted for one year, was renewed annually until 1928; then renewed for five years. It became permanent in 1933 and was utilised until 1972. This prolonged use of temporary legislation is a pattern which can be seen throughout the UK's use of anti-terrorism legislation. In Northern Ireland this Act was succeeded by the Northern Ireland (Emergency Provisions) Act (EPA) 1973, 1978, 1987 and 1996. In addition the Prevention of Terrorism (Temporary Provisions) Act 1974, 1976, 1984, 1989 and the Criminal

[76] Two earlier claims of responsibility were made by the Secret Organisation Group of Al-Qaeda of Jihad Organisation in Europe on 7th July 2005 and the Abu Hafs al-Masri Brigade on 9th July 2005. Both are said to have links to Al Qaeda.

Justice (Terrorism and Conspiracy) Act 1998 applied to the whole of the United Kingdom.

Whilst the legislation had the 1922 Act and the 1939 Prevention of Violence (Temporary Provisions) Act as its provenance, the notion of "legislating for the last atrocity" can be said to have played a part with regard to the enactment of this emergency legislation with terrorist attacks and increased violence creating a climate conducive to the introduction of extreme measures. This cycle of action and reaction can be seen in relation to the increased violence in Northern Ireland in 1972, the Birmingham pub bombings of November 1974 and the Omagh bombing in August 1998. This tendency highlights the role that symbolism plays in this area and this is so in a way which does not tend to arise with other criminal acts. This need to be seen to be doing something is deemed almost more important than what is actually done.

A final and yet important point to be made about British anti-terrorism law is the duplication of many of the provisions of the ordinary law which resulted in the creation of a dual system of criminal justice. A large part of the Act was specific to terrorism and as such was far removed from the ordinary criminal law; however, a great deal of it had the effect of extending the powers available to the authorities. This prompted the United Nations Human Rights Committee to comment "...that the powers permitting infringements of civil liberties, such as of extended periods of detention without charge or access to legal advisers, entry into private property without judicial warrant, imposition of exclusion orders within the United Kingdom are excessive."[77] Indeed such powers had the effect of placing the individual in somewhat of a void where rights and liberties were at best precarious and at worst abused.

Arrest and Detention

One of the most important provisions of the Prevention of Terrorism (Temporary Provisions) Act was the power of arrest provided in section 14.[78] This section

[77] U.N. Human Rights Committee concluding observations: United Kingdom of Great Britain and Northern Ireland (27/05/95) CCPR/C/79/Add.55.
[78] The power of arrest and detention was originally provided in section 12 of the PTA's 1974 and 1976.

provided the police with three separate grounds for arrest without warrant; "...a constable may arrest without warrant a person who he has reasonable grounds for suspecting to be

(a) a person guilty of an offence under section 2, 8, 9, 10, 11...;
(b) a person who is or has been concerned in the commission, preparation or instigation of acts of terrorism to which this section applies;
(c) a person subject to an exclusion order."[79]

However, it was widely recognised, indeed by the Home Office itself, that section 14 provided the only access to a procedure of extended detention unavailable to the police in any other way.[80] Therefore the extent of its use is not surprising; indeed with regard to Northern Irish terrorism, between implementation in 1974 and repeal in February 2001, arrests under Section14 totalled nearly 3000[81], with particularly high use made of it in 1975 and 1976 with 437 and 254 arrests respectively. Amendment to subsection (a) occurred with the passing of the Criminal Justice (Terrorism and Conspiracy) Act (CJTCA) in 1998 so as to bring the law in Northern Ireland in line with that in Great Britain. Section 3(1) of the CJTCA had the effect of making membership of an organisation proscribed in Northern Ireland an offence arrestable under the PTA. Due to the fact that the list of such organisations contained in schedule 2 of the EPA was much more extensive that than under the PTA, this extended the ambit of the section 14 arrest power and therefore was seen to have sharpened the teeth of the Act.

As has been mentioned previously and was often offered as one of the main justifications for retention of the power of arrest in the PTA, arrest under section 14 acted as a gateway through to a system of detention quite unlike that which exists under PACE. Section 14(4) provided for a period of detention of 48 hours following arrest under the Act. However, this was subject to section 14(5) which allowed the Secretary of State to extend this initial period by up to a maximum of a further five

[79] Section 14 (1) PTA 1989. The grounds for arrest under subsection (c) will be dealt with from page 45.
[80] Circular 26/1984 see P. Hall, "The Prevention of Terrorism Acts" in A. Jennings (ed), *Justice Under Fire. The Abuse of Civil Liberties in Northern Ireland* (Pluto Press, 1990) p. 171.
[81] Figure relates to arrests in connection with Northern Irish terrorism.

days. This was considerably longer than the maximum period of detention for a serious arrestable offence under PACE, which stands at 96 hours.[82] However, of more importance still is the requirement that detention beyond 36 hours under PACE must be approved by the Magistrate's court.[83] This shift to include a judicial element with regard to a maximum period of 96 hours stands in stark contrast to the purely administrative system which authorised a maximum period of detention of 168 hours under the PTA. The length of detention and the system regarding the authorisation of detention caused much commentary and formed the subject of much case law. Perhaps the most notable of these cases is *Brogan and Others v UK*[84] because of the European Court's finding of a violation of article 5(3) against the UK and because of the resultant international criticism sparked by the UK's response to the Court's finding.

The context of the terrorist struggle faced by the UK played a pivotal role in determining whether the UK was in breach of its article 5(3) obligations. Indeed it was this which led the majority of the European Commission of Human Rights to conclude that "the struggle against terrorism may require a particular measure of sacrifice by each citizen in order to protect the community as a whole against such crimes"[85] and as such led to the conclusion that extended detention of five days could be justified within the context of terrorism. Whilst mindful of the background to the applications, the majority of the court emphasised the purpose of article 5 and its role in protecting the individual against arbitrary interference by the state with his right to liberty.[86] In this way emphasis was given to the meaning of the word "promptly" in particular in comparison to the urgency inherent in the use of the word "aussitôt" in the French text. This led to a finding that flexibility with regard to the interpretation of the word "promptly" must be limited. Whilst the degree of promptness must be assessed in each individual case, the court stressed that consideration of the special features of each case must never be stretched to the point of negating the state's

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[82] Section 42 PACE.
[83] Section 43 PACE.
[84] (1989) 11 EHRR 117.
[85] *Ibid.* para. 106.
[86] *Ibid.* para. 58.

obligation to ensure a prompt appearance before a judicial authority or a prompt release.[87]

The question for the court essentially amounted to whether, whilst acknowledging the problems faced by the government as a result of terrorism, the release of the applicants was "prompt" for the purposes of article 5(3).[88] In declaring a violation of this article, the court accepted that the situation caused by political violence relating to Northern Ireland did have the effect of prolonging the length of detention available to the authorities subject to sufficient safeguards, before introducing oversight by a judicial authority. However, the situation created by terrorism did not permit the government to dispense with "prompt" judicial control altogether and to find otherwise would import in to article 5(3) a serious weakening of a procedural guarantee to the detriment of the individual. Therefore the court found that even the shortest period of detention, four days six hours, was in violation of article 5(3). However, in deciding this the court did not go so far as to indicate what would amount to the maximum period of detention permitted under the Convention.

The response of the government to this finding was to derogate from article 5 under article 15 by declaring there to be "an emergency threatening the life of the nation." This had the effect that the maximum period of detention permitted under the PTA remained unchanged and importantly no element of judicial oversight was introduced. Moreover, scrutiny by the European Court of Human Rights was hereby shifted to examination of the continued necessity for the derogation. Acceptance of the regime under section 14 by the court came in the decision of *Brannigan and McBride v UK*[89] where the government's derogation from article 5 was upheld. This of course had the effect of legitimising a system of detention under anti-terrorism legislation which was both inadequate from the point of view of the detainee as well as removed from the system under PACE. In contrast, a breach of article 5(3) was found despite a derogation under article 15 in *Demir v Turkey*[90] where the threat posed by terrorism,

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[87] *Ibid.* para. 59.
[88] *Ibid.* para. 60.
[89] (1993) 17 EHRR 539. The derogation was continued by the Human Rights Act 1998 (section 14 and Sch.3).
[90] (2001) 33 EHRR 43

though of great seriousness, could not be used to justify extended detention of 16 and 23 days without contact with a judicial authority.[91]

The effects of extended detention on the individual under the legislation was exacerbated by the fact that the right to have access to a solicitor as well as the right to have somebody informed of their arrest could be delayed for up to 48 hours[92] where the officer concerned reasonably believed that exercise of either right would either:

(a) lead to interference with the gathering of information about the commission, preparation or instigation of acts of terrorism; or

(b) by alerting any person, make it more difficult

(i) to prevent any act of terrorism; or

(ii) to secure the apprehension, prosecution or conviction of any person in connection with the commission, preparation or instigation of an act of terrorism.[93]

Allegations of ill treatment arose many times over the years, but rather than providing protection, it was the law which initially placed those detained in such a vulnerable position and then exacerbated that vulnerability. The European Court of Human Rights is the most obvious forum for dealing with such allegations given the specific prohibition against torture, inhuman and degrading treatment contained in article 3. The most well known case in this area is probably *Ireland v UK*[94] in which the court found that the "five techniques"[95], utilised by the UK government as interrogation techniques, amounted to inhuman and degrading treatment.[96] The same finding was established more recently in *Tekin v Turkey*[97] where the court held that the applicant's treatment whilst in detention, namely being kept in sub-zero temperatures, a lack of blankets, blindfolding, a diet of only bread and water and subjection to treatment which left wounds and bruises on his body, amounted to inhuman and degrading

[91] See also *Sakik v Turkey* [1998] I.N.L.R. 357 (ECHR).

[92] Sections 56(11) and 58(13) provided reasons in addition to those in section 56 of PACE regarding delay in the case of serious arrestable offences, for delaying such access for up to 48 hours.

[93] Full discussion of this area can be found in chapter 7.

[94] (1979-80) 2 EHRR 25

[95] Namely lack of food, deprivation of sleep, subjection to continuous noise, forced standing and hooding.

[96] In this case the European Commission of Human Rights found that use of the five techniques amounted to torture.

[97] (2001) 31 EHRR 4

treatment.[98] The development of the ECHR and the case law of the court became clear in *Selmouni v France.*[99] The court, in its finding that allegations of torture were substantiated, reiterated the fact that the fight against terrorism, and other such serious circumstances, can never justify the use of torture, inhuman or degrading treatment.[100] Further the court emphasised the flexibility of the Convention as an instrument of protection by highlighting its position as a "living instrument which must be interpreted in the light of present day conditions" and that therefore treatment which would once have amounted to inhuman or degrading treatment could be classified differently in the future.[101] "It takes the view that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies..."[102]

Despite the criticism which detention under section 14 inspired, the extended detention provisions were justified on the grounds of the advantages said to result from them. The thread running through the official reviews was one of retention of the seven-day detention period. Indeed Jellicoe and Colville both recommended this[103] despite Jellicoe's conclusion that "there can be no clear proof that the arrest powers [and therefore the powers of detention which flow from them] in the PTA are, or are not, an essential weapon in the fight against terrorism."[104] The thrust of the argument seems to have been the need for extra time to overcome the anti-interrogation techniques employed by some terrorists, placing emphasis on cases in which admissions were made on the 4th or 5th day.[105] More objectionably, Jellicoe also argued that an additional four of five days could help in obtaining evidence with which to charge the detainee.[106] However, official statistics regarding the amount of charges brought following detention tend to contradict this. Indeed between 1974 and

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[98] See also *Tomasi v France* (1993) 15 EHRR 1
[99] (2000) 29 EHRR 403
[100] *Ibid.* para. 95.
[101] *Ibid.* para. 101.
[102] *Ibid.*
[103] Jellicoe, *Review of the Operation of the Prevention of Terrorism (Temporary Provisions) Act 1976,* (London: HMSO Cm. 8803, 1983) para. 62. Colville, *Review of the Prevention of Terrorism (Temporary Provisions) Act 1984,* (London: HMSO Cm. 264, 1987) paras. 5.1.6 and 5.1.7.
[104] Jellicoe, *ibid.* para. 55.
[105] See Shackleton Report *Review of the Operation of The Prevention of Terrorism (Temporary Provisions) Acts 1974 and 1976* (Lomdom: HMSO Cm. 7324, 1978) para. 72 and Jellicoe para. 57.
[106] Jellicoe, n. 103 above para. 58.

2000[107] over 7,500 people were detained under the PTA in relation to terrorism related to Northern Irish affairs under sections 14 and 16, with 2684 of these detained under section 14. Of this figure, 794 detainees had their detention extended beyond 48 hours. In 1974, 183 out of 486 detentions were thus extended and in 1979 almost half of all section 14 detentions were extended beyond 48 hours.[108] More contentious however is the number of charges resulting from detentions under the Act. Indeed between 1974 and 2000, of the 7565 detentions only 714 resulted in any charge being brought (9%) with only 238 of these charged with an offence under the PTA itself; a mere 3%. Such statistics add great weight to the argument that detention under the PTA was utilised for intelligence gathering rather than with the intention of bringing a criminal prosecution.

Exclusion Orders

Described as the "most disturbing feature of the legislation,"[109] the power to exclude a person from one part of the United Kingdom was long debated as the legislative measure most contrary to the civil liberties of the individual. Yet, despite this, or even because of it, the power remained on the statute books until it was abolished in the Terrorism Act 2000. Section 4(1) provided that the Secretary of State could generally make use of this power if it appeared expedient to him to prevent acts of terrorism connected with the affairs of Northern Ireland.[110] Such an order could be made to exclude a person from being in, or entering Great Britain,[111] from being in, or entering Northern Ireland,[112] or from being in, or entering the United Kingdom as a whole.[113] So that such an order could be made, the Secretary of State had to be satisfied that the person concerned either was or had been involved in the commission, preparation or instigation of acts of terrorism, or that the person concerned was attempting to enter the area from which exclusion was sought with a

[107] Including the first 7 weeks of 2001. The Terrorism Act 2000 came in to force on 18th February 2001.
[108] 183 out of 284 detentions.
[109] D. Bonner, "Combating Terrorism in Great Britain: The Role of Exclusion Orders" (1982) Public Law 262.
[110] Section 4(2).
[111] Section 5.
[112] Section 6.
[113] Section 7.

view to being concerned in the commission, preparation or instigation of acts of terrorism regarding Northern Ireland.[114] Sections 5(3), 6(3) and 7(3) provided that in considering whether to make an exclusion order against a person, excluding them from the area in which they were normally resident, the Secretary of State had to have regard to whether that person had a sufficient connection to any other country so as to make it appropriate that exclusion be ordered. Failure to comply with an order was an offence under section 8(1), and section 8(2) made it an offence for any third party to have knowingly been concerned in arrangements for securing or facilitating the entry in to the territory in question of a person whom the third party had reasonable grounds for believing to be an excluded person, or indeed for a third party to knowingly harbour such a person in the excluded territory.

The only limits on the exercise of the power of exclusion were founded on the grounds of citizenship and residence. Section 7(4) made it so that an exclusion order could not be made excluding a British citizen from the whole of the UK, neither could an order be made excluding from Great Britain somebody already subject to an order regarding Northern Ireland[115] or indeed the reverse.[116] The second restriction on the power of exclusion was based on the notion of "ordinary residence." Prior to 1984, it was the case that a person could not be excluded from a territory if he had been ordinarily resident there for 20 years or more. However, it was seen that this reinforced the notion of Northern Ireland as a "terrorist dumping ground" as well as exacerbating the power's already severe effect on civil liberties, and as such this was reduced to ordinary residence for a continuous period of three years in the PTA 1984.[117]

Exclusion orders potentially violated several of the rights protected in the ECHR. Perhaps the most obvious article upon which to base a claim was article 5, the right to personal liberty. In *Guzzardi v Italy*[118] the confinement of a Mafioso to a particular island was found to be a breach of article 5 because of the imposition of such conditions and restrictions as police supervision, a curfew and the need for permission

[114] Section 5(1) (a) (b).
[115] Section 5(4)(b).
[116] Section 6(4)(b).
[117] Jellicoe, n. 103 above para. 182.
[118] (1981) 3 E.H.R.R. 333.

to do certain things. It was said that "The difference between deprivation of liberty and restriction upon liberty is...one of degree and intensity, and not one of nature and substance..."[119] It can be said therefore that the effect on liberty engendered by an exclusion order is not so severe as to amount to a deprivation of liberty on a scale similar to that in *Guzzardi.* Indeed, restrictions upon liberty are not governed by article 5, instead falling within the realm of article 2 of Protocol 4 to the Convention to which the UK has not subscribed. However, article 5 could have come in to play with regard to the period of extended detention possible both before and after the making of an order, which could extend in to a matter of weeks if the subject exercised the rights available under schedule 2 paragraph 3(1).

A second potential ground of challenge under the Convention was based on article 8, as a result of the inevitable effect exclusion had on the private life of the excludee and his family. However, challenges under this head proved no more successful, particularly due to the existence of the exceptions contained in article 8(2), namely national security and the prevention of crime. It has been shown to be the case that the effect on family life must be so severe as to break up a dependent family unit. In *Ryan v UK,*[120] the European Commission of Human Rights found no breach of article 8 due to the fact that independent children left in Britain could travel to the Republic to visit the excludee and dependent siblings.[121] Indeed the commission in *McCullough v UK*[122] noted that relationships between adults would not necessarily acquire the protection of article 8 unless evidence was shown of further dependency, involving more than the normal, emotional ties. However, in *Boughanemi v France*[123] the court found that an interference with article 8 had taken place, due partly to the fact that the deportation had severed the applicant's ties to his siblings and parents.

Aside from the insufficient availability of means with which to challenge the exclusion system and the failings of the adviser system as a form of review, much can

[119] *Ibid* para. 94.
[120] App. No. 9202/80
[121] See also *Mooney v UK* Appl. No. 11517/85. See also C. P. Walker, "Constitutional Governance and Special Powers Against Terrorism: Lessons from the United Kingdom's Prevention of Terrorism Acts" (1997) Columbia Journal of Transnational Law 1 pp. 13-18 regarding potential challenges under other articles.
[122] (1998) 25 E.H.R.R. CD34.
[123] (1996) 22 E.H.R.R. 228.

be said with regard to the philosophy behind such a measure as well as its general effect. The arguments in favour of exclusion focused on the ability of the power to aid the prevention of terrorism, in particular by removing dangerous terrorists from mainland Britain and also by diminishing the effectiveness of terrorists by disruption to information, contacts and travel arrangements.[124] Lord Jellicoe also commented upon its use as the only means available of dealing with cases of great sensitivity. The opinion that exclusion materially contributed to the safety of the public in the UK was surely a compelling one in convincing a frightened populace of its validity in the aftermath of the Birmingham tragedies and beyond. Whilst it can be said that to act in such a pre-emptive manner was questionable due to the potential for dubious evidence, this of course was one of the main attractions. Indeed to be able to take action against a suspected terrorist using evidence that would have been insufficient to stand up at trial was a huge advantage to the security forces in the fight against terrorism. Having said this however, it cannot be said that exclusion was relied on to any huge extent during its lifetime. Indeed, following an initial flurry of orders granted at the end of 1974 and in 1975, the use of the power declined steadily until 1995 when no new orders were made and by October 1997 no exclusion orders remained in force at all. Even at its peak exclusion orders were the result of only 6% of detentions under the Act, and between 1974-2000, exclusion orders were issued following detention in only 5% of all cases.[125]

The logic of moving suspected terrorists from one area of a country to another is somewhat dubious; indeed, a suspected terrorist remains so despite a post-code change and as such, it seems questionable to have claimed the prevention of terrorism as the foundation of this measure, particularly with regard to exclusion to Northern Ireland where terrorism was more prolific. This argument goes further with regard to the assertion that exclusion had the effect of treating Northern Ireland as a dumping ground for terrorists, which implied that what was of real importance was stopping terrorist outrages in Great Britain.

[124] See Jellicoe, n. 103 above para. 176 for the case for exclusion.
[125] Source: The Home Office. These figures are based on detentions under sections 14 and 16 of the PTA.

Proscription

Part I of the PTA[126] provided the Secretary of State with the power to proscribe "any organisation that appears to him to be concerned in, or in promoting or encouraging, terrorism occurring in the United Kingdom and connected with the affairs of Northern Ireland."[127] Similarly, any organisation which was specified in schedule 1 to the Act was also so proscribed for the purpose of the Act, as was any organisation of a name mentioned in schedule 1 regardless of its relationship (if any) with any organisation of the same name.[128]

Proscription of a terrorist organisation opened the door to an array of related offences. Under section 2(1)(a) belonging or professing to belong to a proscribed organisation was an offence with the latter being easier to prove than the former given the secretive nature of such organisations; indeed no charges were ever brought under this head of the PTA.[129] Soliciting or inviting support for a proscribed organisation other than support with money or other property was prohibited in section 2(1)(b). Prior to the 1989 re-enactment of the Act, this head had included soliciting for *financial* support as well as making or receiving financial contributions or otherwise to a proscribed organisation.[130] Under this section there were seven prosecutions for soliciting or receiving money for a proscribed organisation between 1974-1986 of which two resulted in a finding of guilt and imprisonment for one year or less.[131] No other such prosecutions followed. The final offence under section 2 was contained in subsection (c) as arranging or assisting in the arrangement or management of, or addressing, any meeting of three or more persons (whether or not it was a meeting to which the public were admitted) knowing that the meeting was

(i) to support a proscribed organisation
(ii) to further the activities of such an organisation; or
(iii) to be addressed by a person belonging or professing to belong to such an organisation.

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[126] Part III EPA.
[127] Section 1(2)(a) PTA 1989 Section numbers provided relate to the PTA 1989.
[128] Section 1(1) PTA 1989.
[129] Source: The Home Office.
[130] This was then dealt with in Part III PTA 1989. See C. P. Walker, *The Prevention of Terrorism in British Law*, (Manchester University Press, 1992) p. 111 onwards with regard to section 10 of the Act.
[131] Source: The Home Office.

The 1989 Act had the effect of doubling the maximum sentence possible for such offences. Under the 1984 Act a conviction on indictment for an offence under section 2 could result in imprisonment for up to five years.[132] Section 2(3) provided a defence to the offence of belonging or professing to belong to a proscribed organisation. A person was not guilty of this offence if he showed

(a) that he became a member when it was not a proscribed organisation under [the Act]; and

(b) that he [had] not, since he became a member, taken part in any of its activities at any time while it was a proscribed organisation under [the Act].

This had the effect of avoiding accusations that the Act constituted retrospective legislation which would have violated article 7 of the ECHR. This resulted in a reversed burden of proof which placed the accused in the difficult situation of having to prove a *lack* of involvement in the activities of the organisation- a virtually impossible burden to discharge.[133] However, the complete lack of prosecutions for a section 2(1)(a) offence in the lifespan of the Act meant that the operation of the offences and therefore this defence were never considered in anything other than a theoretical manner.

A natural corollary to proscription of terrorist organisations was the offence of publicly displaying support for the organisation in question. This was contained in section 3 of the 1989 Act and was drafted so that an offence was committed on the wearing of any item of dress, or on the wearing, carrying or display of any article in such a way or in such circumstances as to arouse reasonable apprehension that the person concerned was a member or supporter of a proscribed organisation.[134] Successful prosecution of this offence could have resulted in six months imprisonment on summary conviction, or a fine, or both.[135] Between 1974-2000 there was just one such prosecution for which the defendant was fined.[136]

[132] Section 2(2)(a) On summary conviction the Act accounts for imprisonment for a term not exceeding 6 months, or a fine, or both section 2(2)(b).
[133] See Hall, n. 80 above p. 53 for a more detailed critique of the statutory defence.
[134] Sections 3(1)(a) and (b) PTA 1989.
[135] Section 3(1) PTA 1989.
[136] Source: The Home Office.

As mentioned previously, the 1989 PTA created a new offence with regard to contributions to the resources of proscribed organisations. Section 10 prohibited the solicitation or invitation, lending or otherwise making available of any money or other property for the benefit of a proscribed organisation. Subsection (b) similarly made it an offence to give, lend or otherwise make available or receive or accept, any money or other property for the benefit of a proscribed organisation or (c) to be concerned in an arrangement regarding money or property for the benefit of such an organisation. This was the result of the removal of the financial support element from section 2(1) in the re-enactment of the PTA in 1989. It had the effect of extending the scope of such offences beyond the financing of acts of terrorism directly in to the more routine realm of publicity or funds for families of members by the use of the words "for the benefit of."[137] The 1989 Act also had the effect of extending the concept of "proscribed organisations" to encompass organisations proscribed under the EPA with regard to offences under section 10.

A consequence of the repression of terrorist organisations as a result of proscription was the effect on the liberties of the inhabitants of Northern Ireland. This was true of members of such groups whose right to freedom of association was hampered and was also the case with regard to supporters of legitimate Republican groups due to the difficulty of differentiation.[138] However, Republican politics were not suppressed completely and the growth of Sinn Fein as a political force has been said to have countered this adverse effect on the discussion and dissemination of republican politics.[139] This impediment to the expression of political views in the Province, and indeed on the mainland, was a point with which both Jellicoe and Colville had a great deal of sympathy.[140] Indeed Jellicoe stated that "if one were starting with a clean slate, proscription would...be low on the list of priorities for inclusion in counter-terrorism legislation."[141] However, despite the argument that this stifling of political debate outweighed any potential benefits accrued by proscription, the fear of negative reaction if the provision were abolished overrode the effect on the liberties of the individual.

[137] See Walker, n. 130 above p. 111.
[138] *Ibid* p. 63.
[139] C. A. Gearty and J. A. Kimbell, *Terrorism and the Rule of Law,* (Civil Liberties Research Unit, 1995) p. 40.
[140] Colville, n. 103 above para. 13.1.5, Jellicoe, n. 103 above para. 209.
[141] Jellicoe, ibid para. 209.

In addition, proscription ultimately rendered the prevention of terrorism harder to achieve by forcing such groups underground. This made security operations much more difficult by cutting off a valuable source of information. It cannot have been imagined that such long-standing passionate groups as the IRA would fold at the first hint of illegitimacy; indeed it was acknowledged at the time that "it will...be rather more than less difficult as a result of the banning to apprehend the terrorists."[142] However, the desire to appease won through and the symbolism of action overcame any concerns with regard to the adverse effect that such a measure would have on the operational effectiveness of the security forces, as well as on the freedom of the individual.

The provisions relating to proscription and related offences in both the PTA 1989 and the EPA 1996 were compounded by the passing of the Criminal Justice (Terrorism and Conspiracy) Act (CJTCA) 1998 following the Omagh bombing. The effect of the CJTCA was to ease the conviction of those accused of belonging to terrorist organisations by certain evidentiary changes contained in sections 1 and 2 of the Act which inserted sections 2A and 2B into the PTA and section 30A into the EPA. The CJTCA was not concerned with all proscribed groups in the UK. Rather its focus rested on organisations categorised as "specified" in accordance with the Northern Ireland (Sentences) Act 1998. The concept of specification was designed so as to clarify those proscribed organisations which continued to be concerned in terrorism related to Northern Ireland[143] and which had not established or maintained a complete and unequivocal ceasefire.[144]

Section 1 of the CJTCA allowed the admission into evidence of the opinion of a police officer, of at least the rank of superintendent, that the accused was a member of a specified organisation. This had the effect of legitimising evidence which would previously have been classified as hearsay as well as potentially allowing inadmissible evidence in through the back door. The introduction of such opinion evidence placed the police officer in the realm of the expert witness. However, a person could not be

[142] HC Debs, vol. 882, col. 746, 28th November 1974 Mr Lyon MP.
[143] Section 3(8)(a) NISA 1998.
[144] Section 3(8)(b) NISA 1998.

committed for trial, or found to have a case to answer, or be convicted solely on the basis of such opinion evidence.[145] The examinability of such evidence also caused problems with the potential that public interest immunity would often be claimed due to the sensitivity of the information on which the opinion might have been based. If public interest immunity was granted the defence was unable to examine the basis of the opinion evidence. This could result in a breach of article 6(1) of the ECHR if a significant part of the prosecution evidence was not heard or tested in open court.[146]

The 1998 Act also continued the erosion of the accused's right to silence, begun by the Criminal Evidence (Northern Ireland) Order 1988[147] and the Criminal Justice and Public Order Act 1994.[148] Again, by amendment to the PTA 1989 and the EPA 1996, the CJTCA provided that the jury could draw inferences from an accused's failure to mention a fact which was material to the defence and which he could reasonably have been expected to mention, when considering whether the accused belonged to a specified organisation.[149] The drawing of inferences from a suspect's silence has a very negative effect on the rights of the accused. The consequent shift in the burden of proof resulted in a compulsion to speak even though there was no requirement that questioning take place in the presence of a lawyer. This situation was exacerbated by a desire for the sources of information to remain secret which may have prevented accusations from being clarified or backed up by additional information. Moreover, the fact that the PTA provides for extended detention of up to seven days placed the suspect in a particularly uncomfortable position. In the same way as with the opinion evidence of a police officer, an accused could not be committed for trial or found to have a case to answer just on the basis of interferences drawn from silence,[150] though it was of course possible that such inferences could act as corroboration for the opinion evidence of a police officer and vice versa. The Act provided that the suspect must have been permitted to consult with a solicitor so as to overcome the risk of a breach of article 6 of the ECHR.[151]

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[145] Section 2A(3)(b) PTA.
[146] C. P. Walker, "The Bombs in Omagh and their Aftermath: the Criminal Justice (Terrorism and Conspiracy) Act 1998" (1999) 62 M.L.R 879 p. 885.
[147] SI 1988/1987 (NI 20) articles 3, 4.
[148] Sections 34-37.
[149] This applied to silence during interrogation and at trial. Section 2A(6)(a) PTA 1989.
[150] Section 2A(6)(b) PTA 1989.
[151] *Murray v UK* (1996) 22 E.H.R.R. 29.

The compatibility of the CJTCA 1998 and resultant evidentiary changes with Convention rights was, however, questionable. The notion of a fair trial and related rights protected by article 6 of the ECHR manifested itself in the jurisprudence of the European Court of Human Rights not in the form of pronouncements on specific elements of a trial, but rather by way of a general desire for equity. In this way the limitations placed on the defence by way of the requests of the prosecution regarding, for example, public interest immunity, were balanced so that such evidence would play a smaller role in the trial if the effect on the defence were particularly adverse.[152] Article 6(3) of the ECHR provides the accused with the right "to examine, or have examined, witnesses against him...", however, this is at risk of infringement due to the notion of public interest immunity which, if granted, allows non-disclosure of evidence by the prosecution.[153] The use of the opinion of a police officer as evidence under the CJTCA posed particular problems with regard to the position of the defence. The likelihood of a claim of public interest immunity was very high due to the common use of informants with regard to the situation in Northern Ireland. This had the effect that the defence was unable to examine the original source of the information, whilst also resulting in a situation where the defence was potentially labouring under an illusion of credibility which was added to the evidence by the officer delivering it. The European Court of Human Rights has emphasised the role of the national judiciary in balancing the protection of the witness against any detriment to be suffered by the accused and it seems to be the case that this balancing act performed by judicial authorities is seen as a means of mitigating any adverse effect suffered by the defence. As mentioned previously, of importance was the probative value afforded to such evidence and as indicated that was of course likely to be low *because* of the fact that it was not possible to examine the source itself and the grounds underlying it. In this way, whilst a grant of public interest immunity was unlikely to result in a breach of article 6, this would change if the conviction were based mainly on such opinion evidence. The CJTCA reduced the chances of this by inclusion in the PTA of section 2A(3)(b) which limited the consequences for the

[152] C. Campbell, "Two Steps Backwards: the Criminal Justice (Terrorism and Conspiracy) Act 1998" (1999) Criminal Law Review 941 p. 947.
[153] See K. D. Kent, "Basic Rights and Anti-Terrorism Legislation: Can Britain's Criminal Justice (Terrorism and Conspiracy) Act 1998 Be Reconciled with its Human Rights Act?" Vanderbilt Journal of Transnational Law 2000 Vol. 33, No. 1 223 pp. 240-242 for more detail on Public Interest Immunity.

accused regarding the use of such evidence without corroboration. However, as previously stated, the strength of corroboration evidence required was unclear, with the possibility that inferences drawn from the silence of the accused could have been sufficient.

Despite the fact that the European Court of Human Rights has recognised that "the right to remain silent under police questioning and the privilege against self-incrimination are generally recognised standards which lie at the heart of the notion of fair procedure under article 6"[154] the foundation of the right to silence in the UK has not, in recent years, been as firm as was once the case. *Murray v UK* established that the discretion to draw inferences from the accused's silence could only be entertained if the evidence presented required some sort of explanation.[155] Moreover, in the fashion of examining the fairness of the case generally it was deemed that no breach of article 6 had occurred due to the drawing of such inferences, primarily because of the safeguards in place in the UK. A breach of article 6 was however, found on the basis that the applicant had been refused access to a lawyer for over 48 hours.[156] In line with this, the CJTCA only allowed use of such evidence following consultation with a lawyer, although the lawyer was not permitted in the interview room itself. In this way the Act was therefore unlikely to fall foul of article 6 in the same way as occurred in *Murray*. Furthermore, the Court in *Murray* stated that the right to silence would be infringed if a conviction were based solely or mainly on the accused's silence[157] which was again in line with the requirements of the CJTCA. In addition, it seems therefore that a combination of the two kinds of evidence would also have resulted in a breach of article 6.

Internment

In relation to Northern Ireland specific provision was made for the power to intern individuals. This was first enacted in 1922 under the Civil Authorities (Special Powers) Act and this formed the basis of its notorious application in August 1971

[154] *Saunders v UK* (1997) 23 EHRR 313 para. 68
[155] (1996) 2 E.H.R.R. 29 para. 51.
[156] *Ibid* para. 48.
[157] *Ibid* para. 47.

against the IRA. Operation Demetrius began on August 9th 1971 with the aim of arresting and detaining as many IRA terrorists, and those involved with the IRA as possible. In the months preceding, lists of those to be arrested were prepared by the police and the Army. Those arrested were sent to one of three regional holding centres for interrogation and those to be detained were sent to either the Crumlin Road, prison, Belfast or the prison ship "Maidstone." Between August 9th 1971 and December 5th 1975 1,981 people were detained.

Adjustments were made to the power of internment in the Northern Ireland (Emergency Provisions) Act 1973 following the recommendation of Lord Diplock, on the basis of concerns relating to the involvement of the military in arresting and detaining those concerned. Instead the EPA enacted a procedure of interim custody orders under section 10 whereby detention of a suspected terrorist without charge or trial could be ordered by the Secretary of State provided there existed a prima facie case of the individual's involvement in terrorism and that he posed an ongoing danger to the community. Following satisfaction of these elements, an interim custody order for up to 28 days could be imposed. At the end of that period the individual had to be released unless the case was referred for determination to a Commissioner. The individual was detained pending such determination, which could amount to many months of detention. The Commissioner could make a detention order of unlimited duration if satisfied that the individual had been concerned in the commission or attempted commission of any act of terrorism or the organisation of persons for the purpose of terrorism and that his detention was necessary for the protection of the public. In the form of rights afforded the individual, at least seven days prior to the determination hearing the individual had to receive a written statement concerning the terrorist activities to be investigated by the commissioner. Counsel was also provided. Evidence could be withheld from the individual and his lawyer, though information had to be provided, as far as possible, of matters dealt with *in camera* on grounds of security but there was no right to test such evidence. The individual could be required to answer questions but had no right to examine witnesses against him.

As is discussed in chapter 7, the implementation of internment in Northern Ireland was an unmitigated failure. Rather than reduce the levels of violence in the province and weaken the influence of the IRA the opposite occurred. The resultant

infringement on civil liberties cannot be justified on the basis of effective counter-terrorism policy and served to undermine the perception of the government as one able to deal with the threat.

Suspension of the Right to Trial by Jury

A notorious feature of the anti-terrorism framework enacted in Northern Ireland, and one of great longevity was the suspension of the right to trial by jury. Known as "Diplock Courts" after the chairman of the 1972 Commission[158] which propounded their use, this form of tribunal was enacted under the EPA 1973 and continues to endure, although it is planned that their use will be phased out as part of the peace process.

Trial without jury was introduced into the Province in an attempt to deal with the perceived problems of witness and juror intimidation and biased juries.[159] The nature of the enacted measures was the utilisation of juryless trials for various scheduled offences. A scheduled offence was defined as "those crimes which are commonly committed at the present time by members of terrorist organisations."[160] The commission of such an offence gave rise to the withdrawal of the right to trial by jury. It was possible for an offence to be certified out of this procedure by the Attorney-General where the crime in question had been committed in circumstances unconnected to a paramilitary organisation. An inherent right of appeal existed for any individual convicted by a Diplock court.

The use of such tribunals raises important questions with regard to the ability of the defendant to have a fair trial. Indeed, trial by jury is an important safeguard in terms of the due process afforded the individual. Removal of the jury causes concern both in relation to the issue of "case hardening" as well as the amalgamation of the role of the judge as tribunal of law and the traditional role of the jury as tribunal of fact. The former refers to the danger of the judge becoming increasingly cynical of similar

[158] *Report of the Commission to Consider Legal Procedures to Deal with Terrorist Activities in Northern Ireland.*Cm. 5185. (London: HMSO, 1972).
[159] *Ibid.* paras. 17, 37.
[160] *Ibid.* para. 6.

defences offered by one defendant after another as well as preferring to take the version of the police and security forces over that of the defendant. However, notwithstanding the concerns raised in relation to juryless trials it has been held by the European Commission of Human Rights that whilst in some states trial by jury is an important element in ensuring fairness in the criminal justice system, article 6 of the ECHR does not specify trial by jury as one of the elements of a fair trial.[161]

Other changes to the criminal justice system in Northern Ireland, in conjunction with the use of Diplock courts, placed the individual at a disadvantage. These changes were in the form of the admissibility of confessions obtained through coercive interrogation introduced so as to overcome the perception that the common law rules relating to the admissibility of confessions was hampering the course of justice in the province,[162] as well as the use of "supergrasses." In addition the erosion of the right to silence further weakened the position of the individual. Such modifications to the criminal justice system exacerbated the diminishing confidence held by the public in the administration of justice in Northern Ireland. Indeed in a period of less than five years following the introduction of Diplock courts, 82% of the public sought a return to jury trial.[163] Whilst introduced in order to facilitate convictions and reduce the reliance on the power of internment in existence in the province, the power to intern remained in force and indeed was actively used until 1975. Moreover, such provisions proved ineffective at reducing the levels of violence in the Province with the overall effect being that of diminished confidence in the operation and institutions of justice.

Conclusion

The long history of domestic terrorism in the United Kingdom and the prolific nature of the Troubles exemplifies the situation in which a country deems existing anti-terrorism measures to be inadequate in the face of a terrorist attack which results in a

[161] *X and Y v Ireland* (1980) 22 DR 51, 73. *Callaghan and Others v United Kingdom* (1989) 60 DR 296, 301.
[162] *Ibid.* para. 87.
[163] G. Hogan and C. Walker, *Political Violence and the Law in Ireland,* (Manchester University Press, 1989) p. 105.

relationship of action and reaction between the terrorist actors and the state. However, such legislative reaction does not always increase security and instead can have the effect of inciting increased violence. The experience of the UK with regard to Northern Ireland serves as an example of the way in which legislative measures to counter terrorism can have the converse result. Indeed the legislation had the effect of restricting certain fundamental rights and with regard to the province itself, the brunt of its application to the Catholic minority had the effect of undermining the democratic principle of equality of treatment. Such a result served to inflame nationalist passion and in turn increased the membership of terrorist organisations and exacerbated levels of violence.

The effect on democracy was felt differently in Great Britain and Northern Ireland. The interference with fundamental rights and liberties was a notable effect on the British mainland. The enactment of provisions which cause such an impact can be claimed by some as a terrorist victory in prompting the state to respond to the threat in a way which restricts democratic values. Moreover, enactment of extensive powers and interference with the rights and freedoms of the individual over a prolonged period will have an inevitable corrosive effect on the society affected. This was seen by the discrepancy between the number of those arrested under the PTA and the number of those subsequently charged.[164] Moreover, the normalisation of emergency measures into the ordinary law as well its acceptance by the populace demonstrates that fact that democracy did not emerge completely unscathed from the United Kingdom's prolonged terrorist struggle. However, in the case of Great Britain the stability of the state was not threatened by either the violence itself or the measures taken in response. There was no interference with the ability of the mechanisms of state to function effectively and as such the terrorist threat did not cause irreparable damage to the fabric of democracy, though it may be said that such an experience creates an atmosphere with the potential for further repression.

The same cannot be said with regard to Northern Ireland. Indeed, the effect of the provisions enacted in relation to the Province went further than the erosion of rights experienced in Great Britain to a loss of public confidence in the administration of

[164] A further example is the use of Diplock courts in Northern Ireland for cases unrelated to terrorism.

justice and the institutions of the state. In consideration of the fact that the measures enacted were often not effective against the terrorist threat and in some instances served to exacerbate it, it is hard to justify these measures on the grounds of their efficacy. The effect of these measures was to undermine certain democratic principles, though it cannot be said that this occurred to such an extent that democracy in Northern Ireland was negated completely.

The use of extraordinary emergency powers in fighting terrorism has always given rise to arguments and concerns, not just from civil libertarians but also from the public in general, with regard to the repressive nature of the law. The relationship between civil liberties and anti-terrorism law has always been tense, due to the fact that the fight against terrorism seemingly requires the sacrifice of the former in order to strengthen the latter; to deprive freedom in order to restore liberty is an irony not lost in this debate. Moreover, the argument that it is defensible to curtail the rights of the masses in order to secure the conviction of a few grew to rest uneasily given the protracted life span of the PTA, and EPA, regime. The extent and longevity of the Acts placed the individual in a position of vulnerability and also served to exacerbate the pressure caused by such legislation on society, democracy and the rule of law.

Chapter 3

The Terrorist Threat and Anti-Terrorism Measures in the United States Prior to 1996

The Terrorist Threat and Anti-Terrorism Measures in the United States Prior to 1996

In comparison to the well-known Irish Nationalist terrorist struggle in the United Kingdom, it was often assumed that the United States was a country touched only very rarely by terrorism. Whilst attacks against American citizens and property abroad became more prolific,[1] it was often felt that the United States was somewhat of a safe haven from this growing phenomenon. Indeed, with regard to international terrorism, the first major attack on US soil did not occur until the 1993 bombing of the World Trade Centre. However, the often common assumption of the US as a country with a lack of domestic terrorism is a gross misconception. Indeed between 1954-2000 domestic terrorism accounted for 79.7% of US terrorist incidents, and 88.4% of terrorist fatalities.[2] Though an ongoing issue, terrorism in the United States, prior to the end of the twentieth century and the beginning of this, never reached such levels as to seriously threaten the stability of the nation. The same can be said with regard to international terrorism directed at the United States abroad. This is reflected in the response undertaken to the phenomenon which addressed the threat by way of policy decisions across the political spectrum as well as through reliance on the criminal law. The enactment of emergency measures did not prove necessary with the effect that some degree of balance was achieved between the security of the nation and democratic values.

Domestic Terrorism in the United States

There exists a great difference in the source of domestic terrorism in the United Kingdom and the United States. Whilst the vast majority of terrorism in the UK finds Irish Nationalism at its root, there is a huge diversity between groups responsible for domestic terrorism in the US. Indeed the high saturation of Irish Nationalist violence has resulted in a form of word association when Northern Ireland is mentioned. This

[1] The FBI had declared that typically 20-30% of international terrorism incidents which occur annually worldwide involve US interests. See *Terrorism in the United States 1999* p. 16.

is however not the case with the United States because of the multiplicity of groups responsible. Moreover, domestic terrorism in the US has tended to occur in waves, with no one cause being dominant for any continuing period. In what has been termed the swing of the pendulum, the Federal Bureau of Investigation (FBI) have categorised domestic terrorism as falling broadly into three main classes.[3] Left-wing extremism was predominant from the late 1960s to the early 1980s and was then followed by a shift in the late 1980s to right-wing extremism. The 1990s saw a continuation of this in the form of a more factionalised right wing movement focused in particular on militias and patriot groups. A threat was also faced from special interest groups, in particular animal rights and environmental activists in the mid to late 1990s.

Left-wing Terrorism

The atmosphere of unrest in 1960s America spawned by both the civil rights movement as well as the war in Vietnam, was the catalyst for the first major post-war wave of terrorism in the United States. These issues as well as the notion of socialist revolution ignited the student population to such an extent that the roots of many of the prominent left-wing terrorist groups were to be found in the radical student movement and in particular such organisations as the Students for a Democratic Society (SDS). The anti-imperialist, anti-capitalist stance of the movement called for a participatory democracy in post-Vietnam America in an attempt to right the social and political wrongs brought about by the government. Whilst the SDS has been said to have at one time boasted an official membership in the realms of 100,000,[4] this commitment to the cause was not sustainable and despite the fact that the issues which had originally fuelled the New Left had not been resolved and a socialist revolution had not been forthcoming, this parent organisation fractured in 1969 giving way to militant leftist organisations such as the Weather Underground[5] and, though not a direct descendant, the Symbionese Liberation Army (SLA).

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[2] See C. Hewitt, *Understanding Terrorism in America. From the Klan to Al Qaeda* (Routledge, 2003) p. 15

[3] FBI Report, n. 1 above p. 29.

[4] Hewitt, n. 2 above p. 32.

[5] Originally known as the Weatherman, political correctness guided the change in nomenclature.

The more radical methodology employed by the Weather Underground (WU) was influenced by both the experience gained through the SDS but more importantly by the revolutionary hubs of Cuba and Vietnam. Of course the issues which fuelled the New Left such as the desire for social change, originally also formed a large part of the motivation of the WU, however the desire to right these social inequalities was overtaken by the war in Vietnam and the notion of "bringing the war home." In the same way that the focus of the organisation was not static, the ideology of the WU also fluctuated. This was in response to both factors in the US as well as shifts in the ideological guidance of the group from the Cuban revolution and such influences as Regis de Bray and Che Guevara to the revolution in China and thus a more Marxist-Leninist bent. However, despite the often contradictory doctrines of the group, the goal of the WU remained "...the destruction of US imperialism and the achievement of a classless world: world communism."[6]

The shift in motivation from a social to political stance inevitably led to the use of armed struggle and this commitment to violence underscored the schism between the originally non-violent SDS and the direction of the WU. However, although the most active domestic terrorist group at the time, the campaign of the WU was never one of massive onslaught in the same way as that of Irish Nationalist terrorism in the UK; indeed though dedicated to a campaign of guerrilla warfare the WU did not look to achieve its objectives through massive numbers of casualties or fatalities. Targets symbolic of the state were most common, and this policy of avoiding civilian targets meant that the WU, despite its official status as a terrorist group, did not inspire the same atmosphere of fear amongst the population, as was the case in Northern Ireland during the Troubles.

The campaign of the Weather Underground began in October 1969 with an explosion which destroyed the Haymarket Riot statue, erected as a tribute to the officers who were killed during the riots of 1886, in Chicago's Haymarket Square and which signalled the beginning of an uprising which was to last four days and ultimately

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[6] *You don't need a Weatherman to know which way the wind blows,* Statement made by alienated members of SDS, June 18th 1969.

resulted in the arrest of 287 people. No fatalities occurred during the "Days of Rage", however the aggression of the organisation was left in no doubt as 59 police officers alone sustained personal injury ranging from abrasions to human bites.[7] Indeed, the level of violence to which participants were required to commit was blamed for the poor turnout of what was supposed to have been the start of a mass revolution by the people.[8]

Whilst mixed reports exist as to the success of the "Days of Rage", it is the case that the riots failed in their objective as a catalyst for revolution and also damaged the radical leftist cause to a certain extent. The outcome of this initial stage to the WU campaign was to encourage the establishment of an underground movement to which hundreds of members flocked. However, a major contributory factor to this decision was more likely the desire of those arrested to avoid the legal repercussions of their actions. The deaths of three WU members in March 1970 whilst constructing a bomb intended for an army dance in Fort Dix, New Jersey compounded this decision and it was from this increasingly subversive position that the WU continued to wage its war against the state.

The police were to prove to be a common target for the WU and were attacked in many different guises, ranging from symbolic destruction such as the Haymarket Square bronze to the bombing of police cars in various parts of the United States over the years. In 1970 the focus shifted to police stations, with attacks occurring at both the police headquarters in New York in June in which eight people were injured, and the Golden Gate Park branch of the San Francisco police department in February. Several were wounded in this attack which claimed the life of one officer, the only death for which the group was responsible during its campaign. However, responsibility for the Golden Gate Park attack was never officially claimed by the WU, presumably due to the tragic consequences which the organisation usually sought to avoid.

[7] See FBI Weather Underground Summary 20th August 1976 Part 1c p. 7.
[8] T. Wells, *The War Within: America's Battle Over Vietnam* (Berkely, CA: University of California Press, 1994).

The revolution at the core of the WU cause failed to materialise to a large extent due to a lack of support by the masses. A repetitive list of targets and tired accompanying communiqués could be said to be in part responsible for failing to capture the attention of the population. Indeed, commendable though the organisation's policy of avoiding civilian targets was, the absence of a culture of fear so fundamental to terrorism also contributed to a national feeling of indifference to this left-wing struggle. Indeed, this is true even with regard to two attacks by the organisation of very high-profile targets. The US Capitol was the target of an attack by the group on 1st March 1971. No injuries were sustained and although an estimated $300,000 of damage was caused, most of this was focused on a restroom. This building was selected as a world renowned symbol of the imperialist government attacking Indochina,[9] yet the fact that the group only succeeded in destroying a menial facility goes some way in explaining lack of public support for the WU as well as the fact that this infiltration of the heart of the American government was quickly forgotten. A similar example is the bombing of the Pentagon in Arlington, West Virginia in May 1972, which read a similar story with no casualties and little impact on the memory of the country. Publication in 1974 of the tract *Prairie Fire: The Politics of Revolutionary Anti-Imperialism* reiterated the stance of the organisation as "communist men and women" yet despite the continued revolutionary rhetoric, the militant days of the group were numbered with a great deal of members returning to non-violent political activism.

The left-wing struggle against anti-imperialism did not end with the decline of the Weather Underground, with those remaining members unwilling to give up joining with other leftist groups to continue the fight. One such group, formed in the late 1970s, was the May 19th Communist Organisation (M19CO) so called due to the shared birthday of Ho Chi Minh and Malcolm X, the membership of which represented the remaining vestiges of left-wing terrorist organisations. Described as one of the most violent left-wing organisations,[10] M19CO's campaign consisted of three objectives: to free political prisoners held in US prisons and to perpetrate a

[9] FBI Report, n. 1 above.
[10] W. C. Mullins, *A Sourcebook on Domestic and International Terrorism. An Analysis of Issues, Organizations, Tactics and Responses,* (Charles C. Thomas, 1997) p. 182.

series of bombings and attacks which would be funded by criminally acquired capitalist wealth.[11]

Black Liberation Army leader JoAnne Chesimard and leader of the Armed Forces of National Liberation (FALN) William Morales were both beneficiaries of the first stage of the M19CO campaign. The former was rescued from New Jersey State Prison in 1979, and the latter from Bellevue, New York, hospital, whilst recovering from injuries sustained during the preparation of a bomb for the FALN. Perhaps the crime for which M19CO was best known was committed as part of the organisation's second objective, namely the robbery of a Brinks armoured car in Nyack, New York in October 1981. The crime netted the group $1.6 million and resulted in the deaths of two police officers and one Brinks guard. Of the twelve-strong gang, eight of the perpetrators escaped but the four captured represented a core of activists who had eluded the law for over a decade. They received sentences which exceeded 170 years between them. The fact that the money stolen in the Brinks robbery was subsequently recovered did not hinder stage three of the campaign; indeed, using various aliases, M19CO was responsible for many bombs between 1982 and its last attack in February 1985. Targets ranged from the FBI offices in Staten Island, New York, to the Capitol, and the National War College in Washington D.C.[12] However, the decline of socialist inspired leftist terrorism was complete by the mid 1980s, leaving behind only memories of the student radicals and little in the way of actual achievement.

A facet of left-wing terrorism which has persisted in the United States is terrorism emanating from the status of Puerto Rico as a commonwealth of the United States. Following the American Spanish war of 1898 Puerto Rico was annexed by the US as an "unincorporated territory." US citizenship was granted to the inhabitants of Puerto Rico in 1917 and commonwealth status was granted to the island in 1952 following legislative authorisation by Congress for the creation and adoption of a constitution. Plebiscites in 1967, 1993 and 1998 resulted in the majority of voters supporting the continuation of this arrangement. However, it is the issue of Puerto Rican

[11] B. L. Smith, *Terrorism in America. Pipe Bombs and Pipe Dreams,* (State University of New York Press, 1994) p. 101.
[12] *Ibid.*, above p. 103.

independence which has been at the root of a great deal of political violence in the US in the latter part of the twentieth century.

Opposition to the status of Puerto Rico as a commonwealth of the US has existed since its establishment as such, with movements supporting the inclusion of the island as the 51st state as well as those advocating full independence. The independence movement was first brought to the forefront of the public consciousness in 1950 with an unsuccessful assassination attempt made against President Truman by two Puerto Rican extremists. This was followed in 1954 with the injury of five Congressmen when four Puerto Rican nationalists opened fire from the gallery of the House of Representatives. With these attacks, terrorism was directed against US interests on the US mainland with the purpose of affecting US policies for the first time.[13]

Of the six main nationalist terrorist organisations aligned with Puerto Rico, it was only the Armed Forces of National Liberation (FALN) which focused its operations on the US mainland, predominantly in Chicago and New York. The FALN appeared in 1974 and has been credited with being the most prolific terrorist group in US history,[14] with 150 terrorist incidents attributed to it.[15] The organisation rose to prominence in 1975 with the bombing of Fraunces Tavern in New York which killed four and injured fifty-four. New Years Eve 1982 was marked by five bombs in New York City. The choice of targets were representative of the anti-imperialist bias of the FALN with bombs going off at the federal courthouses in Brooklyn and 26 Federal Plaza and at 1 Police Plaza. Two further devices exploded near the federal courthouse at Foley Square before they could be disarmed. Three police officers were injured.

With the same political aims as the FALN but with a different operational base, the remaining Puerto Rican terrorist organisations focus their desire for independence on the island itself. From this pool of many, the Macheteros and the Organisation of Volunteers for the Puerto Rican Revolution (OVRP) emerged in 1978 to complement and indeed later succeed the nationalistic efforts of the FALN, selecting military targets in Puerto Rico in particular. The ambush of a Navy bus in December 1979

[13] J. D Simon, *The Terrorist Trap,* (Indiana University Press, 2001) pp. 51-52.
[14] G. Martin, *Understanding Terrorism. Challenges, Perspectives and Issues* (Sage Publications, 2003) p. 325.

which resulted in the deaths of two Navy personnel and the wounding of nine others acted as a precursor to what has been described as one of the most daring terrorist attacks in US history. [16] On 12th January 1981 the Macheteros bombed nine military planes at a National Guard base on Isla Verde, Puerto Rico; fortunately there were no casualties. The OVRP was dominant in late 1984 and 1985 with a spate of bombings on the island, with particular focus on Army recruiting offices. These organisations often joined forces and in this capacity were responsible for the assassinations of various military and establishment figures, as well as a rocket attack against the federal courthouse in San Juan in 1985.[17] Between, 1980-1989 the Macheteros and the OVRP alone were responsible for 44 terrorist incidents.[18]

The operational capacity of these organisations was greatly eroded due to effective detection by various law enforcement agencies particularly, in the case of the Macheteros and the OVRP, following several attempted and successful robberies of Wells Fargo armoured trucks which resulted in the indictment of nineteen participants. However, despite this diminishment in the strength of Puerto Rican nationalist terrorist organisations, the FBI in 1999 stated Puerto Rican terrorism to be one of the remaining vestiges of left-wing terrorism in the US.

Right-wing Terrorism

The United States witnessed the rise of a new wave of terrorism in the 1980s. Whilst the notion of rightist violence was not a completely new phenomenon to the country given the history of violence perpetrated by such groups as the Ku Klux Klan, the threat faced in the 1980s and 1990s was very different to that posed by left-wing extremism in the preceding decades. Whilst the purpose here is not to critically examine the variations between left-wing and right-wing terrorism, one of the important differences which goes some way in explaining the assortment of groups on the right is the lack of a universal ideological foundation. The left is characterised by the influence of Marxism which provides a link between leftist organisations

[15] Hewitt, n. 2 above p. 61.
[16] Smith, n. 11 above pp. 115-116.
[17] Mullins, n. 10 above p. 184.

throughout the world.[19] This is not the case with right-wing groups and as such explains the mixture of organisations on the right, linked sometimes tenuously only by notions of nationalism and racism. The basic foundation of the right-wing movement is the notion of racial supremacy, which of course encompasses intense racism, nationalism and in particular a hatred of Jews as well as more widespread xenophobia. In this way the descent from fascism is clear. This extends further on the far right to include anti-government sentiment which ranges from dissatisfaction with what is perceived as a liberal Congress, to the belief that the country is actually run by a Zionist occupation government which aims to destroy the true Aryan race.

Such right-wing beliefs have long featured in US history and were manifested most infamously in the actions and beliefs of the oldest terrorist group in the US, the Ku Klux Klan. The Klan itself was not directly responsible for the violent right-wing extremism of the 1980s, rather it acted as a precursor for the later right-wing groups whilst providing a solid membership base. Various factors have been identified as contributing to the resurgence of the 1980s, *inter alia,* the growth of women's rights, the introduction of more relaxed immigration laws, racial equality and affirmative action.[20] This plethora of causal influences as well as the lack of a universal binding philosophy had the effect of spawning a vast number of right-wing organisations inspired by various factors and therefore committed to differing levels of violence.

Whilst it is the case that there is no universal ideological influence on the right-wing movement, religion has provided a bond to some of the organisations of the late twentieth century in the form of Christian Identity. This originates in "Anglo-Israelism" which espouses the belief that white Anglo-Saxons are the true "chosen people" due to Christ's Aryan ancestry. This goes further to denounce Jews as the spawn of Satan and anyone of non-Aryan descent as "mud people." Anti-governmental sentiment can also be traced to the belief that corruption of the Constitution and consequently the contamination of the citizenry of the United States was the work of an illegitimate federal government through the adoption of the Fourteenth Amendment which grants citizenship to *anybody* born in the States and not

[18] FBI Report, n. 1 above pp. 54-61.
[19] Martin, n. 14 above p. 165.
[20] Mullins, n. 10 above p. 185.

just Aryans.[21] This extends further in to the notion of postmillennialism, whereby the white race must re-establish itself by overthrowing the Zionist controlled government, to enable the second coming of Christ.[22] A cornerstone of the far right, in both secular and Christian identity groups is the belief in Armageddon and it is preparation for this final battle which has prompted some degree of militancy in even the least violent groups by way of paramilitary training and weapons caches.

Violence on the right tended to be far more sporadic and inconsistent than the longstanding campaigns of the revolutionary left or the Irish Nationalists, nevertheless several organisations moved past ideology and rhetoric into the realms of terrorist violence. One such group, the Order was established in 1983 with the aim of overthrowing the federal government: "We from this day forward declare that we no longer consider the regime in Washington to be a valid and lawful representative of all Aryans who refuse to submit to the coercion and subtle tyranny placed upon us by Tel Aviv and their lackeys in Washington...Let friend and foe alike be made aware. This is War!" As is the case with all terrorist organisations, ultimately crime pays and as such, much of the criminal activity of the Order was related to the funding of the revolution by way of both robbery and counterfeiting. Indeed it was the theft of $3.6 million during the robbery of a Brinks truck in July 1984 which ultimately led to the collapse of the organisation following indictments for various offences in 1985. Although the operational lifespan of the group ultimately proved to be little over a year, twenty-one incidents were attributed to the Order[23] including robbery, bombings, arson and murder. However, the organisation gained notoriety following the murders of a state trooper in Missouri and Jewish talk-show host and critic of Christian Identity, Alan Berg; indeed these violent tendencies were further underscored when demonstrated internally through the execution of Walter West, an unreliable and therefore dispensable member of the Order.

A group of similar standing and with which the Order became linked was the Covenant, Sword and Arm of the Lord (CSA). Established more as a refuge for ex-convicts and drug addicts in 1971, the 224 acre compound became a survivalist camp

[21] See H. W. Kushner, *Terrorism in America. A Structured Approach to Understanding the Terrorist Threat,* (Charles C. Thomas Publisher Ltd., 1998) *pp.* 59-64 regarding Christian Identity.
[22] Mullins, n. 10 above pp. 187-188.

and paramilitary training centre for the far right. In this way, the CSA represents an earlier version of the militias which were to come to prominence in the 1990s. The militancy of the group grew in the early 1980s as somewhat of a parallel to the actions of the Order, whilst links were also formed with other violent Christian Identity organisations such as the Aryan Nations. What is of particular interest regarding the CSA is not necessarily the actual violence perpetrated, which did not amount to a great deal. Rather, it is the potential for mass destruction which marked this organisation out from the violence of other right-wing groups. Indeed, in its quest to aid the second coming of Christ, the CSA masterminded a plan to poison the water supply of a major North American city and actually went to far as to amass thirty gallons of cyanide. The bombing of a gas pipeline in Arkansas also exemplifies the terrorist mindset of this organisation. Though minimal damage was caused, the potential for destruction was enormous.

The prosecutions and subsequent collapse of many of the more prominent right-wing groups of the 1980s, did not lead to the outright disintegration of the movement as a whole. However, it was not until the early 1990s that the anti-government sentiment of the movement was sufficiently roused so as to prompt the formation of the patriot and militia movements; two distinct, yet overlapping factions built on the foundations of the American right. Two catalytic events were responsible for this development which is said to have claimed over 50,000 members at its peak. In 1992, the siege at Ruby Ridge provided ample evidence of the danger posed by the government, when the actions of white separatist Randy Weaver resulted in an eleven-day siege and the deaths of Weaver's wife and son and one federal agent. The siege at the Branch Davidian compound in Waco, Texas in 1993, in which over eighty people died further reinforced the notion of a tyrannical federal government and led to the belief that the people must be allowed to arm themselves against this danger. This hatred and indeed fear of federal government is compounded by an abundance of conspiracy theories ranging from the belief in the existence of concentration camps to deal with true patriots, to the positioning of invasion coordinates on the back of road signs to aid the imposition of the New World Order.[24] It is this paranoia which has led most militias and patriot groups to establish survivalist compounds and paramilitary training camps

[23] Hewitt, n. 2 above p. 61.

so as to be sufficiently prepared for the coming apocalypse. Moreover, a form of judicial legitimacy is provided to such anti-government beliefs in the form of Common Law Courts, which act in defiance of genuine law enforcement authorities and courts, often targeting political opponents in "trials" as well as absolving adherents of any legitimate legal burdens and obligations. Whilst closely connected to the militia movement and therefore deemed a threat, common law courts more readily engage in fraud and financial crime by issuance of bogus liens and cheques. This form of "paper terrorism" has become such a problem in some states as to result in the drafting of legislation outlawing such activity.[25]

The militia movement rose to worldwide prominence in 1995 following the bombing of the Alfred P. Murrah federal building in Oklahoma City on April 19th, a date chosen to coincide with the FBI assault in Waco, Texas. The perpetrators of this attack, Timothy McVeigh and Terry Nichols whilst acting alone with no particular affiliation with any terrorist organisation, were said to have both been adherents of the patriot movement, with alleged attendance at militia meetings. The bombing in Oklahoma City claimed the lives of 168 people and remains the worst act of domestic terrorism in the United States. Indeed, initially the horror felt at the bombing resulted in a reduction in militia members with several groups closing down.[26] However, this was not followed with a reduction in the threat posed by right-wing extremism, with a number of bank robberies and bombings directed at abortion clinics carried out in 1996 by a group known as the Phineas Priesthood, an off-shoot of the Christian Identity movement.[27] The prevention of several acts of terrorism planned by militia groups such as the Mountaineer Militia and the Freemen Organisation highlight that the threat posed by such organisations continues.

Special Interest Terrorism

Despite the inclusion of special interest terrorism in some classifications of left or right wing terrorist movements and organisations, groups espousing special interest

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[24] Martin, n. 14 above p. 314.
[25] FBI Report, *Terrorism in the United States 1997* p. 11.
[26] Kushner, n. 21 above p. 116.

causes, such as animal rights or anti-abortion beliefs represent a unique form of terrorism. This is due to the fact that, rather than seeking to achieve wide-spread political change akin to, for example, the desire for socialist revolution by the Weather Underground, special interest groups aim to change only the law and/or policy surrounding the subject of concern. Three main issues have been at the root of the special interest terrorism faced by the United States; animal rights, the environment and the anti-abortion question.

Animal rights extremism and eco-terrorism are causes which stem from the 1980s but which rose to prominence in the 1990s under the label "specific issue terrorism." Many groups dedicated to the protection of the environment or committed to stopping animal abuse exist, and several have engaged in violent tactics and terrorism on differing levels in an attempt to bring these causes to the forefront of public awareness and to achieve their underlying objectives. Of the organisations active, not only in the United States but internationally, the most infamous and indeed the most prolific are the Animal Liberation Front (ALF) and the Earth Liberation Front (ELF).

Though with different roots and a different driving force, both groups are very similar in structure as well as in deed. The use of direct action is a common tactic in both organisations as a means of achieving the respective objectives of bringing about the end of all animal abuse, and preventing the destruction and exploitation of the natural environment. In both cases, this direct action is perpetrated through the common guerrilla tactic of autonomous cells operating independently and anonymously so as to minimise the potential for infiltration and detection by law enforcement agencies.

It is the policy of both the ALF and the ELF to take all basic precautions so as to avoid causing harm to life, both human and animal and it can be said that the vast majority of terrorist actions by both organisations have not resulted in numerous deaths and injuries. However, any such harm which occurs as a result of an operation is seemingly justified as a necessary sacrifice in the overall struggle, as has been the case when ALF actions have resulted in the deaths of lab animals.[28] In contrast to terrorist organisations which seek to achieve the biggest death tolls in an attempt to

[27] FBI Report, *Terrorism in the United States 1996* pp. 4-5.

achieve objectives and gain publicity, these special interest groups generally focus on economic sabotage and financial loss as an effective weapon in driving companies and laboratories out of business. Incendiary devices and arson are among the most popular methods chosen by these organisations, particularly with regard to ALF attacks on university laboratories due to the fact that the destruction of years of research is an effective means of discouraging further work; indeed the first terrorist incident recorded by the FBI as perpetrated by special interest extremists was an attack by the ALF on a laboratory in the University of Davis, California in 1987 which caused damage in the region of $5.1 million. Other such attacks have occurred steadily since 1984 on targets such as meat and poultry distribution companies, fast food restaurants and hospitals.

The ELF caused over $12 million of damage with an arson attack at a ski resort in Vail, Colorado in 1998 in protest at proposed expansion which would have allegedly destroyed the best natural habitat of the Canadian lynx in the state. This attack underlined the difference in tactics between the ELF and its founding organisation the British Earth First movement; indeed it is believed that the lack of militancy in the parent organisation prompted the formation of a splinter group prepared to use violence to further the cause. Further arson attacks have taken place on such targets as US Forest Industries facilities, university laboratories researching genetically engineered products and companies responsible for deforestation and destruction of ecosystems. The ELF was particularly active in 2003 causing an estimated $50 million of damage in the arson of an apartment complex in San Diego, California in a stand against "rampant urban development"[29] as well as targeting several car dealerships in Los Angeles to demonstrate against pollution and fuel consumption. Indeed the ELF claims to have caused damage in the region of over $100 million since 1997.[30] As is the case in the United Kingdom, with animal rights extremism, specific issue terrorism is a growing phenomenon in the United States. The on-going campaign of such groups is clear on consideration of statistics regarding domestic

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[28] C. C. Combs, *Terrorism in the Twenty-First Century,* (Pearson Education, Inc, 2003, 3rd ed.) p. 166.
[29] Seth Hettena, (2003), Earth Liberation Front Claims Responsibility for San Diego Arson, *The Mercury News* 18th August.
[30] ELF Strikes Against Urban Sprawl in San Diego: Four Houses Burned to the Ground in Action Against "Development Destruction" September 19, 2003. http://www.earthliberationfront.com/news/2003/091903.shtml [23/09/03].

terrorism; indeed animal rights or environmental activists were responsible for eight of the twelve domestic terrorist incidents to occur in the US in 1999.[31]

A further manifestation of special interest terrorism, common to the United States stems from the anti-abortion issue. Violence perpetrated against abortion clinics and women's care centres dates back to 1977, but the emotiveness of the issue concerned has meant that such violence was not labelled terrorism for many years. Furthermore, it was often mistakenly believed that such violence was the work of impassioned individuals working alone, rather than with the support of extremist organisations. However, the fundamentalist religious foundations of organisations such as the Army of God, known to encourage violence against those involved in abortions, have resulted in the connections between groups of this ilk and the far right. The staunch pro-choice stance of the Clinton administration, exemplified clearly by such action as the Freedom of Access to Clinics Entrance Act of 1994 would have easily pushed the anti-abortion movement into a closer alliance with the anti-government stance of the right, so that Christian beliefs were not the only cornerstone of this shared foundation.[32]

Anti-abortion terrorism has often occurred in trends; butyric acid attacks were the weapon of choice in the early 1990s,[33] arson has also been a common favourite, as has vandalism and harassment. These trends have been punctuated by differing tactics, for example the kidnapping of an abortion provider and his wife in Illinois, who were held hostage for eight days. However, a clear escalation is evident in the level of violence used by pro-life terrorists, particularly in the 1990s. The use of bombs increased as the amount of care taken to avoid casualties decreased; indeed forty such attacks are said to have been committed on abortion clinics between 1993-1998. Individual abortion providers also became increasingly vulnerable to the sniper's gun, with the murders of five such workers attributed to anti-abortion terrorism in the 1990s.

[31] FBI Report, n. 1 above p. 30.

[32] See Hewitt, n. 2 above pp. 38-41, 125-126. See also F. Rich, 1995, *Connect the Dots,* in F. McGuckin, *Terrorism in the United States* (The H. W. Wilson Company, 1997) pp. 14-15 on this connection.

[33] E. Smeal, 1995, *Antiabortion Extremists: Organized and Dangerous,* in McGuckin, *ibid.* p. 70.

International Terrorism

International terrorism has been very much a double-edged sword for the United States over the years; indeed the relative dearth of international terrorist incidents in the US has to be balanced against the frequency of attacks against US citizens and property abroad. The Cuban terrorist group Omega 7 represented the majority of international terrorist activity on US soil in the late 1970s and early 1980s. Scores of attacks against Cuban targets and representatives between 1974 and 1983 credited the organisation with being the most active international terrorist group in America during this period.[34] However, it was not until the 1990s that Americans were specifically threatened by international terrorism within the borders of the US. International terrorism overseas posed a much greater threat to Americans; this has been said to result from several factors, in particular the high visibility of American targets across the world and the guaranteed media coverage which resulted from such attacks. Furthermore, the policies of the United States, such as involvement in the Middle East, was seen as an impediment to the political objectives of many terrorist groups.[35]

Essentially the targeting of Americans overseas began in 1970 with the hijacking of four planes en route to New York by the Popular Front for the Liberation of Palestine (PFLP). This hijacking was a large-scale extension of the common terrorist tactic of the 1960s, but this represented the first major international incident directed specifically against the US. This however, was not representative of the attacks against US targets which varied a great deal in location, perpetrator, method and target over the years. One of the most popular tactics for international terrorists across the world was the targeting of American embassies and diplomatic staff. This was not a new phenomenon; indeed the late 1960s and early 1970s were punctuated with sporadic attacks on US diplomatic personnel in various countries, ranging from kidnap to murder. The threat faced by such personnel was brought home in the US embassy hostage crisis of 1979 in which 53 diplomats were held hostage for more than a year. This terrorist incident, played out on the world stage, highlighted the

[34] Smith, n. 11 above p. 134.

effectiveness of terrorism as a political tool not simply because of the length of time the Americans were imprisoned but because it highlighted the way in which a country as powerful as the United States could also be held captive; indeed the Iranian radicals were essentially responsible for the downfall of the Carter administration. This incident also exemplified the phenomenon of state-sponsored terrorism, of which Iran was one of the main proponents for many years.

Although at risk from terrorist attack in a great many countries of the world, America's involvement in the Middle East laid the foundations for the majority of terrorism overseas which the US experienced. Indeed it was on the Middle Eastern stage that America suffered some of the worst assaults, particularly because the US military presence in the region increased the choice of American targets for groups such as Hizb'allah.[36] Mortar and grenade attacks against US troops became a common occurrence but the most effective weapon proved to be the suicide bomb. This was first used against a US target by Hizb'allah on April 18th 1983 when a truck carrying 2000lbs of explosives crashed in to the American embassy, killing 63 people, seventeen of which were Americans.[37] The effectiveness of this weapon was highlighted again in an attack on the US Marine barracks in Beirut in October 1983 which killed 242 Americans. The ultimate withdrawal of the US from Lebanon in 1984 obviously led to a lessening in the amount of terrorist attacks against US targets in the region. However, the risk to Americans remained in other parts of the world. Attacks occurred in such places as Greece and Mexico, and groups such as Hizb'allah continued to act as a threat to the US in other areas, as demonstrated by the bombing of a restaurant in Spain in April 1984 which was often frequented by US citizens; eighteen American servicemen were killed and 83 others were injured. The interception of communications between Tripoli and the Libyan embassy in East Germany authorising the bombing of a known haunt of US servicemen, the LaBelle disco in West Berlin, in which two people were killed and 230 were injured, finally provided the US with enough reason to retaliate against this known sponsor of terrorism. However, this incident and the bombing of Pan Am flight 103 on the night

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[35] J. Brent Wilson, "The United States' Response to International Terrorism" in D. A. Charters, *The Deadly Sin of Terrorism. Its Effect on Democracy and Civil Liberty in Six Countries,* (Greenwood Press, 1994) p. 174.
[36] Also known as Islamic Jihad.
[37] Simon, n. 13 above p. 175.

of December 21st 1988 in which 270 people, including 189 Americans were killed demonstrated that the reach of international terrorism, and in particular state sponsored terrorism, extended far beyond the borders of the Middle East.

High profile incidents in 1985 such as the hijacking of TWA flight 847 by Lebanese terrorists as well as the hijacking of the cruise ship *Achilles Lauro* by Palestinian terrorists, in which two Americans were murdered, kept international terrorism very much in the public eye in the 1980s. However, the tactic of choice in this decade was a return to kidnapping, which proved to be a most effective weapon in the Middle East, and indeed the many hostage takings which occurred periodically throughout the decade came to personify international terrorism at the time. Citizens of several countries fell victim to this ploy, which proved effective, in a similar way to the Iran hostage crisis of 1979-1981, due to the prolonged nature of the tactic which affected many countries worldwide. Seventeen Americans were held hostage between 1982 and 1992, with claims that as many as 90 foreigners were abducted in Lebanon during this period.[38]

US interests continued to be the most common targets of international terrorism in the 1990s. However, the backdrop of the majority of international terrorism directed at the US in the late 1980s and early 1990s shifted from the Middle East to South America; indeed in 1989 64% of all anti-US terrorism occurred in Latin America.[39] Anti-American sentiment provided a common bond for the many terrorist groups in the region, and the majority of this was directed at American property, in particular American owned companies. The majority of attacks in 1989 consisted of bombings against US owned oil pipelines. Peru was noted as a particularly dangerous place for any foreigner but specifically Americans due to the violent tendencies of Sendero Luminoso and the Tupac Amaru Revolutionary Movement. Abduction also proved a popular tactic in the region in the 1990s, particularly in Colombia where the ransoms paid were used to fund criminal actions, specifically the rife drug trade in the country. Kidnappings of US citizens by groups such as the Revolutionary Armed Forces of Colombia (FARC) continued steadily throughout the 1990s. It was not until 1993 that

[38] Amnesty International (1997) *Israel's Forgotten Hostages: Lebanese Detainees in Israel and Khiam Detention Centre*, AI INDEX: MDE 15/018/1997 Available from: http://web.amnesty.org/library/Index/ENGMDE150181997?open&of=ENG-ISR [15/09/03].

Latin America lost the dubious title of being the region of the world witness to the most terrorism.

The 1990s witnessed the evolution of a reinforced strain of anti-American feeling. This was nurtured to full strength by Osama bin Laden and Al Qaeda. Such was the part played by this organisation in the 1990s in international terrorism, and in particular anti-American violence, that bin Laden is viewed by many as the personification of terrorism itself. Al Qaeda aims to rid the Middle East of Western influence so as to establish fundamentalist Islamic regimes in the countries of the region. The virulent anti-American feeling stems, from the imperialism of the US government and its presence in the Middle East which is seen as impeding the establishment of Muslim rule. The bombing of a US military housing facility, Khobar Towers, in Dharhan, Saudi Arabia in June 1996, in which nineteen US servicemen were killed and 515 others were wounded, is a prime example of an attempt to rid the region of the US military. Whilst, no direct connection to bin Laden was made, indeed indictments were returned in 2001 against fourteen members of Hizb'allah, intelligence indicates increased cooperation between these two very dangerous organisations, particularly in the sphere of anti-American action. Al Qaeda's commitment to the removal of the US military in the Middle East was left in no doubt following the bombing of the USS Cole in October 2000 which killed 17 sailors and injured 39 others.

Though officially formed in 1988, with roots dating back to the 1970s and the Soviet invasion of Afghanistan, Al Qaeda did not rise to prominence, particularly in the eyes of the public, until the 1990s when the large scale, high profile attacks of the organisation and the resultant mass casualties guaranteed a place in the public consciousness. The simultaneous bombings of the US embassies in Nairobi, Kenya and Dar es Salaam, Tanzania on August 7th 1998 in which over 250 people were killed and over 5000 injured exemplifies the desire of the organisation to claim as many lives as possible. Indeed the original intention had been to place the bombs beneath the embassy buildings to achieve maximum damage and increase the death

[39] Patterns of Global Terrorism: 1989.

toll. There can be no better example of this tactic than the attacks on the United States on September 11th 2001.

As mentioned previously whilst terrorism directed at US citizens abroad continued unabated in the latter years of the twentieth century, international terrorism took on a new twist in the 1990s in the form of attacks against Americans *in* America. The first example of this occurred in 1993 with the bombing of the World Trade Centre in New York on 26th February by Islamic extremists, in which six people were killed and over 1000 injured. 1200lbs of fertilizer-based explosives were packed into a rental van which was parked in an underground parking garage. The plan, though ultimately unsuccessful, was to topple one tower in to the second with the intention of killing the fifty or so thousand people believed to be in the complex at the time. The symbolism of the attack was as important, if not more so, than the ultimate outcome: terrorism had finally struck at the heart of America, dispelling the aura of invulnerability which had existed in the United States for so long.[40] As of that day, Islamic extremism became synonymous with terrorism, so much so that the immediate assumption following the April 1995 bombing of the Alfred P. Murrah Federal building in Oklahoma City, in which 166 people were killed, was that it was the work of Islamic fundamentalist terrorists. However, whilst some worrying parallels did exist between the perpetrators of these two tragedies, in particular the fact that both were the work of so-called freelance terrorists rather than those with obvious links to known terrorist organisations,[41] the automatic assumption that terrorism related to the Middle East had struck again on US soil was proved to be incorrect. Rather, it was determined that the attack had been perpetrated by individuals with connections to domestic right-wing extremism.

The final vestiges of America's invulnerability were destroyed on the morning of 11th September 2001 as four planes, hijacked by members of Al Qaeda were used both as literal and symbolic missiles against landmarks representative of the American heartland. Over 3,000 people were killed in the attacks on the twin towers of the World Trade Centre, the Pentagon in Washington and on a fourth plane which crashed

[40] The following year four Islamic militants were convicted of the bombing and sentenced to 240 years each. Two further men, one, Ramzi Yousef, is believed to have masterminded the plot, were convicted and sentenced for their part in the bombing in 1998.

into open countryside in Pennsylvania, but which is believed to have been heading for either the White House or the Capitol building.

With hindsight, the attacks of the 1990s, both on American soil and abroad, particularly those perpetrated by Al Qaeda, can be seen as a prelude to the worst terrorist attack ever to occur. In the space of a few short hours, it became clear that 2001 would stand as a watershed between terrorism in the twenty first century and the phenomenon as it existed previously. The attacks of September 11th changed more than just the physical landscape of the United States. For the first time ever, America was deemed to be under attack and this manifested itself in the aftermath of the atrocity not only militarily but also legislatively.

The enactment of two pieces of anti-terrorism legislation in 1996 and 2001, in response to major terrorist attacks was reminiscent of the United Kingdom's response to its terrorist struggle. Indeed legislating for the last atrocity was a recognised feature of British anti-terrorism law but was not a contributory factor to the legislative landscape of the US until the country was faced with terrorism of great magnitude on home soil. In the past the terrorist threat was such that the criminal law was deemed sufficient in investigating and prosecuting terrorist offences. This is no longer the case and the terrorism of recent years, as well as a fear of what the future holds has resulted in the enactment of specific legislation, which has been accused of unconstitutionality due to the potential for infringement of civil rights. The nature of the phenomenon is such that the issues arising from anti-terrorism legislation are essentially the same in both the United Kingdom and the United States, despite the fact that the legislation was enacted in response to different manifestations of the phenomenon. Indeed despite having witnessed the United Kingdom's prolonged struggle to balance security and liberty, the United States found these conflicting concepts no easier to reconcile.

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[41] See Kushner, n. 21 above pp. 40-53 regarding the growth of this phenomenon in the US in the 1990s.

The United States Response to the Terrorist Threat Prior to 1996

As has been seen, the United States has faced a sustained terrorist threat over the years, both domestically and more prolifically from international actors, mainly abroad. In response the US utilised a raft of measures in an attempt to counter the growing threat. These measures were wide-ranging and extended across the political spectrum.[42] An extensive framework of policies and organisations was established by the executive branch and was subsequently amended and built upon in effecting US counter terrorism policy. This began with the establishment of the Cabinet Committee to Combat Terrorism, the role of which was to coordinate government response, collect information and determine the response to be taken in the event of a terrorist attack. Changes were made to this structure by subsequent administrations. Under President Carter the Special Coordination Committee of the National Security Council undertook supervision of various agencies in their roles, such as the Federal Aviation Administration's (FAA) responsibility for aircraft hijackings, the State Department's responsibility for overseas incidents and the joint role of the Department of Justice and FBI regarding domestic incidents. The Reagan administration established an Interdepartmental Group on Terrorism which dealt with international cooperation, diplomacy efforts, legislation, research and training exercises. Further amendments occurred later with the establishment of the FBI as the lead agency for domestic terrorism and the primary supporting agency for international incidents and the establishment of the role of a national coordinator for security, infrastructure protection and counter terrorism.

The threat posed to US citizens and installations overseas resulted in international cooperation forming a pillar of US policy in this area. This has included bi-lateral and multilateral agreements, such as the Convention for the Prevention and Punishment of Terrorism 1937, the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons including Diplomatic Agents 1973 and the International Convention for the Suppression of the Financing of Terrorism 2000. United States anti-terrorist policy also extended so as to make use of military strikes,

[42] For a detailed discussion of these measures see Laura K. Donohue, *In the Name of National Security: U.S. Counterterrorist Measures, 1960-2000*. BCSIA Discussion Paper 2001-6, ESDP Discussion Paper ESDP-2001-04, John F. Kennedy School of Government, Harvard University, August 2001.

such as those utilised against Libya in 1986 in response to the bombing of the La Belle disco in Berlin as well as coercive practices by the FBI and CIA with regard to suspected international terrorists such as Fawaz Younis. In making use of the extraterritorial jurisdiction of the 1986 Omnibus Diplomatic Security and Anti-Terrorism Act US authorities arrested Younis in international waters off Cyprus in 1987. In addition to the use of the military for retaliatory strikes the Department of Defence also established a counter-terrorism unit following the 1977 Mogadishu hijacking, known as Delta Force. Following the failed rescue mission of the US hostages held in Teheran in 1980, the Joint Special Operations Command was created, with the remit of establishing a more unified special forces approach to the terrorist problem which was utilised in both an operational and advisory capacity. Steps were also taken to improve airport and aeroplane security as well as the security of federal buildings within the US and its embassies and installations abroad. This includes sky marshals, improved security apparatus, more security officers, passenger profiling, roadblocks and tighter security checks on airport and federal staff. The need for increased airport security prompted the enactment of legislation such as the 1974 Air Transportation Security Act requiring the implementation of improved security standards as well as US involvement with international treaties such s the Montreal Convention 1971.

In addition to the above measures, the United States utilised the law as a means of addressing the terrorist threat. However, in contrast to the United Kingdom's specialist anti-terrorist legislation, the US relied predominantly on the ordinary criminal law. The successful investigation and prosecution of terrorist incidents such as the World Trade Centre bombing in 1993 and the Oklahoma City bombing in 1995, through reliance on ordinary investigative practices and criminal procedure rules, underlined an approach which was consistent with the level of threat as well as with the guarantees of the Bill of Rights. The threat faced by the US was not sufficient to justify enactment of measures such as internment, extended or coercive detention and interrogation or adjustments to the criminal justice system, as occurred in the UK. Moreover, the Constitution has acted as a buffer preventing enactment of such provisions as extended detention or trial without jury. This approach contrasts to that of the United Kingdom, whereby the anti-terrorism package enacted provisions

specific to countering terrorism as well as amending basic elements of criminal procedure, such as arrest and detention, so as to create a wholly separate regime.

In order to make it easier to use and secure prosecutions under the criminal law, various pieces of legislation were enacted in the US. For example the 1974 Anti-hijacking Act and the Air Transportation Security Act authorised universal baggage screening and led to the establishment of the FAA anti-hijacking program. The Omnibus Diplomatic Security and Antiterrorism Act 1986 established jurisdiction for US courts over extraterritorial attacks against US nationals. The Antiterrorism Act 1991 sought to deal with the financial workings of terrorist organisations and provided a statutory right to American victims of international terrorism to seek civil redress, by enabling victims to seize assets of terrorists who are within jurisdictional reach. Additional legislation was enacted in the form of the Anti-Terrorism Act 1987, which, as somewhat of a precursor to the AEDPA, prohibited US citizens from receiving any assistance, financial or otherwise, except informational materials, from the PLO. In addition, the Act proscribed the establishment of offices and similar facilities which sought to further the interests of the PLO. In a similar vein to the provisions relating to the designation of foreign terrorist organisations and the provision of material support to such groups under the AEDPA, this provision of the 1987 Act[43] raised questions with regard to its compatibility with the First Amendment. Such a provision enacted in the name of national security in order to prevent the PLO a platform in the United States from which to operate, potentially restricted the First Amendment rights of freedom of speech and assembly of those individuals wishing to associate with and advocate on behalf of the PLO. In keeping with the cases which arose in relation to the provisions of the AEDPA, it was held in the case of *Mendelsohn v Meese*[44] that the Act does not violate the First Amendment and that any incidental restriction on freedom of speech was outweighed by the overwhelming governmental interest in national security.[45]

[43] Section 1003 Anti-Terrorism Act 1987. 22 USC 5202.
[44] 695 F. Supp. 1474 (S. D. N. Y. 1988) Further discussion of this case and the provisions of the Act can be found in L. A. Harke, "The Anti-Terrorism Act of 1987 and American Freedoms: A Critical Overview" (1989) University of Miami Law Review, Vol. 43, pp. 667-719.
[45] The test utilised by the court was that laid down in the case of *United States v O'Brien* 391 US 367 (1968). This is discussed in greater detail in chapter 6 with regard to freedom of expression and the provisions of the AEDPA. The four elements to be satisfied in the test are as follows: 1) that enactment of the provision is within the constitutional power of the government, 2) that it furthers an important or substantial governmental interest, 3) that the governmental interest is unrelated to the suppression of

Conclusion

It is important to remember that the measures discussed are those prior to the enactment of the AEDPA 1996 and the USA PATRIOT Act 2001. The events of September 11th and the subsequent response cast a shadow over preceding measures and the less prevalent terrorist history experienced by the US within its borders. Certain observations can be made regarding this period in the history of the United States' experience with terrorism. Firstly, the terrorist threat was not sufficient to draw the United States into a cycle of reaction to the same extent as occurred in the United Kingdom. That is not to say that steps were not taken in response to terrorist attacks. The military strikes taken against Libya in 1986 and the measures taken to improve airport security exemplify the use of counterattack and adaptation in answer to questions asked of the US. However, the nature of the threat faced by the United States was never such as to prompt legislative reaction, as was often the case in the United Kingdom.

Secondly, save for the aforementioned provision of the 1987 Anti-Terrorism Act relating to freedom of expression which, due to satisfaction of the test in *O'Brien,* was held not to violate the First Amendment, it can be said of these counter-terrorism measures that any consequent restriction on the rights and liberties of the individual was minimal. Indeed, at no point did terrorism or the country's response to it damage the fabric of democracy. In comparison to the prolonged and concentrated threat posed to the UK by Irish Nationalist violence, it seems that the threat to the US, both domestic and international, was not of such strength as to provoke far-reaching and intrusive measures. Prior to the high-profile attacks of 1995 and 2001, terrorist incidents within the US were not of the prevalence or intensity as to place the US in the position of a country under attack. As such it was not deemed necessary to curtail liberty in order to protect freedom. This may be attributed to the counter-terrorism measures put in place, or to the nature of US society which espouses the ideals of freedom of expression and political dissent to such an extent as to dissipate the tensions which can ignite terrorist violence. In consideration of the measures enacted in the past it may be the case that it is a combination of both factors to which the

free expression and 4) that the incidental restriction on alleged First Amendment freedoms is no greater

relative dearth of attacks can be attributed. Indeed, in enacting measures which on the whole left fundamental rights intact and kept the ideals of democracy as a foundation, the United States achieved some degree of the requisite balance between security and liberty which protected democracy and the security of the country.

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than is essential to the furtherance of that interest.

Chapter 4

Anti-Terrorism Legislation and the Privacy of the Individual

Anti-Terrorism Legislation and the Privacy of the Individual

The events of September 11th 2001 acted as a catalyst for new legislative measures affecting the privacy of the individual, revealing a shift in the methods employed in countering the current terrorist threat. In the United Kingdom emphasis is placed on data retention and disclosure of information in the Anti-Terrorism, Crime and Security Act 2001, whilst the USA PATRIOT Act contains numerous provisions concerning surveillance and data collection. This plethora of measures represent an attempt to confront the technological advances which have occurred in mobile and internet communications in recent years and which have become a common feature of modern life. These advances, as well as the nature of the 9/11 attacks perpetrated by "sleeper cells" of terrorists with no known affiliations residing in the country, acted as a catalyst for provisions which have resulted in an increase in the interference with the right to privacy by measures enacted to counter terrorism.[1] Of course, international terrorism was a threat faced by both countries prior to the events of 9/11, yet in seizing the legislative opportunity posed, by extending the powers of the state with regard to surveillance of and information gathering about individuals, the governments in both countries have taken advantage of the intense vulnerability felt by the populace at the time.

Privacy in the United Kingdom

Although it was once the case that there was said to be no explicit right to privacy in the UK,[2] the law in this area has developed to such an extent that it can now be asserted that such a right does exist in English law, albeit somewhat lacking in clarity.[3] However, even prior to these developments and the enactment of the Human

[1] Previously, the privacy of the individual had been affected by anti-terrorism provisions in the form of measures such as house searches, particularly in Northern Ireland. See for example, sections 17, 18, 20 and 23 EPA 1996.
[2] "It is well known that in English law there is no right to privacy..." *Kaye v Robertson* [1991] F.S.R. 62 p. 66.
[3] R Singh and J. Strachan, *Privacy Postponed*, (2003) EHRLR 12. See *Campbell v MGN Ltd.* [2004] UKHL 22.

Rights Act it was not the case that privacy was afforded no protection. Indeed, several international instruments have provided recognition and protection to the privacy of the individual. The United Kingdom is a signatory to the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights (ICCPR), both of which provide that "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks."[4] This is reinforced by the European Convention on Human Rights under which "Everyone has the right to respect for his private and family life, his home and his correspondence."[5] The notion of "private life" is said to be broader than that of privacy encapsulating, *inter alia,* sexual orientation[6] sexual activity,[7] personal information,[8] and parental contact.[9] Seemingly, this notion of private life as a broader concept than simply the "right to be let alone" is reminiscent of the penumbral quality of the right to privacy in the United States.

Qualification to article 8 of the European Convention on Human Rights is contained in subsection (2) which provides that any interference with this right by a public authority must be in accordance with the law, necessary in a democratic society and carried out in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.[10]

The parameters of the right to privacy in the context of covert surveillance and national security were outlined in the case of *Klass and Others v Germany.*[11] This concerned a challenge to legislation which permitted covert surveillance of mail, post and telecommunications in order "to protect the free democratic constitutional order or the existence or security" of the state. In its judgment, the European Court of Human Rights found that legislation of this kind constitutes a direct interference with

[4] See article 12 Universal Declaration on Human Rights and article 17 ICCPR.
[5] Article 8(1) ECHR.
[6] *Smith v UK* (2000) 29 E.H.R.R. 493.
[7] *ADT v UK* (2001) 31 E.H.R.R. 33.
[8] *MG v UK* (2003) 26 E.H.R.R. 3.
[9] *Sahin v Germany* (2003) 36 E.H.R.R. 43.
[10] Article 8(2) ECHR.

the privacy of all users and potential users of such telecommunications networks, as guaranteed by article 8.[12] The court stated that the "menace of surveillance" of citizens is "tolerable under the Convention only in so far as strictly necessary for safeguarding the democratic institutions."[13] The court observed that in light of the proliferation of terrorism as well as the technical advances made in the fields of espionage and surveillance techniques, democratic societies must be able to order the covert surveillance of subversive elements of society so as to counter such threats effectively. However, the operation of any system of surveillance must be accompanied by the existence of safeguards as a guarantee against abuse. It was stated that this assessment is one of relative character, depending on all the circumstances of the case such as the nature, scope and duration of the possible measures, the grounds required for ordering such measures, the authorities involved in carrying out and supervising such measures as well as the kind of remedy provided by domestic law.[14]

In *Klass* the contested legislation provided numerous limitative conditions to be satisfied in relation to any surveillance undertaken. Judicial control of the surveillance was not provided, and whilst such a form of supervision was said to be preferable in an area in which abuse was potentially so easy on the basis that the rule of law implies that interference with an individual's rights by the executive should be controlled by judicial control offering the best guarantees of independence and impartiality, the nature of the safeguards provided were held to be sufficient so as to keep the "interference" resulting from the legislation from exceeding the limits of what may be deemed necessary in a democratic society.[15] These safeguards included the approval of surveillance by a statutory commission, supervision of implementation by an official qualified for judicial office and a requirement that the Minister make regular reports on the use of the legislation to an all-party parliamentary committee. These were found to amount to effective and continuous control ensuring that surveillance was not ordered irregularly or without due and proper consideration.

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[11] (1979) 2 EHRR 214.
[12] *Ibid* para. *37.*
[13] *Ibid.* para. 42.
[14] *Ibid.* para. 50.
[15] *Ibid.* para. 56

The nature of covert surveillance dictates that it is carried out without the knowledge of the individual concerned, thereby precluding him from any review proceedings which take place and indeed negating any recourse to the courts which may, in principle, be available once surveillance has ceased. It was held by the court that in some cases subsequent notification may well jeopardise the purpose which prompted the surveillance as well as reveal the operational methods of the intelligence services; "…in so far as the "interference" resulting from the contested legislation is in principle justified under Article 8(2), the fact of not informing the individual once surveillance has ceased cannot itself be incompatible with this provision since it is this very fact which ensures the efficacy of the "interference.""[16] In light of these considerations, the court stated that failure to inform the subject of the surveillance once it had ceased was not incompatible with article 8. However, due to the fact that the logistics of covert surveillance prevent the individual from seeking an effective remedy of his own accord, the adequacy and efficacy of safeguards is essential in preventing abuse and protecting the rights of the individual. Ultimately, the values of a democratic society must be followed as closely as possible in respecting the rule of law and ensuring a balance is achieved between the exercise of the individual's right to privacy guaranteed under article 8(1) and the necessity of surveillance for the protection of society as a whole.

The Anti-Terrorism, Crime and Security Act 2001

The events of September 11th resulted in the enactment of a plethora of measures in the United States with the potential to interfere with the constitutionally protected right to privacy. This was not an isolated phenomenon. Indeed, the equivalent legislation in the United Kingdom also raised questions about the compatibility of certain provisions with the right to respect for private life contained in article 8 of the ECHR, as conferred by the Human Rights Act 1998.

[16] *Ibid.* para. 58

Part XI Retention of Communications Data

Part XI of the ATCSA provides for the retention of communications data[17] by requiring communication providers to hold communications data beyond the period for which such information is necessary for business purposes. The Act only governs retention of the data, access to which falls under the regime established under the Regulation of Investigatory Powers Act (RIPA) 2000. The aim of Part XI is said not to be to extend the fields of data retained by such providers but to encourage retention for longer than would be necessary for commercial reasons.[18] Communications data is defined in section 21(4) of RIPA and amounts to data emanating from telephone, Internet and postal communications. This includes such information as that concerning the subscriber, details of calls made, emails sent or websites visited and in the case of mobile phones, the geographical position of the user.[19] Whilst this does not extend to the content of the communication, the information is such that it is possible to build up a complete dossier on an individual's private life.[20] Whilst this is a concern in itself, it is exacerbated by the fact that Part XI provides for blanket retention of such data, resulting in such profiles on thousands of people.

Section 102 of the Act provides for the issuance of a code of practice by the Secretary of State regarding the retention of communications data for an extended period, stated at paragraph 16 to be twelve months.[21] This provides that retention of data for extended periods is necessary for the purpose of safeguarding national security or for the purposes of prevention or detection of crime or the prosecution of offenders which may relate directly or indirectly to national security.[22] The Bill originally provided for such retention in relation to any criminal activity, a scope which met with great opposition in the House of Lords and eventually led to a last minute amendment

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[17] Currently governed by the Telecommunications (Data protection and Privacy) Regulations 1999.
[18] *Retention of Communications Data Under Part 11: Anti-Terrorism, Crime and Security Act 2001* Voluntary Code of Practice: The Home Office.
[19] T. Owen, (2002) *Police Powers, Surveillance and Privacy Intrusions,* Justice Conference, *Terrorism. Mapping the New Legal Framework,* London, 28th June.
[20] C. Walker and Y. Akdeniz, "Anti-Terrorism Laws and Data Retention: War is Over?" (2003) NILQ 54(2) 159 p. 162.
[21] A draft of the code of practice was published in March 2003 and is available at http://www.legislation.hmso.gov.uk/si/si2003/draft/5b.pdf
[22] Code of practice para. 2 See also section 102(3) ATCSA.

requiring that retention for the purpose of the prevention or detection of crime be connected to national security either directly or indirectly.[23] However, whilst it is the case that *retention* of data is necessary for purposes of or related to national security, *access* to such data is not constrained in this way. "The Government do not consider that the fact that data is held by communications service providers under the code of practice for national security purposes should in itself prevent the police or other public authorities having access to that data for another purpose. It is considered that this would be wrong as a matter of policy and that legally no such automatic restriction exists."[24] The Joint Committee on Human Rights (JCHR) was nonetheless satisfied that sufficient safeguards were in place so as to comply with the requirements of article 8 of the ECHR.[25]

Described as "...one of the more insidious elements of the Bill"[26] the notion of such data retention has raised many questions and generated a great deal of criticism with regard to the privacy of the individual. Indeed, retention of communications data as provided for in the Act does not comply with the principles of the Data Protection Act 1998, most notably that personal data shall not be further processed in a manner incompatible with the purpose for which it was retained and shall not be kept for longer than is necessary for that original purpose.[27] Indeed, the Law Society has stated that the Government has failed in the first serious test of its commitment to data protection.[28] However, the code of practice can be said to be in accordance with the Data Protection Act on the grounds that such retention is necessary for the purposes of national security, as provided in section 28 of the 1998 Act.[29]

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[23] HL Debs vol. 629, col. 1474, 13th December 2001.
[24] Letter from Rt Hon David Blunkett MP, Secretary of State for the Home Department, to the Chair of the Joint Committee on Human Rights, 30th October 2003, submitted as written evidence to the Committee's Sixteenth Report available at:
http://www.publications.parliament.uk/pa/jt200203/jtselect/jtrights/181/18102.htm
[25] For example the requirement that such access be authorised by a designated person bound to refuse an authorisation unless he or she believes that the requirements of necessity and proportionality are met on the facts of each particular case, as well as the availability of judicial review and the need to comply with the principles of the Data Protection Act 1998. See JCHR 16th Report *ibid.* para. 25.
[26] HL Debs, vol. 629, col. 255, 27th November 2001, Earl of Northesk.
[27] Sch. 1 Data Protection Act 1998.
[28] *Underpinning Security, Safeguarding Liberty*, A Memorandum to the Home Affairs Select Committee on the Anti-terrorism, Crime and Security Act 2001 available at
http://www.lawsociety.org.uk/dcs/pdf/immigration_underpinning.pdf [20th April 2004]

In light of this circumvention of data privacy principles, it is increasingly important to balance the need for what is considered to be an effective tool in the war against terrorism and in law enforcement generally against the implications which arise with regard to the privacy of the individual. On a slightly different note, it is entirely possible that knowledge of the existence of such a vast database would have a detrimental effect on freedom of expression given the fact that the individual may adjust her behaviour, albeit completely innocent, due to concern regarding access to personal communications information by the state. Indeed, it is the employment of blanket data retention described as being kept for an "investigatory rainy day"[30] which essentially leads to the creation of a suspect community, as opposed to data preservation on the grounds of reasonable suspicion of involvement in a criminal activity[31] which is extremely unpalatable given its resemblance to a police state.[32]

Much debate has centred on the status of communications providers. Section 6 of the Human Rights Act 1998 requires that all public authorities act in a manner compatible with the Convention; however concern has arisen with regard to whether a communications provider falls within this category. In answer to the Joint Committee on Human Rights, the Home Secretary declared that it is the opinion of the government that retention of data under Part XI is considered to be "a private function that arises out of the commercial service that the communication services providers provide".[33] This of course would have the effect that such providers are not bound by the requirements of section 6. In contrast, it has been suggested that in retaining data in accordance with the code of practice, a communications provider could be said to be exercising a function of a public nature so as to bring it within the notion of a public authority contained in section 6(3)(b) of the 1998 Act.[34] The narrowly drawn criteria applied in determining whether a body is likely to be held to be a public body performing public functions is problematic with regards to human rights protection

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[29] See paras. 5-10 code of practice.
[30] C. Walker, *Blackstone's Guide to the Anti-Terrorism Legislation,* (OUP, 2002) p. 157.
[31] In *Klass and Others v Germany* (1979) 2 E.H.R.R. 214 there had to exist certain factual indications for suspecting a person of planning, committing or having committed certain serious criminal acts.
[32] See Walker and Akdeniz, n. 14 above p. 177.
[33] JCHR, 16th Report, n. 18 above para. 11.
[34] See Anti-Terrorism, Crime and Security Act 2001 Retention and Disclosure of Communications Data Summary of Counsels' Advice available at http://www.privacyinternational.org/countries/uk/surveillance/ic-terror-opinion.htm [18th April 2004].

and has led to an examination of the meaning of "public authority" as developed since the Human Rights Act came in force by the Joint Committee on Human Rights.[35] In light of this clarification on the matter it is indeed arguable that a communications provider may fall within the notion of a "functional public authority" given its exercise of a power of a public nature directly assigned to it by statute.[36] Also, influential though singularly not determinative is the public interest, namely national security and the detection and prevention of crime, in the function performed as well as the motivation of serving the public interest as opposed to any financial motivation.[37]

The desire that measures and procedures which have the potential to interfere with the rights of the individual, are balanced, proportionate and in conformity with human rights standards, is vastly increased when the practice in question is inherently covert, as discussed in the context of *Klass.* The provisions contained in Part XI have generated a great deal of concern with regard to compliance with article 8: "The proposed provisions could have a significant impact on the privacy of individuals whose data are retained."[38]

Possible justification under article 8(2) first requires that the interference be in accordance with the law. The fact that implementation occurs through a code of practice may be problematic, however the provision ultimately derives from the ATCSA, and combined with the option of giving directions by way of statutory instrument if deemed necessary under section 104, results in a prima facie satisfaction of this requirement. However, this requirement encapsulates two further criteria, namely that the law is accessible and sufficiently precise so as to be foreseeable in its consequences. With regard to the former, it can be said that the code of practice sets out the legal rules applicable to retention of data as well as provision for oversight by way of the Data Protection Act 1998 which is in turn subject to supervision by the

[35] Seventh Report on The Meaning of Public Authority under the Human Rights Act 1998 available at http://www.publications.parliament.uk/pa/jt200304/jtselect/jtrights/39/3902.htm [21st April 1998].
[36] *Ibid.* para. 40.
[37] *Ibid.*
[38] News Release, *Information Commissioner Contributes To Scrutiny of Anti-Terrorism Bill*, 13th November 2001, available at

Information Commissioner.[39] Moreover, the fact that the opportunity for public consultation was given prior to publication of the draft code as well as publication itself would be sufficient to give to the individual an indication of the legal rules applicable. With regard to foreseeability, the European Court of Human Rights has stated that this requirement may vary according to context, for example in cases of covert surveillance, "...the law must be sufficiently clear in its terms to give citizens an adequate indication as to the circumstances in which and the conditions on which public authorities are empowered to resort to...secret and potentially dangerous interference with the right to respect for private life and correspondence."[40] Given that the code of practice authorises blanket retention of all communications data for twelve months, the circumstances and conditions of retention leading to an interference with an individual's privacy should be sufficiently, though worryingly clear.

The purpose of data retention under Part XI is said to be for the safeguarding of national security or for the prevention or detection of crime or the prosecution of offences which relate directly or indirectly to national security. As such it is clear that the requirement that an interference with the right to respect for private life must pursue a legitimate aim is satisfied. However, establishing whether interference such as this is necessary in a democratic society is problematic. Of course the fact that such a provision has been enacted in the first place indicates that it has been deemed to be necessary in a democratic society. However, this requires a finding of proportionality as well as the establishment that the interference results from a pressing social need. Whether blanket data storage of essentially all citizens on the off chance that such information may one day be of use in an investigation amounts to a pressing social need to protect national security is certainly debatable. This is particularly so given the special emphasis afforded by the court with regard to protection of personal data,[41] despite the wide margin of appreciation normally afforded states with regard to national security. Indeed it was recently stated in the

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www.informationcommissioner.gov.uk/cms/DocumentUploads/131101%20anti%20terrorism.pdf [19th April 2004].

[39] Code of Practice, n. 12 above para. 29.

[40] *Malone v UK* (1985) 7 E.H.R.R. 14 para. 67.

European Court of Human Rights that "...there has to be at least a reasonable and genuine link between the aim invoked and the measures interfering with private life for the aim to be regarded as legitimate. To refer to the more or less indiscriminate storing of information relating to the private lives of individuals in terms of pursuing a legitimate national security concern is, to my mind, evidently problematic."[42] However, even if it can be successfully argued that such a practice is in accordance with a pressing social need, serious questions are raised with regard to the proportionality of such a measure. Whilst a balance must be sought between the right to respect for private life contained in article 8(1) and the need to protect the whole of society by the use of covert surveillance under article 8(2),[43] it has been stated that "...States do not enjoy unlimited discretion to subject individuals to secret surveillance or a system of secret files. The interest of a State in protecting its national security must be balanced against the seriousness of the interference with an applicant's right to respect for his or her private life."[44] Indeed, it is under this head that it can be argued that data retention under Part XI is incompatible with article 8.

As previously mentioned, Part XI provides only the framework for the *retention* of communications data, *access* to this information is governed by the Regulation of Investigatory Powers Act 2000. The code of practice states that the purpose of data retention is so that it is available to be acquired by relevant public authorities under chapter II of Part I of RIPA. Section 22(2) RIPA provides that data may be obtained where necessary:

(a) in the interests of national security;
(b) for the purpose of preventing or detecting crime or of preventing disorder;
(c) in the interests of the economic well-being of the United Kingdom;
(d) in the interests of public safety;
(e) for the purpose of protecting public health;

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[41] See *MS v Sweden* (1999) 28 E.H.R.R. 313 para. 41 and *Z v Finland* (1998) 25 E.H.R.R. 371 para. 95.
[42] *Rotaru v Romania* Application No. 00028341/95 4th May 2000, concurring opinion of Judge Wildhaber available at http://hudoc.echr.coe.int/
[43] *Klass v Germany* (1979) 2 E.H.R.R. 214.
[44] *Ibid.*

(f) for the purpose of assessing or collecting any tax, duty, levy or other imposition, contribution or charge payable to a government department;

(g) for the purpose, in an emergency, of preventing death or injury or any damage to a person's physical or mental health, or of mitigating any injury or damage to a person's physical or mental health; or

(h) for any purpose (not falling within paragraphs (a) to (g)) which is specified for the purposes of this subsection by an order made by the Secretary of State.

The effect of this is such that although the retention of data under the code of practice has national security at its root, it is possible for access to be gained under RIPA for any of the above purposes, which are clearly far wider than the concept of national security. It is the indiscriminate use of data, which makes such a vast database of personal information such a dangerous concept. It has been identified as telling that section 22(2) was not incorporated into Part XI as grounds for data retention, and it can be thus deduced that the intention was that communications data should be retained only on national security related grounds rather than the far broader purposes listed under RIPA.[45] It is this "disparity of purpose"[46] which raises serious issues regarding the proportionality of Part XI and its compliance with human rights standards. It may be possible to argue that retention of communications data for twelve months and the subsequent interference with the privacy of the individual is proportionate to the interests of the state in protecting national security. However, the balance of proportionality is tipped firmly away from the state due to the fact that it is possible to gain access to personal information for reasons far less legitimate than the security of the nation. Indeed "Parliament's decision not to follow the terms of section 22(2) RIPA, and instead to restrict the statutory purposes under section 102(3) ATCSA to cases involving national security is, in Counsel's view, powerful evidence that it did not consider those less pressing public interests to be sufficiently weighty to justify a general requirement for the extended retention of communications data."[47] It is this discrepancy and consequent disproportionate effect which appears to make Part XI incompatible with article 8. Moreover, in consideration of the jurisprudence of the

[45] Summary of Counsels' Advice, n. 28 above para. 14.
[46] *Ibid.* para. 17.
[47] *Ibid.* para. 19.

European Court of Human Rights,[48] in which such importance is given to the incorporation of safeguards in relation to state interference with the privacy of the individual, the provisions concerning retention of communications data are notably lacking in this regard. Indeed, in *Klass* whilst it was stated that the rule of law implies that such an interference by the executive should be subject to effective control, which should normally be assured by the judiciary as the best guarantee of independence, impartiality and proper procedure, it was found that the nature of the supervisory and other safeguards in place were sufficient and not outside the bounds of what may be deemed to be necessary in a democratic society. With regard to retention of communications data under the ATCSA, the lack of sufficient supervision and control is, as such, notably lacking.

Part III Disclosure of Information

Clear following the investigation into the attacks of September 11th 2001 was a sense of betrayal resulting from the knowledge that the perpetrators of the attacks had been residing legally in communities across the United States. As a result of this, section 203 of the PATRIOT Act facilitated cooperation between domestic law enforcement and foreign intelligence operations so as to allow access to information, which may otherwise have been unavailable to those investigating potential terrorist threats.[49] This awareness of the power of information and data collection is also reflected in the ATCSA. Part III of the Act provides for the extension of existing disclosure powers as listed in schedule 4 to the Act, so as to encourage the disclosure of information by public authorities. Section 17(2) provides that each of the provisions listed in schedule 4 shall have effect, in relation to the disclosure of information by or on behalf of a public authority, as if the purposes for which the disclosure of information is authorised by that provision included each of the following:

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[48] *Klass v Germany* (1979) 2 E.H.R.R. 214.

[49] Note the position in the US whereby an individual is deemed to "voluntarily" reveal information when documents or data are provided to third parties. As a result of this notion of individual "consent", the holders of such data may pass the information on to the government without falling foul of the Fourth Amendment. See P. P. Swire, *Katz is dead. Long Live Katz,* January 20th 2004, Forthcoming, Michigan Law Review, available at http://ssrn.com p. 6.

(a) the purposes of any criminal investigation whatever which is being or may be carried out, whether in the United Kingdom or elsewhere;

(b) the purposes of any criminal proceedings whatever which have been or may be initiated, whether in the United Kingdom or elsewhere;

(c) the purposes of the initiation or bringing to an end of any such investigation or proceedings;

(d) the purpose of facilitating a determination of whether any such investigation or proceedings should be initiated or brought to an end.

Section 19 of the Act provides for the disclosure of information which is held by or on behalf of the Inland Revenue or Customs and Excise for the above purposes, as well as allowing disclosure for the purpose of facilitating the performance of any of the functions of any of the intelligence services.[50]

Whilst this notion of data sharing was welcomed by the Home Affairs Select Committee[51] it met a great deal of opposition in both Houses as well as from non-governmental sources. A recurring argument during the passage of the Bill was "...that this is emergency legislation concerning terrorism, not general legislation concerning criminality"[52] and as such of massive concern is the breadth of the provision which allows disclosure for the purpose of "any criminal investigation...or proceedings whatever" whether carried out in the UK or further a field. However, this goes further in that disclosure can be made for the purpose of determining whether or not to initiate an investigation in the first place. This raises serious privacy concerns given its resemblance to the notion of a fishing expedition through personal information held by various public authorities.

The argument behind such a broad provision is that information about crimes seemingly unrelated to terrorism might lead investigators to find information connected to terrorism. "Those activities involve other criminal activities that could lead one to terrorists. There is no alternative way to start an investigation involving

[50] Section 19(2)(a) ATCSA.
[51] Home Affairs Select Committee, First Report, *The Anti-Terrorism, Crime and Security Bill 2001,* HC 351, para. 55.
[52] HL Debs. vol. 629, col. 402, 28th November 2001, the Earl of Onslow.

terrorism other than by looking more widely."[53] However, the argument that such a wide provision is necessary because it may not be immediately clear that a terrorist offence has been committed or that the investigation will become a terrorist investigation[54] does not go very far to allay reasonable fears that the privacy of the individual will be run roughshod over in the name of fighting terrorism. The inclusion of a test of proportionality to be satisfied by the public authority prior to disclosure was said to respond to fears of blanket disclosure with regard to any crime,[55] and at least incorporates one of the fundamental standards of the Convention into this part of the Act. However, in spite of this, concern was expressed that the proportionality of disclosure will not in practice be properly considered prior to the making of the disclosure but only if the disclosure comes to the attention of the individual or those concerned who subsequently make a complaint.[56] The fact that those concerned may well remain unaware of the fact that a disclosure has been made is reminiscent of section 215 of the PATRIOT Act under which law enforcement officers are able to access personal records without the knowledge or consent of the individual concerned. However, whilst under section 215 the record holder is prohibited from disclosing the fact that such a search was made, it is seemingly the case in the UK that the individual has the right under the Data Protection Act to enquire about any disclosures made. This still requires a proactive stance by the individual concerned to actively enquire as to the status of his personal information, but is preferable to the situation in the US. However, the utility of a challenge to disclosure by a public authority is minimal given that the disclosure itself will have been made by then.

Schedule 4 contains 66 pieces of legislation, which can be added to by order,[57] under which disclosure can be made. However, the breadth of the provisions in Part III is shown not only in the quantifiable provisions contained therein but rather in the vast range of legislation listed. Indeed, the list extends to include such legislation as the Cereals Marketing Act 1965 and the Diseases of Fish Act 1983, both of which can be

[53] HL Debs. vol. 629, col. 401,, 28th November 2001, Lord McIntosh of Haringey.
[54] *Ibid.* col. 410, Lord McIntosh of Haringey.
[55] See HL Debs vol. 376, col. 1421, 13th December 2001 Lord Rooker.
[56] Law Society, n. 22 above p. 7.
[57] Section 17(3) ATCSA.

said to have a very dubious connection with terrorism and the protection of national security. The power to disclose is not dependent on a suspicion of terrorism but rather of criminal activity in general, begging the question why such measures were pushed through as emergency legislation? The ATCSA was seemingly deemed a suitable vehicle for this power of disclosure following the failure to enact such provisions the previous year.[58] This point is supported by the government argument that Part III serves to clarify for public authorities the situations in which disclosure is permitted, and as such codifies existing disclosure provisions across the board rather than those connected solely with terrorism or indeed, serious crime. Moreover, a codification in this way which includes legislation such as the Telecommunications Act 1984 and the Health Act 1999 raises serious privacy concerns given the wealth of information that is stored and therefore potentially disclosable about the individual. This is exacerbated by the fact that disclosure is not limited to the confines of the United Kingdom and can indeed be made to authorities investigating or prosecuting a criminal offence overseas, which of course raises concerns with regard to the use and protection of information once disclosed to authorities abroad. Under section 18 the Secretary of State has the power in certain circumstances to prohibit disclosure for the purpose of any overseas proceedings, although such a direction shall not prohibit the making of a disclosure by a Minister of the Crown or by the Treasury, or in pursuance of a Community obligation.[59] However, this provision does nothing to lessen legitimate concerns with regard to the use and protection of information once disclosed to authorities abroad. Reassurance by the government that protection is provided by way of the Human Rights Act and the Data Protection Act has been condemned by the Privy Counsellor Review Committee as "illusory" due to the fact that the onus for action rests with the individual despite the fact that he may be completely unaware of the fact that a disclosure has been made.[60] It is for this reason that the absence of any form of independent oversight is particularly glaring and has been highly recommended.[61]

[58] Similar provisions were originally part of the Criminal Justice and Police Bill 2001, but were removed following intense criticism.
[59] Section 18(4)(a)(b) ATCSA.
[60] Privy Counsellors Review Committee, *Anti-Terrorism, Crime and Security Act 2001: Report,* 12th December 2003, p. 46 available at www.atcsact-review.org.uk/lib/documents/18_12_2003/Report.pdf

The provisions of Part III have raised many concerns with regard to its compatibility with the Convention, with the Joint Committee on Human Rights concluding that there remains a risk that disclosure under Part III violates the right to respect for private life under article 8.[62] The importance given to the protection of personal information by the European Court of Human Rights[63] requires strong justification for any interference with the right of the individual to privacy on the part of the state. The status of Part III as part of primary legislation makes clear the fact that the interference is "in accordance with the law" as required under article 8(2). With regard to the requirement of accessibility the average citizen is arguably able to determine the relevant rules applicable under the ATCSA, given its availability in the public domain. However, it can be said that the breadth of the purposes contained in section 17(2) for which disclosure is permitted coupled with the diverse range of legislation authorising disclosure contained in schedule 4 has resulted in a vast and unclear legislative minefield for the individual to navigate. It is certainly arguable that an individual may be unlikely or unable to foresee that information gained under the Agricultural Marketing Act 1958 is liable for disclosure to authorities abroad for the purpose of determining whether or not to initiate an investigation in to a criminal act. It was stated by the court in *Malone v UK* that "...the law must indicate the scope of any...discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference."[64] In this respect section 17 can be said to be lacking given the fact that the absence of guidelines[65] for public authorities to follow in determining the necessity and proportionality of a disclosure leaves the discretion fully in the hands of the disclosing authorities. This is exacerbated by the lack of any form of independent oversight.

It is arguable that the breadth of the purposes listed in section 17(2), in particular subsection (d), namely the purpose of facilitating a determination of whether any such

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[61] *Ibid.* pp. 46-47.
[62] Joint Committee on Human Rights, 5th Report, 5th December 2001, para. 24 This conclusion was endorsed by the Privy Counsellors Review Committee at para. 165.
[63] *MS v Sweden* (1999) 28 E.H.R.R. 313,, *Z v Finland* (1998) 25 E.H.R.R. 371.
[64] (1985) 7 E.H.R.R. 14 para. 68.

investigation or proceedings should be initiated or brought to an end, are not sufficient to indicate a pressing social need for such a restriction on the privacy of the individual. Ironically, had the government been swayed to accept the proposed amendments to limit disclosure to terrorism rather than crime in general, the case for the existence of a pressing social need would have been vastly strengthened. Although, the symbolism of a piece of emergency legislation as the vehicle of enactment for such provisions as well as the existence of a margin of appreciation may well serve to aid in the satisfaction of this requirement.

In contrast to the regime for the retention of communications data in Part XI of the Act under which data is stored for the purpose of national security but could then potentially be disclosed for a completely unrelated subject, the reverse is the case here. Part III provides for the disclosure of information gained for an entirely benign purpose such as that obtained by the Sea Fish Industry Authority[66] but which can subsequently be used for the purposes of any criminal investigation or proceedings anywhere. In the same way as proportionality is an issue in this area under Part XI, it can similarly be argued that disclosure of information obtained for one purpose and then disclosed, potentially abroad, for another purpose is disproportionate and an interference with the right to respect for private life of the individual. Moreover, it can further be argued that disproportionality arises from the enactment of blanket disclosure due to a concern that there was a need to "make it simple for public officials to understand what they are supposed to disclose."[67] Of course, should it be established that interference with the right to privacy corresponds to a pressing social need, it is still arguable that such vast powers of discretionary disclosure unfettered by safeguards or oversight cannot be said to be proportionate to the aim of protecting national security or preventing crime. Indeed, whilst the need for balance between the privacy of the individual and the protection of society as a whole has been acknowledged by the European Court of Human Rights, this must be accompanied

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[65] The Inland Revenue Code of Practice on the Disclosure of Information came into effect on 11th February 2002. However, this is no more explicit with regard to the test for proportionality, though it does set out the legal and administrative safeguards in place.
[66] See Privy Counsellors Review, n. 53 above para 154.
[67] HC Debs, vol. 375, col. 794, 26th November 2001, Ruth Kelly MP.

with adequate and independent safeguards if the measures enacted are to be considered necessary in a democratic society.[68]

The Right to Privacy and the Fourth Amendment

Described as "the most comprehensive of rights and the right most valued by civilised men"[69] the fact that the "right to be let alone" or the right to privacy, as it is more commonly known, has no explicit constitutional basis is surprising. Legal consideration of the right to privacy can be traced to an article published in 1890 in which Samuel Warren and Louis Brandeis claimed that, in appropriate cases, the foundation of actions such as those in contract, trust, confidence or property was the right to privacy.[70] "The principle which protects personal writings and any other productions of the intellect of or the emotions, is the right to privacy, and the law has no new principle to formulate when it extends this protection to the personal appearance, sayings, acts, and to personal relations, domestic or otherwise." However, it was not until the case of *Griswold v Connecticut*[71] in 1965 that the Supreme Court recognised privacy as a constitutional right. It was established that the right to privacy resides in the "penumbras" of specific guarantees of the Bill of Rights, in particular the First, Third, Fourth, Fifth and Ninth Amendments[72] due to the fact that "various guarantees create zones of privacy."[73] The breadth of such a foundation has led to the development of a comprehensive as well as often controversial right to privacy, the nature of which is both positive and negative. Indeed, the individual is entitled to be free from governmental or other invasion in to their private life as well as the right to freedom with regard to personal choices such as sexual behaviour[74] and abortion.[75] Over time this has developed to the extent that

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[68] See *Klass v Germany* (1979) 2 E.H.R.R. 214.
[69] *Olmstead v US* 277 US 438, 478 (1928), Mr Justice Brandeis (dissenting).
[70] S. Warren and L. Brandeis, *The Right to Privacy,* Harvard Law Review vol. IV December 15th 1890 No. 5 .
[71] 381 US 479 (1965).
[72] The Ninth Amendment states "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."
[73] *Griswold v Connecticut* n. 63 above p.484, Mr Justice Douglas.
[74] *Lawrence and Garner v Texas* No. 02-102. Argued March 26, 2003--Decided June 26, 2003.
[75] *Roe v Wade* 410 US 113 (1973).

privacy in the United States is considered to be a "fundamental personal right, emanating 'from the totality of the constitutional scheme under which we live.'"[76]

As a result of the fact that the right to privacy pervades many areas of life, it therefore has a broad constitutional basis. However, it is the Fourth Amendment in particular which has become synonymous with individual privacy, particularly in the sphere of law enforcement, stating:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Almost certainly formulated with the judgment of Lord Camden in *Entick v Carrington*[77] in mind, the Fourth Amendment was described in 1886 as providing protection against all governmental invasions "of the sanctity of a man's home and the privacies of life."[78] More recently the limits imposed on search and seizure powers were said to exist so as to "prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals."[79] This has inevitably required the Supreme Court to undertake a balancing act in reconciling the competing interests of the government and law enforcement in crime prevention and investigation with the privacy interests of the individual.

In determining the applicability of the Fourth Amendment to a particular case, it is necessary primarily to establish the scope of the protection provided. The obvious distaste with which the English practice of general warrants was viewed along with their eventual common law condemnation motivated this guarantee of protection from governmental interference. It is clear from such an impetus that the focus of the guarantee is property, a notion clarified by the Supreme Court.[80] The protection guaranteed is further emphasised in the Amendment itself, in the explicit citation of entities notable for their tangible nature, namely "...persons, houses, papers,

[76] *Griswold v Connecticut,* 381 US 479, 494 (1965), Mr Justice Goldberg (concurring).
[77] (1765) 19 How. St. Tr. 1029.
[78] *Boyd v US* 116 US 616, 626-627, 630 (1886).
[79] *US v Martinez-Fuerte* 428 US 543, 554 (1976).
[80] *Boyd v US,* 116 US 616, 627 (1886).

effects..." It was due to this that the first cases alleging a violation of the Fourth Amendment as a result of wiretapping and surveillance to come before the Court were unsuccessful.[81] This somewhat narrow interpretation was extended so as to include conversation within the purview of protection offered by the Fourth Amendment in *Silverman v US.*[82] Here, the Supreme Court stated that Fourth Amendment protection extends to the recording of oral statements, "overheard without any technical trespass under...local property law," as well as the seizure of tangible items.[83] This was more emphatically stated in *Warden v Hayden*[84] by way of a declaration that it is privacy rather than property which falls within the protection of the Fourth Amendment. As such "the premise that property interests control the right of the government to search and seize has been discredited."[85] Indeed, "...once it is recognised that the Fourth Amendment protects people and not simply 'areas'...it becomes clear that the reach of the Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure."[86]

In establishing whether protection under the Fourth Amendment arises, it is necessary to determine whether there exists a reasonable expectation of privacy on the part of the individual concerned. Given the acknowledged focus of the Fourth Amendment, namely the person rather than the place, it is the case that even in a public place that which the individual seeks to preserve as private may be constitutionally protected.[87] In this vein, a two-stage test was formulated, in the concurring opinion of Justice Harlan, in order to establish the existence of protection under the Fourth Amendment. For the privacy right to merit such protection it was said that there had to be a demonstration of an actual (subjective) expectation of privacy on the part of the individual, coupled with a recognition by society that such an expectation is reasonable.[88]

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[81] See *Olmstead v US* 277 US 438 (1928).
[82] 365 US 505 (1961).
[83] *Ibid.* p. 511.
[84] 387 US 294 (1967).
[85] *Silverman v US* 365 US 264, 33 (1967).
[86] *Katz v US* 389 US 347, 353 (1967).
[87] *Ibid.* p. 351.
[88] *Ibid.* p. 361. See more recently, *Minnesota v Carter* No. 97-1147 decided December 1st 1998.

Fundamental to the Fourth Amendment is the requirement of a warrant so as to act as a buffer between the individual and the actions of law enforcement and the government. This warrant requirement is premised on the concept of probable cause, the purpose of which is to "...keep the state out of constitutionally protected areas until it has reason to believe that a specific crime has been or is being committed..."[89] This requirement has been defined as a "reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the party is guilty of the offence with which he is charged."[90]

An important facet to the warrant requirement is the inclusion of judicial oversight, which introduces an element of independence and neutrality in the determination of whether a warrant to search the home of an individual is justified. Whilst judicial office is not a pre-requisite in the issuance of warrants, the Supreme Court has stated that issuance requires neutrality and detachment as well as the ability to determine the existence of probable cause on the part of the issuer.[91] The importance of this requirement was reaffirmed in the case of *United States v United States District Court*[92] which concerned assertions on the part of the government that warrantless surveillance was lawful as a reasonable exercise of presidential power in order to protect national security. The legislation relied on was Title III of the Omnibus Crime Control and Safe Streets Act[93] which contains a provision stating that nothing in the law limits the constitutional power of the President to protect against the overthrow of the government or against any other clear and present danger to the structure or existence of the government. This was taken to mean that Congress recognised the authority of the President to conduct surveillance related to national security without prior judicial approval. However, the court disagreed stating that the duty of the government to safeguard domestic security must be weighed against the potential danger that unreasonable surveillance poses to individual privacy and freedom of expression. "These Fourth Amendment freedoms cannot properly be guaranteed if

[89] *Berger v New York* 388 US 41, 59 (1967).
[90] *Stacey v. Emery* 97 US 642, 645. This has also been stated as a standard of evidence less than that which would justify condemnation. *Lock v US* 11 U.S. 339, 348 (1813) See also *Brinegar v US* 338 US 160, 173 (1949).
[91] *Shadwick v City of Tampa* 407 US 345, 354 (1972).
[92] 407 US 297 (1972).
[93] 18 USC 2511(3).

domestic security surveillances may be conducted solely within the discretion of the Executive Branch...[without the judgement of] a neutral and detached magistrate."[94]

The validity of a warrant depends not only upon a finding of probable cause but also on a requirement of particularity in the warrant, namely a description of "the place to be searched, and the persons or things to be seized."[95] This specification reflects the Framers' abhorrence for the practice of general warrants from which they were trying to escape; indeed the purpose of the requirement is the avoidance of "a general, exploratory rummaging in a person's belongings."[96] Sufficient particularity means that nothing is left to the discretion of the officer executing the warrant.[97]

Whilst not explicitly mentioned in the text of the Fourth Amendment, it has been deemed by the Supreme Court that the rule that notice of a warrant is given, known as the "knock and announce" rule, is a constitutional requirement.[98] Indeed in *Wilson v Arkansas*[99] the Supreme Court declared that the rule forms part of the Fourth Amendment reasonableness inquiry. That is not to say however that notice must be given before the execution of every warrant. It is recognised that delayed announcement will be justified in certain circumstances, *inter alia,* where there is a threat of physical violence or where it is believed that evidence will be destroyed if notice is given.[100] Indeed, there is an appreciation on the part of the court that the requirements of the Fourth Amendment not be so inflexible as to ignore or inhibit law enforcement interests.[101] Given the circumstances narrowly prescribed by the court in which it is possible to delay notification of a warrant, questions under the Fourth Amendment are raised with regard to section 213 of the PATRIOT Act. This creates a new exception to the rule of announcement, namely that delay is possible when notice would create an "adverse result."

[94] *US v US District Court* 407 US 345, 317-318 (1972).
[95] US Constitution, Amendment IV.
[96] *Coolidge v New Hampshire* 403 US 443, 467 (1971).
[97] *Marron v US* 275 US192, 196 (1927).
[98] *Ker v California* 374 US 23 (1963).
[99] 514 US 927 (1995).
[100] *Ibid., Richards v Wisconsin* 520 US 385 (1997).

Electronic Surveillance and the Fourth Amendment

Technological advancement in the communications arena raised new issues concerning the privacy of the individual and the Fourth Amendment; indeed it has been said that "few threats to liberty exist which are greater than that posed by eavesdropping devices."[102] Previously, the intangible concept of privacy had always related to and derived from interference with tangible effects, as explicitly referred to in the text of the Fourth Amendment. The proliferation of electronic and covert surveillance as a tool of law enforcement introduced the courts to previously unexplored ground.

The first case challenging use of electronic surveillance to reach the Supreme Court was *Olmstead v US,*[103] which was essentially confined to establishing whether the introduction of evidence obtained by wiretapping, in this case of the defendant's private telephone conversations, violated the Fourth and Fifth Amendments. A narrow majority of the court relied on the emphasis on material effects in determining that wiretapping and the fruits obtained by such interception did not fall within the protection of the Fourth Amendment. It was deemed to be a reasonable assumption that the intention of one who installs a telephone in his home is to project his voice to the outside world by way of the connecting wires beyond the boundaries of the home.[104] The decision was premised on a dual platform. Firstly, protection under the Fourth Amendment was intended for actual property and as such a physical invasion of the property was required before there could be said to have been a violation. Interception of the wires running from the property did not amount to an unlawful trespass. Similarly, the placing of a device against an office wall so as to enable eavesdropping was held not to amount to a violation of the Fourth Amendment due to the fact that there was no physical trespass on to the property concerned.[105] This can be contrasted to *Clinton v Virginia*[106] in which attachment of a device to a wall by a

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[101] *Wilson v* Arkansas 514 US 927 (1995).
[102] *Berger v New York* 388 US 41, 63 (1967) Mr Justice Clark.
[103] 277 US 438 (1928).
[104] *Ibid* p. 465.
[105] *Goldman v US* 316 US 129 (1942) . See also *On Lee v US* 343 US 747 (1952).
[106] 377 US 158 (1964).

drawing pin was found to amount to a physical trespass.[107] Secondly, the Court relied on the intangible nature of conversation as opposed to the material emphasis in the text of the Amendment, in holding that wiretapping did not amount to an unreasonable search and seizure under the Constitution.[108]

However, it is notable that the assertions made in dissent, showing a foresight unappreciated by the majority, were to eventually provide the foundation of the court's position in this area. In expressing his distaste for the invasion of privacy caused by wiretapping due to the far-reaching impact on the privacy of a much wider class, Justice Brandeis emphasised the dynamic nature of the Constitution. "Time works changes, brings into existence new conditions and purposes. Therefore a principal to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of Constitutions...in the application of a Constitution, our contemplation cannot be only of what has been, but of what may be."[109] In this way, his appreciation of the future advancement of scientific developments produced a judgment ahead of its time, not only technologically but also with respect to the protection afforded to the right to privacy.

The rationale of *Olmstead* was explicitly overruled in 1967, following gradual steps towards its negation in subsequent cases. *Katz v US*[110] concerned the placement of a device on the top of several telephone boxes in order to intercept the conversation of Katz, believed to be transmitting gambling information by telephone across state lines. The government asserted that unlawful entry of the area concerned had not occurred and that as such there was no search and therefore no violation of the Fourth Amendment. However, the "trespass" doctrine of *Olmstead* was set aside by the court in establishing that the Fourth Amendment protects people not places and that in this way the presence or absence of a physical intrusion was no longer pivotal to its application. The privacy upon which Katz relied in using the telephone box was

[107] See also *Silverman v US* 365 US 505 (1961).
[108] *Ibid.* p. 511.
[109] *Olmstead v US* 277 US 438, 473-474 (1928).
[110] 389 US 347 (1967).

violated by the interception and as such constituted an unlawful search and seizure under the Fourth Amendment.[111]

The decision in *Katz* has recently come under scrutiny from the Supreme Court in the context of new technology and its position with the Fourth Amendment.[112] *Kyllo v US*[113] concerned the use of thermal imaging equipment on a home by the police so as to confirm the use of high-intensity lights, as often used in the growth of marijuana. The Supreme Court declared that the use of such equipment amounted to a search within the ambit of the Fourth Amendment. However, the court went further than this and reconsidered its decision in *Katz* and its implications. Essentially, *Kyllo* reaffirmed the position that physical trespass is not a necessary prerequisite of a search warrant under the Fourth Amendment. However, in placing special emphasis on the sanctity of the home, namely that aiming a thermal-imaging device at a house could reveal intimate details otherwise unobtainable, the judgment conflicts with the fundamental notion that the Fourth Amendment protects people not places. In response, it has been suggested that reconciliation of *Katz* with the special emphasis afforded the home is possible by way of the private nature of the phone call rather than the location of the telephone box. Indeed the "place" that warranted protection was the "cyber space" occupied when making a phone call as opposed to the physical location of the booth.[114] Broadly speaking, *Kyllo* established that for the purposes of the Fourth Amendment, a search is conducted whenever information is gained by the government through the use of "sense-enhancing technology", which could otherwise only have been obtained by way of a physical search.[115] This was enjoined by the caveat that this was the case at least where the technology at issue was not in general public use. However, this caveat was not elaborated upon further and so does create the potential that the protection of privacy by the Fourth Amendment will lessen as technology is advanced.[116] The effect of this decision remains to be seen.

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[111] *Ibid*, p. 353.
[112] See D. A. Sklansky, *Back to the Future: Kyllo, Katz and Common Law,* Mississippi Law Journal, Forthcoming, available at http://ssrn.com, for a detailed discussion of this decision and its implications.
[113] 533 US 27 (2001).
[114] Sklansky, n. 104 above p. 39.
[115] *Ibid* p. 26.
[116] *Ibid.* p. 41.

The suggestion in *Silverman v US*[117] that Fourth Amendment protection extends beyond the seizure of tangible items to include the recording of oral statements independent of physical or even technical trespass[118] was expressly confirmed in *Berger v US.*[119] The Supreme Court struck down a state wiretapping statute as unconstitutional on the ground that it authorised "indiscriminate use" of electronic devices of such a broad scope that a comparison was drawn with the general warrants condemned in *Entick v Carrington.* Conversation was explicitly held to fall within the scope of the Fourth Amendment, and its interception by way of electronic device was said to amount to a search within the meaning of the Constitution.[120] Of great importance was the court's acknowledgement that to invade the privacy of an individual in this way was not unlawful provided there was sufficient probable cause to justify the grant of a warrant by an independent party, as is the case with regard to conventional warrants for the search and seizure of material effects.[121] The constitutional requirements of probable cause and particular description in preventing governmental "fishing expeditions" have been afforded equivalent status and application with regard to search and seizure of oral as well as material evidence. This is the case so that surveillance is so narrowly circumscribed as to ensure "...no greater invasion of privacy [is] permitted than [is] necessary under the circumstances."[122] The compatibility of such jurisprudence with the provision of a legally "roaming" wiretap, as enacted in section 206 of the PATRIOT Act, raises some interesting constitutional questions.

Despite its potentially precarious status due to the lack of explicit protection provided in the Bill of Rights, the right to privacy is as fundamental in the United States as those rights expressly provided in the first eight Amendments to the Constitution. Indeed the overlapping nature of privacy with many of the rights guaranteed perhaps entrenches its position further. The nature of law enforcement has long posed a challenge to individual privacy, requiring a balancing act on the part of the courts. However, the threat posed by terrorism today and the subsequent legislative response,

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[117] 365 US 505 (1961).
[118] *Ibid.* p. 511.
[119] 388 US 41 (1967).
[120] *Ibid.* at 51.
[121] *Ibid.* at 57.

particularly in the area of surveillance, search and seizure, arguably poses the greatest threat to individual privacy in the United States to date. The extent to which these provisions of the USA PATRIOT Act will withstand constitutional scrutiny remains to be seen.

The USA PATRIOT Act 2001

A notable feature of the PATRIOT Act, particularly in comparison with previous anti-terrorism legislation and its British counter-part, are the extensive changes wrought in the field of surveillance and access to communications data.

The introduction, in Title II of the PATRIOT Act, of some extensive and controversial changes to this area of the law, in both domestic and foreign arenas, has the potential to impact severely on the privacy of vast numbers of citizens and non-citizens alike in the name of national security. This in turn has resulted in a plethora of commentary as well as fears of a return to the past when the practices of American law enforcement ran roughshod over the rights of the people.

Section 215 Access to "tangible things"

Section 215 of the PATRIOT Act is one such provision, which has inspired not only academic commentary and public protest but also legal action[123] in the backlash against its scope and potential unconstitutionality. In amending the Foreign Intelligence Surveillance Act (FISA) 1978, section 215 expands the power of the government in accessing personal records so that it is possible for the FBI to require the production of "...any tangible things (including books, records, papers, documents, and other items)..." The magnitude of this provision can be more readily appreciated when considered in the light of 50 USC 1862 which was stricken and replaced by

[122] *Ibid.*

section 215. This previously provided access to certain *business* records for foreign intelligence and international terrorism investigations, stated to be those held by a common carrier, public accommodation facility, physical storage facility or vehicle rental facility.[124] This is obviously far removed from its successor's provision of access to essentially anything. There may be some argument that the nature of international terrorism has changed with the advent of "sleeper cells" of terrorists residing in the US, such as the perpetrators of 9/11, and as such that access to personal documentation and material would be of assistance to the authorities. However, the breadth of this provision which, as will be seen, extends to cover books borrowed and purchased, coupled with a low standard of certification has the potential to interfere with the privacy of a large number of people in a disproportionate way. In addition it can be questioned how much intelligence can be gleaned from literature choices.

Of further concern is the fact that the key to a provision of such breadth is certification that the investigation is for the purpose of protecting against international terrorism or clandestine intelligence activities. In addition an application need only specify that the "...records concerned are sought for an authorized investigation conducted...to obtain foreign intelligence information...or to protect against international terrorism or clandestine intelligence activities."[125] This loose standard of certification is seemingly more a gesture than an opportunity for rigorous examination of the reasons and proof underlying that which has the potential to result in a huge intrusion into a person's private life. Indeed, any attempt to describe the system in place as one involving an element of judicial oversight would be farcical given that the judge to which the application is made has no power to refuse the application and so represents a "rubber stamp" rather than meaningful review by an independent authority. Obtaining a warrant from an independent magistrate upon a finding of probable cause is one of the most fundamental safeguards of the American criminal justice system, and yet the effect of section 215 is the erosion of the protection afforded by the Fourth Amendment. This deficiency is all the more serious given the fact that the reach of

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[123] The ACLU filed the first lawsuit challenging section 215 on 30th July 2003. The suit was filed on behalf of six community groups who contend that they are investigative targets because of their religion, ethnic origins or political associations.

[124] 50 USC 1862 (a)(1). Definitions for these terms can be found at 50 USC 1861.

[125] Section 215, inserting section 501(b)(2).

section 215 stretches beyond those involved in terrorism and encompasses potentially everybody so long as it can be shown that at the root of the request lies an authorized investigation. This is in further contrast to the more particular requirement in 50 USC 1862[126] that each application for access to certain business records stated that there were specific and articulable facts giving reason to believe that the person to whom the records pertained was a foreign power or an agent of a foreign power. It is hard to justify the extent of section 215 on the basis of any kind of practical benefit. Of course arguments can be made that the ability of law enforcement to keep track of citizens' activities and interests may allow the opportunity for pre-emptive prevention of a terrorist attack. However, even if such an argument were to prove successful the power could be limited without compromising its effectiveness by inclusion of an objective standard that the individual concerned is actually involved in such activities. Indeed a return to the pre-PATRIOT Act standard would act as an improvement on that which is currently in place. At present, the provision potentially infringes the First Amendment activities of all individuals and interferes with activities which should be protected by the Fourth Amendment to such an extent that it essentially amounts to surveillance of the populace without sufficient justification on the grounds of terrorism prevention.

Seemingly in acknowledgement of the dubious actions of the FBI in the past in placing citizens, most notoriously Dr. Martin Luther King Jr., under extensive surveillance due to involvement in legitimate political dissent, section 501(a)(2)(B) FISA provides that a United States person shall not be investigated solely on the basis of activities protected by the First Amendment. On this basis a small measure of respect is afforded the First Amendment and the freedoms it protects. However, a chilling effect may still be felt for example by a US citizen of Arab descent, recently returned from a visit to his home country, who is dissuaded from expressing his feelings on the war on terror at a local meeting or by way of a letter to the editor of his local newspaper for the very reason that it may make him vulnerable to such scrutiny. This combination would be sufficient to negate the prohibition against First Amendment investigations and as such illustrates that this "safeguard" rests on a very

[126] 50 USC 1862(b)(2)(B)

insubstantial foundation. Moreover, no such protection exists with regard to non-citizens, even permanent resident aliens, who may therefore have their private lives subjected to extreme examination solely on the basis of a book they read or a conversation they had.

What makes this provision even more objectionable is the fact that a person subject to FBI scrutiny under section 215 would never be aware of the fact. Section 501(d) provides that "no person shall disclose to any other person (other than those necessary to produce the tangible things under this section) that the Federal Bureau of Investigation has sought or obtained tangible things under this section." Section 215 therefore not only infringes the privacy of the target of the order and potentially their First Amendment rights with regard to the reason for the surveillance, it also affects the freedom of expression of the record holder in prohibiting disclosure concerning the government's interest to anybody. However, in the context of jurisprudence emanating from the European Court of Human Rights, it has been held that failure to inform an individual of surveillance after the event is not in principle incompatible with article 8(2) of the Convention due to the sensitivity of operational methods as well the risk that to provide notification could jeopardise the long-term purpose of the surveillance.[127] Seemingly, similar arguments could be found to justify the lack of notification inherent in section 215. However, in contrast to the existence of numerous safeguards providing effective and continuous control of the measures in *Klass*, section 215 is utilised without any meaningful standard of review or protection for the individual.

The security interest claimed by the government is obviously of great importance and the intrusion into the life of the individual concerned is serious, though arguably not as serious as physical intrusion. It is exacerbated however, by the delay in informing the subject that a search has taken place, as well as the minimal oversight and the low test to be initially satisfied. Reasonableness might be more readily achieved by employment of a more exacting test requiring evidence that the person is involved in activities threatening national security or the requirement that a statement of relevance

[127] *Klass v Germany* (1979) 2 E.H.R.R. 214.

with regard to the foreign intelligence investigation be provided. This would improve the balance sought as would increased oversight, particularly if the policy of non-disclosure is required to remain.

Reminiscent of the FBI's controversial Library Awareness Programme, the aim of which was to discover the reading and research interests of Eastern Europeans, the extension of FBI surveillance by section 215 into areas such as books purchased or borrowed from a library has inspired a fierce backlash, culminating in legal as well as legislative action. Given the existence of the prohibition on disclosure in the Act, it is impossible to obtain a compete picture of the extent to which this provision has been utilised, however some indication is possible. A survey undertaken by the Library Research Centre of the University of Illinois found that 85 out of 1028 (8.3%) nationwide libraries surveyed reported having been approached by federal or local law enforcement to request information about patrons since September 11th, a telling figure given that the survey was completed in the early months of 2002.[128] Moreover, a further chilling effect is the opportunity for library staff to adopt the mantle of law enforcement by way of surveillance and reporting of patrons and their reading materials on a voluntary basis. Indeed in a survey conducted in October 2002, 4.1% of library staff revealed having voluntarily reported patron records or behaviour to authorities in relation to terrorism.[129] Of concern is the standard against which "suspicious" patrons are tested. To be reported to the FBI on the basis of a whim or unsubstantiated subjective impression of a third party undermines the principles of freedom of expression and individual privacy to a great extent. The fact that 8.3% of patrons disclosed having reported concern about the behaviour of another patron in relation to suspected terrorist activities, 32.6% of which were made to outside authorities, appears to represent a variation of the much criticised Operation TIPS (Terrorist Information and Prevention System.) This government proposal to recruit

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[128] In the year after the attacks, Federal and local law enforcement officials visited at least 10.7% of libraries to ask for these records, of which 3.5% of such visits were from the FBI. *Public Libraries' Response to the Events of September 11th, 2001*, Library Research Centre of the University of Illinois available at www.lis.uiuc.edu/~leighe/02PLA.ppt [15th April 2004]. See also http://www.ala.org/ala/oif/ifissues/usapatriotactlibrary.htm#analysis

[129] *Public Libraries and Civil Liberties: A Profession Divided,* The Library Research Center, University of Illinois, available at http://alexia.lis.uiuc.edu/gslis/research/civil_liberties.html [5th April 2004].

one million volunteers to spy on fellow citizens sparked so much outrage that its implementation was prohibited in section 880 of the Homeland Security Act of 2002. However, it seems clear that since the events of September 11th and the enactment of the PATRIOT Act that the individual has much to fear not only from the government but also from his fellow countrymen in terms of surveillance of even the most common hobbies or tasks.

Whilst section 215 has resulted in a great deal of attention since its enactment, an equally invasive provision to the same end has inspired very little debate. Perhaps it is due to the fact that the concept of "national security letters" was pre-existing in the law enforcement armoury of the United States that it has emerged so far unscathed from the onslaught of post-PATRIOT Act criticism.[130] Section 505 compels the production of personal records from third party holders by the issuance of a national security letter, a device previously used only in cases of espionage. However, this has now been extended so that access to personal records is possible even in cases in which the target is not suspected of any crime, and where no foreign government or agent is involved. In line with section 215 such a provision lies in contravention of the requirements of the Fourth Amendment, such as probable cause and in fact goes beyond this due to the fact that the process is wholly executive in nature with no judicial element whatsoever. The combination of this provision with section 215 ensures that the protection of the Fourth Amendment is not so rigorous as might once have been the case with regard to personal records and access to them by law enforcement.

Subsequent to the enactment of the PATRIOT Act, a great deal of legislation has been forthcoming. Some has sought to expand on the powers in the Act, however it is in response to the provisions affecting privacy and in particular sections 215 and 505 that a plethora of legislation has been introduced in both Houses.[131] With regard to section 215 and proposed amendments, the themes running through the amending legislation

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[130] In September 2004 a federal judge in the Southern District of New York ruled section 505 to be unconstitutional on the basis of First and Fourth Amendment violations. See *John Doe et al. v Ashcroft et al.*04 Civ. 2614 (VM). 28th September 2004.

are either an exemption for libraries and booksellers with regard to obtaining an order from the FISA court for access to any tangible thing, or indeed a return to the pre-PATRIOT standards utilised in obtaining an order under FISA for such access. Whether any of the amendments become law remains to be seen, however it is clear that any consensus on the part of the public that privacy was an acceptable sacrifice in the name of security is diminishing. This assault on the fundamental guarantees of privacy and freedom of expression is set to continue beyond the original expiry period of the provision following renewal of the PATRIOT Act in July 2005. Section 215 is now subject to a ten year sunset period.

Section 213 "Sneak and Peek Searches"

Whilst the Supreme Court has held that providing notice of a search forms part of the Fourth Amendment's reasonableness requirements,[132] the notion of delayed notice of the execution of a search warrant has long been a part of the criminal justice system in the United States. No mention is made of the notice requirement in the Federal Rules of Criminal Procedure,[133] and use of clandestine surveillance and search orders form part of FISA 1978. However, section 213 of the PATRIOT Act represents the first statutory provision of delayed notice applicable generally in the criminal law.

Section 213 of the Act provides that notification may be delayed if "the court finds reasonable cause to believe that providing immediate notification of the execution of the warrant may have an adverse result."[134] Adverse result is defined as endangering the life or physical safety of an individual, flight from prosecution, destruction of or tampering with evidence, intimidation of potential witnesses, or otherwise seriously jeopardising an investigation or unduly delaying a trial.[135] Whilst not a new phenomenon, having first been introduced by FISA in 1978, the notion of a "sneak

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[131] Freedom to Read Protection Act (HR 1157), Library and Bookseller Protection Act (S1158), Library, Bookseller and Personal Records Privacy Act (S1507), Security and Freedom Ensured Act (S 1709, HR3352) and Protecting the Rights of Individuals Act (S1552).
[132] See *Ker v California* 374 US 23 (1963). *Wilson v Arkansas* 514 US 927 (1995).
[133] Rule 41 governs search and seizure.
[134] 18 USC 3103a(b)(1) as amended by section 213 USA PATRIOT Act.
[135] 18 USC 2705 (2)(A)-(E).

and peek" search as expounded in section 213 is contentious due to its extension beyond that originally intended in FISA, whereby the target had to be a foreign power or its agent suspected of involvement in terrorism, into the realms of the ordinary criminal law. This results from the fact that there is no requirement that the investigation to which the search is related be connected to terrorism in any way. On this basis, it seems as if the enactment of section 213 provides an example of the state taking advantage of the legislative opportunity of an emergency situation to extend the criminal law under the guise of countering terrorism. In addition, the fact that this extension from foreign agents involved in terrorism to any crime where notice may create an adverse result, increases the potential target pool of such searches to every citizen and non-citizen in the country as well as beyond. Whilst acknowledged by the court as a necessary reality in some cases, this extension of delayed notification, beyond the confines of a narrow exception, has the effect of essentially negating this part of the Fourth Amendment's reasonableness requirements in potentially every case.

However, though raising serious questions under the Fourth Amendment, there is much debate as to whether section 213 can actually be deemed unconstitutional. Indeed, it is due to the inconsistency of the case law on this subject and the resultant uncertainty that the Department of Justice has justified the enactment of section 213 as providing a degree of uniformity to this area.[136] Although the Supreme Court has not explicitly ruled on the constitutionality of covert warrants, it has been accepted that in the interests of law enforcement, notification of a search may be delayed in certain circumstances. *Richards v Wisconsin*[137] established that entry without prior notice is justified in instances where the police have a reasonable suspicion that knocking and announcing their presence would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence. "This standard--as opposed to a probable cause requirement-strikes the appropriate balance between the legitimate law enforcement concerns at

[136] See Department of Justice, *Field Guidance on New Authorities Enacted in the 2001 Anti-Terrorism Legislation..*
[137] 520 US 385 (1997).

issue in the execution of search warrants and the individual privacy interests affected by no knock entries."[138]

The decisions of other federal courts on the issue of covert warrants have not made clarification possible and instead have only contributed confusion to this grey area. In *Villegas v US*[139] the Second Circuit Court of Appeals stated that "Certain types of searches or surveillances depend for their success on the absence of premature disclosure...When nondisclosure of the authorized search is essential to its success, neither rule 41 nor the Fourth Amendment prohibits covert entry." More recently, it was stated in *US v Simons*[140] that "The Fourth Amendment does not mention notice, and the Supreme Court has stated that the Constitution does not categorically proscribe covert entries, which necessarily involve a delay in notice." In contrast the 9th Circuit Court of Appeals held in *Freitas v US*[141] that the failure to provide notice of the warrant violated both the Fourth Amendment and Rule 41. Whilst acknowledging that not all covert entries are unconstitutional, the court stated "the absence of any notice requirement in the warrant casts strong doubt on constitutional adequacy."[142] As seen, the case law has not clarified the balance which needs to be struck between the needs of law enforcement and the requirements of the Fourth Amendment. Yet it is of course the case that such a balance must be struck. It stands to reason that law enforcement agencies must have the power of covert entry in executing search warrants in cases where this proves necessary. However, section 213 has the effect that the broad reasons for covert entry, in particular seriously jeopardising an investigation or unduly delaying a trial, are now applicable to *anybody* in *any* criminal matter, without the incorporation of additional safeguards so as to ensure the proper use of such an intrusive power. Whilst uniformity may have been gained by section 213, uniformity should not need to be achieved at the sacrifice of reasonable safeguards or necessity.

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[138] *Ibid.* See also *Dalia v US* 441 US 238 (1979).
[139] 899 F.2d 1324, 1336 (2nd Cir. 1990).
[140] 206 F.2d 392, 403 (4th Cir. 2000) See also *US v Pangburn* 983 F.2d 449, 455 (2nd Cir. 1993) "The Fourth Amendment does not deal with notice of any kind."
[141] 800 F.2d 1451 (9th Cir. 1986).
[142] *Ibid.* p. 1456.

It is important to note that whilst it is possible to delay notice of a search, notice cannot be deferred indefinitely; indeed the Department of Justice has stated that *"it would be a violation of the USA PATRIOT Act to fail to provide notice."*[143] The Supreme Court has never upheld a government search for which notice is never provided.[144] Section 213 provides that notice be given within a reasonable period of the execution of the warrant, a period which may be extended by the court on a showing of good cause.[145] A lack of statutory clarification as to what amounts to a "reasonable period of time" however, has resulted in reliance on conflicting jurisprudence once again. Whilst the notion of a "reasonable period" is said to be a flexible standard according to the circumstances of the individual case,[146] the consensus appears to be that a delay of seven days, subject to additional extensions, amounts to a reasonable period.[147] However, much longer periods of delay have been held as reasonable for the purposes of the Fourth Amendment,[148] highlighting the developing nature of jurisprudence on this issue. A more satisfactory position would be a declaration of what amounts to a reasonable period of time, with the possibility of extension if certain criteria are met. This would provide clarification and an element of legal certainty.

Congressional distaste for the PATRIOT Act, and in particular section 213, was clearly demonstrated in 2003 when the "Otter Amendment", a provision seeking to prohibit the use of federal funds to conduct such searches, was passed in the House of Representatives by 309-118. However, whilst this represented the apprehension with which the Act and several of its provisions are viewed and certainly seems to tell of the unease felt for the PATRIOT Act, the Senate and House leaders refused to put the amendment into the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act 2004 due to go before Congress.

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[143] Department of Justice written objection to the Otter Amendment, July 25th 2003, emphasis in original, available at http://www.cdt.org/security/usapatriot/030725doj.pdf [1st April 2004].

[144] This can be contrasted to the jurisprudence of the European Court of Human Rights in *Klass v Germany* regarding failure to inform the subject of surveillance after the event, as discussed earlier in the chapter.

[145] 18 USC 3103a (b)(3).

[146] *Villegas v US* 899 F.2d 1324, 1337 (2nd Cir. 1990).

[147] *Ibid. Freitas v US* 800 F.2d 1451, 1456 (9th Cir. 1986). *US v Pangburn* 983 F.2d 449, 454-455 (2nd Cir. 1993).

[148] See *US v Simons* 206 F.2d 392 (4th Cir. 2000) where a delay of 45 days was held not to affect the constitutionality of a search.

The lack of an explicit ruling by the Supreme Court on the constitutional validity of covert warrants make it very difficult to accurately assess the outcome of such a ruling were the question to come before the court. The court has long appreciated the needs of law enforcement and has thus recognised that the practice of "sneak and peek" warrants is sometimes necessary in narrowly circumscribed situations. An argument could easily be made due to the events of September 11th and the subsequent war on terror that such a practice would be condoned and held not to be in violation of the Fourth Amendment on the grounds of national security. Moreover, the power to delay notice of a search developed prior to the PATRIOT Act and there is no indication that the concept of delayed notice has been abused to the extent that delayed notice has become the rule rather than the exception. However, it is equally arguable that the enactment of section 213 was not strictly necessary due to the fact that delayed notice of a search was already available to law enforcement agencies prior to 9/11, and as such represents as expansion of the criminal law in the guise of countering terrorism. Moreover, the wide scope of section 213, coupled with the fact that the concept of "adverse result" is so vague as to potentially fit any situation, could have the effect that warrants issued under section 213 do become the norm. This would essentially negate the requirements of the Fourth Amendment and could result in the court finding section 213 to be in violation of the Constitution.

The Legal Framework Relating to Electronic Surveillance pre-PATRIOT Act

Despite the use of virtually identical techniques and technologies in obtaining information, the purpose for which the information is sought, crime prevention or intelligence gathering, dictates the legal regime under which the surveillance is authorised. The phenomenon of terrorism, however, blurs this distinction by way of the fact that an investigation into terrorism can be concerned at once with both national security and law enforcement.[149] A brief discussion of the law relating to surveillance prior to the enactment of the PATRIOT Act will serve to emphasise the changes wrought in 2001 and their impact.

[149] W. C. Banks & M.E. Bowman, *Executive Authority for National Security Surveillance*, 50 AM. U. L. REV. 1, 93 (2000).

Interceptions for the Purpose of Law Enforcement

The Omnibus Crime Control and Safe Streets Act[150] was enacted in 1968 in response to the landmark decisions of *Katz* and *Berger* the preceding year. The law governing wiretapping was enacted in Title III of the Act, and it is by this name that federal law in this area is often referred. Primarily, Title III provides that it is a crime for any person to intercept or disclose the contents of any wire, oral or electronic communication.[151] This is however, subject to the exception that a court order has been issued on the grounds that there is probable cause to believe that a criminal offence, as listed in section 2516, has been, is being or is about to be committed.[152] 18 USC 2516 lists certain "predicate crimes" for which a wiretap could be ordered, to which section 201 of the PATRIOT Act added crimes of terrorism or production or dissemination of chemical weapons, and section 202 added a "felony violation of section 1030 (relating to computer fraud and abuse)." Title III was amended in 1986 with the enactment of the Electronic Communications Privacy Act (ECPA) which extended the scope of the wiretap law so as to extend to electronic communications as well. However, in contrast to the standard in section 2516(1) whereby applications and orders for interception are made on the ground that the interception may provide or has provided evidence of any of the offences listed, with regard to interception of electronic communications, the standard employed is that the interception may provide or has provided evidence of *any* Federal felony.[153] The Supreme Court's recognition that the protection of the Fourth Amendment is applicable to electronic surveillance is evident through the criteria enacted in Title III. For example, the inclusion of enumerated crimes for which surveillance can be ordered, the principle of "minimization" under which surveillance must be limited to the potentially incriminating communications of the target alone, as well as the fact that evidence obtained through an unlawful interception may be suppressed.

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[150] Codified as amended at 18 USC 2510-2522.
[151] 18 USC 2511.
[152] 18 USC 2518.

Interceptions for the Purpose of Intelligence Gathering

Whilst *Katz* established that electronic surveillance for the purpose of law enforcement was subject to the Fourth Amendment, it left untouched the issue of warrantless surveillance on national security grounds. This was dealt with in 1972 in *United States v United States District Court*[154] in which the Supreme Court prohibited security surveillance which did not conform with the safeguards of the Fourth Amendment.[155] "These Fourth Amendment freedoms cannot properly be guaranteed if domestic security surveillances may be conducted solely within the discretion of the Executive Branch."[156] Instead the court invited Congress to establish a legal regime, distinct from that under Title III, but also compatible with the Fourth Amendment, to govern intelligence surveillance, as opposed to surveillance for the purpose of law enforcement.[157]

In 1978 Congress enacted the Foreign Intelligence Surveillance Act (FISA). This established a panel of judges,[158] known as the Foreign Intelligence Surveillance Court (FISC), to review and grant[159] applications to undertake electronic surveillance[160] in the United States, for the purpose of collecting foreign intelligence information. The proceedings of the court take place *in camera* and the records and files are classified. Whilst in a criminal case the standard applicable is probable cause to believe that a crime has been committed and that the person is using facilities sought to be monitored in connection with the crime, in a foreign intelligence case an order under FISA requires rather a finding of probable cause that the target is a member of a foreign terrorist organisation or an agent of a foreign power and that the facilities sought to be monitored are being used by an agent of a foreign power.[161] In contrast, if the target is a US citizen or a permanent resident alien, there must be probable cause

[153] 18 USC 2516(3).
[154] 407 US 297 (1972).
[155] *Ibid* p. 320.
[156] *Ibid* pp. 316-317.
[157] *Ibid* pp. 322-323.
[158] See 50 USC 1803. Originally, section 103 of FISA designated 7 judges to sit on the Court. This was increased to 11 by section 208 of the PATRIOT Act 2001.
[159] An order must be granted provided that the application is in compliance with the requirements of the Act 50 USC 1805(a).
[160] This was extended to include covert physical searches in 1994 and pen register and trap and trace orders in 1998 see 50 USC 1821-1829 and 1841-1846.

to believe that the target is knowingly engaged in clandestine intelligence activities for, or on behalf of such a foreign power, which involve or may involve a violation of the criminal statutes of the United States.[162] This has enabled the government to assert that the PATIOT Act has not eroded the probable cause standard. However, in relation to foreign intelligence surveillance the probable cause standard applied is far removed from the traditional interpretation of the term. Indeed as it stands, no protection is offered by way of the probable cause standard in foreign intelligence cases.

The difference between the procedure under Title III and FISA is highlighted by the fact that the omission of the traditional probable cause requirement of the Fourth Amendment in the regime under FISA was replaced by an undertaking that the primary purpose of the surveillance is to obtain foreign intelligence information.[163] This was to act as a safeguard for American citizens against covert surveillance. However, this was changed in 2001 by the introduction of a less stringent standard in section 218 of the PATRIOT Act, which amended FISA so that foreign intelligence gathering need now only be a "significant" purpose of the surveillance. This has the effect that it is now possible for US citizens to be subject to covert surveillance, as granted by a secret court subject to no public accountability so long as foreign intelligence can be said to play some part in the investigation. In 2002 the FISC rejected a Department of Justice proposal that provided for information sharing between prosecutors and investigators which would have had the effect that FISA would be used primarily for a law enforcement purpose. "...law enforcement officials shall not make recommendations to intelligence officials concerning the initiation, operation, continuation or expansion of FISA searches or surveillances."[164]

This blurring of domestic and foreign intelligence gathering circumvents the protections of the Fourth Amendment and Title III by way of the fact that evidence so obtained may now be used in a criminal prosecution where it would once almost

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[161] See 50 USC 1801 for definitions.
[162] 50 USC 1801(b)(2)(A).
[163] 50 USC 1804(a)(7)(B).
[164] *In Re All Matters Submitted to the Foreign Intelligence Surveillance Court,* May 17th 2002, p. 27 This was however overturned by the FISA Appeals Court in November 2002.

always have been subject to exclusion.[165] This possibility was foreseen by the Court of Appeals in 1991 when it stated that "The [A]ct is not to be used as an end-run around the Fourth Amendment's prohibition of warrantless searches."[166] The alternative is of course, that unless the information obtained is used in a prosecution the citizen is never informed of the fact that they were a target of such covert surveillance; arguably an equally chilling prospect in terms of the right to individual privacy.

Section 206 "Roving Wiretaps" Multi-Point Authority

An important part of the protection afforded by the Fourth Amendment is the requirement of specificity in any warrant of the place to be searched, which of course equates in terms of wire or electronic surveillance to the particular phone to be intercepted. This was originally the case in Title III, however the position was changed with the enactment of the ECPA 1986 which authorized that the requirement of specificity contained in 18 USC 2518 (1)(b)(ii) did not apply where it was shown that the target was acting with the intent of avoiding surveillance. This was amended further in 1998 in section 604 of the Intelligence Authorization Act 1999,[167] which stated that specification of the nature and location of the facilities to be intercepted need not be provided where probable cause exists that the target's actions *could* have the effect of thwarting interception.[168] This essentially provided the FBI with the power to engage in "roving wiretaps" in criminal cases, whereby the interception authorised is of a person rather than a particular phone.

Despite the gradual relaxation of the particularity requirement of the Fourth Amendment, the use of roving wiretaps was limited to use by law enforcement. This however changed with the passage of the PATRIOT Act, in which section 206 extended FISA to permit use of roving wiretaps to intercept the communications of intelligence targets. This has the effect that not only are the intelligence services able

[165] See Lawyers Committee For Human Rights, *A Year of Loss,* (2002) p. 9 available at www.lchr.org
[166] *US v Johnson* No. 90-2010 Published 19th October 1992 p. 11.
[167] A provision which did not appear in either version of the Bill which passed the House or the Senate.

to follow an intelligence target from location to location intercepting the communications from *any* telephone or computer used by the target, but also this is authorised by the FISC in secret and without a showing of probable cause. By its nature this negates the provision in 18 USC 2518(12) that law enforcement officers must ascertain that the target is actually using the line to be intercepted before the surveillance begins, thereby removing a degree of protection for those innocent users caught in the surveillance.

The constitutional questions raised by roving wiretap surveillance are numerous. The importance of the particularity requirement of the Fourth Amendment has been emphasised by the Supreme Court on numerous occasions. In *Berger v New York,* it was stated that to name "...the person or persons whose communications, conversations or discussions are to be overheard or recorded...does no more than identify the person whose constitutionally protected area is to be invaded rather than "particularly describing" the communications, conversations, or discussions to be seized. As with general warrants this leaves too much to the discretion of the officer executing the order."[169] Furthermore, the court in *Stanford v* Texas[170] found the words of the Fourth Amendment to be "... precise and clear. They reflect the determination of those who wrote the Bill of Rights that the people of this new Nation should forever "be secure in their persons, houses, papers, and effects" from intrusion and seizure by officers acting under the unbridled authority of a general warrant." However, the issue of the constitutionality of roving surveillance has not yet come before the Supreme Court. Instead, current authority rests with lower Federal courts with regard to the use of roving wiretaps.

The constitutionality of Title III roving interception of oral communication[171] under 18 USC 2518 (11)(a) was addressed in *US v Bianco[172]* and was found to adhere to the particularity requirement of the Fourth Amendment. Rejecting a literal interpretation of the Amendment, the Court instead followed the flexible approach taken by the

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[168] 18 USC 2518(11)(b)(2) emphasis added.
[169] 388 US 41, 59 (1967).
[170] 379 US 476, 481 (1965).
[171] As opposed to wire or electronic communication under section 2518(11)(b).
[172] 998 F. 2d 1112 (2nd Cir. 1993).

Supreme Court "...designed to keep pace with a technologically advancing society" reiterating the contention that the prohibition against unreasonable searches and seizures "...must be interpreted in light of contemporary norms and conditions." Moreover, the court found compelling the reasoning used in *US v Silberman*[173] in which an order issued under section 2518(11)(b) was upheld as constitutional on the grounds that roving surveillance was justifiable if it was determined that the target was deliberately evading detection. This was applied to an order under section 2518(11)(a) on the grounds that deliberately thwarting surveillance was sufficient to serve as an example of impracticality as required by section 2518(11)(a)(ii). In combination with the requirement in subsection 12 that it be ascertained that the target is actually using the line to be intercepted, this was deemed sufficient to fulfil the particularity requirement of the Constitution. *US v Gayton*[174] followed the earlier case of *US v Petti*[175] in which the court relied strongly on section 2518(11)(b)(ii) in stating that a lack of specificity with regard to location was acceptable if it was established that the target has attempted to evade surveillance. The developments in communication allow those involved in matters of crime and espionage to use technology to evade law enforcement by way of multiple mobile phones and SIM cards as well as numerous anonymous email accounts. As a result of this reality, the opinion of roving surveillance as a necessary weapon of law enforcement held by the lower courts is understandable.

However, whilst upheld in the lower courts as a necessary weapon of contemporary law enforcement[176] it is impossible to escape the resemblance of roving wiretaps to general warrants. The argument that the requirement of particularity is satisfied by the specific targeting of a person rather than a place is only superficially attractive. This is particularly so because the concept of roving surveillance of a target's phone calls or email communications, by its very nature, will result in the interception of communications of thousands of innocent parties. The nature of roving surveillance is such that it conflicts with a person's reasonable expectation of privacy. This is

[173] 732 F.Supp 1027 (S.D.Cal. 1990).
[174] 74 F. 3d 545 (5th Cir. 1996).
[175] 973 F. 2d 1441 (9th Cir. 1992).
[176] See *US v Hermanek* where it was stated that roving wiretaps are an appropriate tool since the advent of cellular technology. No. 99-10092 Filed May 15th 2002 P. 7079 (9th Cir. 2002).

particularly so if one agrees with the suggestion in *Katz* that it was the fact that Katz was engaged in a communication which warranted privacy and that the "place" to be protected was "cyber space"[177] as opposed to the physical location of the telephone box.[178] Furthermore, should the target enter the home of an innocent third party, the phone line can be tapped or if the target uses an Internet café, the communications of all users of the café can be intercepted covertly. This has massive implications for the privacy rights of thousands of individuals caught in roving surveillance, particularly since the expansion of FISA to grant roving wiretaps has removed the requirement in section 2518(12) that it be ascertained that the target is actually using the communication device concerned. Indeed, the phone line of a house could be legitimately intercepted even if the target is a guest for only a short time and does not even use the telephone. This negation of the particularity requirement coupled with a massive element of discretion on the part of law enforcement and intelligence service officers, for which the Supreme Court has made clear its abhorrence,[179] certainly provides the seeds for a ruling that roving surveillance is in violation of the Fourth Amendment. Deemed necessary as a tool of law enforcement, there is logistically some sense in not requiring the authorities to apply for a new warrant so as to intercept every phone or computer in question. However, it is hard to justify the potential infringement on the right to privacy which emanates from the provisions on this basis. It is the case that the broad scope and meagre safeguards interfere with the privacy of an infinite number of people such as to amount to disproportionality.

The Supreme Court has identified that in cases involving national security it is the task of the court to balance "...the duty of Government to protect the domestic security, and the potential danger posed by unreasonable surveillance to individual privacy and free expression."[180] It is certainly arguable that national security interests will be held to supersede those of individual privacy, particularly in the current climate and given the jurisprudence emanating from the US Court of Appeals.[181]

[177] Cyber space has been described as "that place you are in when you are talking on the telephone." See Sklansky, n. 104 above p. 39.
[178] *Ibid.*
[179] See *Stanford v Texas* 379 US 476, 481-485 (1965).
[180] *US v US District Court* 407 US 297, 314-315 (1972).
[181] See N. C. Henderson, "The PATRIOT Act's Impact on the Government's Ability to Conduct Electronic Surveillance of Ongoing Domestic Communications", (2002) 52 Duke L. J. 179, p. 198.

However, in *United States v United States District Court* the Supreme Court emphasised the position of the Bill of Rights as the instrument to protect the privacy of citizens, even when faced with the vital interest of safeguarding society in general and the security of its people. In so doing the court emphasised the importance of the role played by the warrant requirement in balancing these competing interests and found that warrantless surveillance was not justified even in the interests of national security. Though decided prior to the enactment of FISA, there is not a large gulf between warrantless surveillance and the system of review of FISA applications by the FISA court. It is therefore arguable that the court would uphold the requirements of the Fourth Amendment as a buffer between government power and individual privacy, particularly given the fact that to uphold the constitutionality of roving wiretaps could be construed as gutting the Fourth Amendment of its intended significance.

Conclusion

The increased threat from Islamic fundamentalism and the events of September 11th signify a change in the focus of anti-terrorism measures. In the past the privacy of the individual had not been an area affected as extensively as others by anti-terrorism provisions. Measures enacted to deal with the Northern Irish troubles provided powers which had a greater impact on the freedom of expression and association, liberty and due process rights of the individual. Data retention and the use of such information were not techniques utilised in the United Kingdom's counter-terrorism strategy, at least not to the extent currently employed. In addition, traditionally in the United States ordinary investigative practices were utilised by police to notable success in investigating terrorist attacks, such as the World Trade Centre bombing in 1993 and the Oklahoma City bombing in 1995. This begs the question whether these countries actually need such measures in order to be able to counter the threat from Islamic extremism effectively? Or is it the case that the governments of both countries took advantage of the legislative opportunity presented to enact extensive

provisions which are not limited to terrorism but extend into the realm of the ordinary criminal law?

With regard to the measures contained in the ATCSA, both the retention of communications data and the disclosure of information can be said to achieve questionable satisfaction of the requisite criteria in assessing a valid limitation on a fundamental right, in particular the requirement of necessity. Indeed, it is fair to say of both measures that they lack sufficient proportionality to the end to be achieved. It is acknowledged that Part III includes a test of proportionality, yet concerns exist with regard to the extent to which the proportionality of the disclosure will be considered prior to the act. In addition there is arguably no pressing social need for the measures given the far-reaching and indiscriminate nature of the provisions. The questions raised concerning satisfaction of the necessary criterion tend towards the conclusion that these measures were not necessary in order to counter the threat from Islamic fundamentalism effectively and instead can be said to be an extension of the criminal law enacted as emergency legislation. This is borne out by earlier unsuccessful attempts to enact the provisions relating to disclosure of information.

The utility of these measures is also questionable. The argument that information relating to terrorism may be uncovered through disclosure of other information can be criticised on several fronts. Such a technique cannot be said to amount to efficient and effective investigative practice. This leads on to the point that inherent interference with the privacy of innumerable individuals cannot properly be justified on the basis of the utility of the provision in question. Similarly, the blanket retention of data such as to essentially profile the individual is hard to justify on the basis that such information *may* be of use to an investigation should an individual be identified as a terrorist suspect. In addition any safeguards which might have minimised the interference with the right to privacy are notably absent.

The provisions enacted in the PATRIOT Act differ from the information retention provisions of the ATCSA to provisions primarily concerned with data collection. This portrays a desire to be in a position of knowledge with regard to those living within US borders, perhaps understandably, given the fact that the 9/11 hijackers lived

and took flight lessons in the United States for long periods prior to the events of September 11th.

Of the measures enacted in the PATRIOT Act it is section 213 relating to "sneak and peek" searches, which can be said to be supported by an objective justified in its utility. Covert entry and delayed notification are powers of acknowledged use in law enforcement, both generally and in the field of terrorist offences. The utility of such a measure in relation with the investigation of terrorism is clear with regard to locating incriminating documentation as well as the paraphernalia connected with the making of explosives. This is particularly so when dealing with the phenomenon of suicide bombers when any notice may provide the opportunity for detonation. However, the necessity of section 213 must be questioned given the fact that law enforcement agencies already had the power of covert entry and delayed notification in certain circumstances.

However, whilst covert entry is sometimes necessary in relation to crime generally, the effect of section 213 and the broad definition of "adverse result" increases the potential for its use so that delayed notification becomes more a rule than an exception. The cornerstone of the Fourth Amendment is reasonableness, and the importance of the government's aim coupled with the logistical advantage of secrecy in certain circumstances, particularly cases concerning terrorism, tends to justify the intrusion. However, the reasonableness achieved through the utilisation of covert entry as a tool in exceptional circumstances is dissipated by the potential for delayed notice searches to become of almost general application. This situation could be improved by a narrower definition of "adverse result", as well as the establishment of a set period of time so as to provide a degree of certainty. Covert searches are obviously required by law enforcement in certain circumstances however the protections of the Fourth Amendment need not be entirely negated.

It is with regard to the provisions of section 215, access to tangible things and section 206, relating to the use of roving wiretaps, that the balance required in the Fourth Amendment can be said to be tipped towards unreasonableness. With regard to the former the provision combines a wide scope with a lack of any meaningful oversight,

which cannot be justified on the basis of any practical benefit. It is not the case that satisfaction of an objective standard of suspicion justifies access to tangible items; rather the effect of the provision is general surveillance of the population without adequate justification in connection with the prevention of terrorism. In addition, the breadth of the provision is such as to encourage and in turn rely on the unsubstantiated suspicions of the public. Similarly, whilst advances in technology have assisted criminal actors with regard to means of contacting associates and evasion of detection, roving surveillance the scope of which was expanded by section 206, has the effect of removing the particularity requirement of the Fourth Amendment. This essentially allows interception of communications generally and leaves a great deal of discretion to law enforcement and intelligence services officers. Of course the law must keep pace with advances in science and technology but the scope of section 206 is so broad that it is hard to justify the intrusion to the privacy of potentially thousands of people, even having regard to the national security concerns of the country.

These powers in both the UK and the US can be said to form a large part of a proactive attempt to "root" out terrorist threats pre-emptively rather than focus on identifying the culprit in the aftermath of another atrocity. Whilst an understandable sentiment, there is something unpalatable about legislation which essentially treats the whole community as suspect and is able to infringe the privacy of individuals on a virtually discretionary basis without satisfying objective standards. This effect is not mitigated by the inclusion of adequate safeguards. Indeed, it can be said of both the measures in the ATCSA and the PATRIOT Act that they combine insufficient, and in some cases a complete lack, of independent oversight with a purview which extends into the criminal law rather than solely relating to terrorist investigations. These measures represent a severe assault on the privacy of the individual. What is notable about these provisions is that this assault on privacy cannot be said to be justified by the utility of the measures in investigating terrorist offences, save for section 213 of the USA PATRIOT Act in relation to covert searches, the utility of which is not confined to terrorist investigations but extends to the criminal law in general. Whilst it can be argued that such measures may prevent terrorist attacks, this would come at a price. Indeed, the interference with individual privacy is hard to justify on the basis of tenuous claims of counter terrorism success with powers which *may* be of use in

preventing terrorism. The effect of these measures has a deleterious effect on standards integral to democratic society. These measures represent only part of the provisions enacted in each country both prior to and following the events of September 11th which curtail individual freedom to some extent. In combination, the detrimental effect on the individual as well as on democratic values is clear.

Chapter 5

Anti-Terrorism Legislation and Freedom of Expression

Anti-Terrorism Legislation and Freedom of Expression

Freedom of expression, though a cornerstone of democracy, has often fallen victim to attempts by the state to ensure security in times of emergency or crisis. This has occurred in the United Kingdom and the United States through policy decisions such as the media ban introduced in October 1988 as well as investigative practices such as those undertaken by the FBI in monitoring political activity and affiliations instead of investigating criminal behaviour. In addition, previous anti-terrorism legislation in the UK has contained provisions, such as proscription, with the potential to interfere with the freedom of expression of the individual. Such practices have garnered considerable criticism over the years. This criticism has continued with regard to the United Kingdom due to the re-enactment of these provisions with permanent status under the Terrorism Act 2000. Similarly, interference with freedom of expression and the notion of guilt by association has been enshrined in legislation in the United States, through the concept of designation of foreign organisations, by way of both the Anti-Terrorism and Effective Death Penalty Act 1996 and the USA PATRIOT Act 2001.

Freedom of Expression in the United Kingdom

The importance afforded freedom of expression by the European Convention on Human Rights is highlighted in its description as "...one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man."[1] However, despite this fundamental status, freedom of expression in the United Kingdom is not absolute. The grant of the right to freedom of expression in article 10 which includes freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers, is immediately curtailed in the subsequent paragraph in situations where the interference is prescribed by law, is necessary in a democratic society and, of relevance here, is in the interests of national security, territorial integrity or public

[1] *Handyside v UK* (1976) 1 E.H.R.R. 737 para. 49.

safety or for the prevention of disorder or crime.[2] Its vital importance coupled with this qualified status has resulted in great use of the supervisory function of the European Court of Human Rights.

The scope of article 10 of the Convention in the context of terrorist cases was considered by the European Commission of Human Rights in *Purcell and Others v Ireland.*[3] This concerned alleged restrictions on the applicants' freedom of expression resulting from a ministerial Order made under Section 31 of the Broadcasting Authority Act 1960[4], under which restrictions were placed on the broadcasting of a particular matter or any matter of a particular class if it was considered that to so would be likely to promote, or incite to, crime or would tend to undermine the authority of the State. Of relevance here were interviews with or broadcasts of spokesmen of Irish nationalist and loyalist organisations.[5] In finding such an Order to constitute an interference with the exercise of the applicants' right to receive and impart information and ideas, various statements were made by the Commission in reference to the justification of such an interference under article 10(2) of the ECHR. The Commission determined that the Order prohibited the use of the media for the purpose of advocating support for organisations which seek to undermine, by violence and other illegal means, the constitutional order and the fundamental rights and freedoms guaranteed by the Convention. In so doing it was found that by allowing, in Article 10(2), certain restrictions on the exercise of the freedom of expression, the Convention recognises the principle that no group or person has the right to pursue activities which aim at the destruction of any of the rights and freedom enshrined in it.

Freedom of expression was said to constitute one of the essential foundations of a democratic society, but it was also emphasised that the exercise of that freedom "carries with it duties and responsibilities" and that the defeat of terrorism is a public interest of the first importance in a democratic society. In a situation where politically motivated violence poses a constant threat to the lives and security of the population and where the advocates of such violence seek to utilise the media for publicity

[2] This is in addition to the right to freedom of expression in article 19 of the Universal Declaration of Human Rights and article 19(2) of the International Covenant on Civil and Political Rights.
[3] Application No. 15404/89
[4] As amended by Section 16 of the Broadcasting Authority (Amendment) Act 1976.
[5] These were the IRA, Sinn Fein, the UDA, the INLA and any organisation proscribed under the Northern Ireland (Emergency Provisions) Act 1978.

purposes, it was acknowledged to be particularly difficult to strike a fair balance between the requirements of protecting freedom of information and the importance of protecting the state and the public against the threat posed by the advocates of violence. Ultimately, it was found that the balance was tipped in favour of the promotion of national security on the basis that protection of the democratic order safeguards freedom of expression and other fundamental rights for all.

Establishing justification of an interference with the right to freedom of expression on the grounds of national security has been greatly eased by the decision in *Secretary of State for the Home Department v Rehman*[6] in which the House of Lords defined the term in an extremely broad manner. In *Rehman* the Special Immigration Appeals Commission (SIAC) upheld the appeal against the Secretary of State's decision to deport Rehman, a Pakistani national, on the basis that he was a danger to national security. It was the definition of national security and the determination of what could be said to be in the interests of national security which occupied the court of Appeal and the House of Lords. The SIAC defined national security as engaging in, promoting, or encouraging violent activity which is targeted at the United Kingdom, its system of government or its people and found that Rehman could not be said to have acted contrary to national security on the facts before the Commission. This definition was submitted by the government to be too narrow. Indeed an exhaustive definition of what is in the interests of national security would bind the executive when dealing with changing circumstances, risk assessments and politics. Moreover, what is in the interests of the national security of the UK was said to go further than those acting against the UK and included those within the UK taking action against foreign states. This was on the basis of protecting the collective security of the community of nations as well as in an attempt to foster a relationship of reciprocity with other nations in combating terrorism and safeguarding the security of the state.

However, in an area such as this where the executive acts with a wide discretion, a narrow approach would be preferable. A circumscribed approach is particularly important where a finding that an individual is a danger to national security can result in deportation and have an adverse effect on his enjoyment of protected rights.

[6] [2003] 1 A.C. 153. Hereinafter *Rehman.*

However, the House of Lords held that the interests of national security could be threatened not only by direct action against the United Kingdom, its system of government or its citizens, but also by an indirect threat to another state, a definition exacerbated by its application at the executive's discretion. Such an approach will clearly have the effect that justification for an interference with Convention rights will be far easier to establish. Whilst it was held that the definition itself fell within the ambit of judicial determination as a question of law, whether an issue falls as being in the interests of national security is a question for the executive.[7] The result of this therefore was that SIAC could not disagree with the Secretary of State's opinion that terrorism against a foreign state was contrary to the interests and security of the United Kingdom.[8] This had the effect that whilst SIAC was said to have full appellate jurisdiction,[9] an issue such as national security was not one which could be properly decided by a judicial tribunal at all.[10] However, this of course would have the effect of defeating the purpose for which SIAC was established. This was recognised by Lord Hoffmann and as such, he provided three examples of situations in which SIAC could review matters of national security:

1. The factual basis for executive opinion that deportation would be in the interests of national security must be established by evidence which could be reviewed by SIAC.
2. Whether the decision of the Secretary of State was Wednesbury unreasonable was reviewable.
3. An appeal to the Commission may turn on issues which do not lie within the ambit of executive discretion such as whether deportation interferes with rights under the ECHR.

Whilst this has the effect of delineating the roles of the judiciary and executive in this area, it also reduces the level of judicial review to which such decisions can be subjected. This approach is in keeping with the postscript Lord Hoffmann added following the events of September 11th which underlines the need for judicial deference to the executive in such matters on the basis of access to information and

[7] *Ibid.,* para. 50 .
[8] *Ibid.,* para. 53.
[9] Section 4(1) Special Immigration Appeals Commission Act 1997.
[10] *Rehman,* n. 3 above para. 52.

the expertise held by ministers as well as the notion of democratic accountability. However, to reduce the role of the courts in the area of national security in this way leaves this area and those individuals caught therein in an extremely vulnerable position. Whilst this may have provided some degree of clarity to the ambiguity surrounding questions of law and politics regarding national security, this clarity has come at a high price which is in keeping with an increase in judicial deference post 9/11.[11]

The Terrorism Act 2000 and the Anti-Terrorism, Crime and Security Act 2001

Freedom of expression was long a casualty of the anti-terrorism regime under the PTA and the EPA, and the situation has not improved under the permanent status of the Terrorism Act 2000, nor under the most recently enacted Anti-Terrorism, Crime and Security Act 2001. Primarily, this is due to the fact that Part II of the Terrorism Act replicates, and moreover extends, those provisions which have the potential to restrict the freedom of expression and association of the individual, and which derive from the power to proscribe organisations as terrorist.

Proscription and Related Offences

The gateway to several offences contained in the Terrorism Act is the power of proscription as contained in section 3 of the Act. Since its initial enactment, the power to proscribe has raised concerns under the banners of freedom of expression and association, however the Terrorism Act has brought about two further important and troubling consequences. Whilst this power to proscribe remains essentially the same as that under the PTA, its scope extends beyond the affairs of Northern Ireland to include other domestic organisations as well as foreign terror groups. This obviously has the effect of increasing the potential for infringement of freedom of expression and association far beyond that which existed previously. Secondly, the status of the Terrorism Act is such that the potential for interference with these fundamental rights is now a permanent feature of the British legal landscape.

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[11] See *Suresh v Canada (Minister of Citizenship and Immigration)* [2002] 1 S.C.R. 3.

Despite questions raised as to the effectiveness, as opposed to the symbolism, of proscription, the decision was taken to re-enact this power in the Terrorism Act, notwithstanding misgivings regarding its compatibility with the rights contained in the ECHR. Proscription is no longer the purely executive power it was under the previous regime, due to the establishment of the Proscribed Organisations Appeal Commission (POAC), which allows an organisation to appeal against the decision of the Secretary of State not to deproscribe the group. Provision is made in the Proscribed Organisation Appeal Commission (Procedure) Rules 2001[12] for a special advocate to represent the interests of the appellant in the hearing due to the fact that the exclusion of the appellant and his legal representative from proceedings may be ordered. This enables the POAC to consider all evidence pertaining to the matter in camera, including that obtained by way of intercepted communications. The special advocate may make written and oral representations to the Commission and may cross examine witnesses. However, once material has been disclosed to the special advocate by the Secretary of State, there may be no communication with the appellant or his legal representative unless permission is obtained from the POAC. This obviously prevents any form of effective refutation of the material by the appellant. Whilst this situation is of course disadvantageous to the appellant, the difference between this and the comparable scenario before the Special Immigration Appeals Commission (SIAC), discussed in chapter 7, with regard to the detention of suspected international terrorists, is that the proceedings before POAC are not concerned with the liberty of an individual. As a result of this the evidential and procedural disadvantages to the appellant are not as objectionable as is the case with proceedings before the SIAC.

Proscription of an organisation causes interference with the freedom of expression of a group far wider than the membership of the organisation concerned. Indeed, to ban a particular organisation inhibits political discussion in the community at large. This impact can be seen in the case of *R (On the Application of the Kurdistan Workers'*

[12] SI 2001/443.

Party and Others) v Secretary of State for the Home Department,[13] in which it was stated that proscription of the PKK had the effect of smothering the only outlet for political expression had by a great number of the Kurdish community and essentially suppressed all political debate. Such an effect undermines democratic values and therefore plays into the hands of terrorist organisations. Moreover, such a stance seemingly subverts the aim of proscription as denying terrorist organisations so designated the "oxygen of publicity" by potentially drawing more attention to the organisation and its cause.

This case dealt primarily with jurisdiction; however it was found that the claims made with regard to the infringement of the claimant's rights under the Convention were arguable, giving credence to the assertion that proscription and the offences consequent to that power restrict rights protected by the ECHR. Interestingly, parallels may be drawn between this case and the European Court of Human Rights case of *Yazar, Karatas, Aksoy and the People's Labour Party v Turkey.*[14] Of concern in *Yazar* was the People's Labour Party (HEP), which supported the aim of self-determination of the Kurdish people and was dissolved as being a threat to the territorial integrity of Turkey. In finding a violation of article 11, the court made a number of important pronouncements. It was stated that article 11 must be considered in light of article 10 due to that fact that the protection of, and freedom to express opinions is one of the objectives of freedom of association as enshrined in article 11.[15] That applies all the more in relation to political parties in view of their essential role in ensuring pluralism and the proper functioning of democracy.

In determining whether a violation of the Convention had occurred, the court found that the restriction on the article 11 rights in question was prescribed in law by way of the relevant articles of the Turkish constitution as well as by certain sections of a domestic law on the regulation of political parties.[16] Furthermore, it was found that the dissolution of the party pursued a legitimate aim, namely the protection of

[13] [2002] EWHC 644 at para. 42. This case concerned the proscription of the PKK, the People's Mojahedin Organisation of Iran (PMOI) and Lashkar e Tayyabah (the LeT). Hereinafter known as *PKK.*
[14] (2003) 36 EHRR 59 Hereinafter known as *Yazar.*
[15] *Ibid.,* para. 46.
[16] *Ibid.,* para. 35.

territorial integrity and of national security.[17] However, it was in its assessment of whether the government action could be said to be necessary in a democratic society that a number of important statements were made. Democracy thrives on freedom of expression and if it were deemed that by promoting the same principles as a group which utilised force as a means of achieving its aims, that a political group was supporting acts of terrorism, democratic debate would be diminished. This would have the effect of allowing armed movements to monopolise support for the principles concerned, as well as being contrary to the spirit of Article 11 and the democratic principles on which it was based.[18] Moreover, the right to freedom of expression contained in article 10 extends to not only that which is favourably received but also to the protection of expression which offends, shocks or disturbs, and therefore the opinion of the minority. Pluralism requires that public debate extend to ideas which are not necessarily in conformity with government policies in an attempt to resolve problems without the use of violence.[19] Ultimately, dissolution of a political party is an extreme measure which in the circumstances amounted to an unnecessary interference with the freedom of association of the applicants.

The fact that proscription gives rise to such a serious interference with the rights of an organisation and its supporters means that a correspondingly compelling justification for the proscription will have to be advanced. In noting the chilling effect on freedom of expression, the court in *PKK* made clear its appreciation of the fact that proscription can constitute an interference with the rights protected by articles 10 and 11 of the ECHR. Using the traditional formula of the European Court of Human Rights, the restriction was legislatively prescribed by the Terrorism Act, and establishment of pursuing a legitimate aim would not be hard to establish in the name of national security, particularly given the assertion in *Rehman* that in the contemparary world the security of a foreign state may be capable of affecting the national security of the UK. However, the importance placed on freedom of expression as a fundamental human right and its key role in the maintainance of healthy democracy means that establishment of the necessity of such an interference is harder to achieve than the former conditions. Whether banning these three foreign

[17] *Ibid.*, para. 38.
[18] *Ibid.*, para. 57.
[19] *Ibid.*, para. 40.

organisations could be said to satisfy a "pressing social need"[20] is debatable, particularly given the conflicting claims made by the organisations in rebuttal of the statements made by the Secretary of State with regard to their terrorist actions. Of the three, only the PMOI acknowledged the use of violent means in pursuit of democratic aims, and this was said to have been a path forced upon the organisation which was allegedly tempered by the fact that only military and security targets were focused upon.[21]

In this vein, the criteria which must be considered in making a proscription order as laid down by the Home Office consist of the following:

(a) the nature and scale of the organisation's activities,
(b) the specific threat it poses to the UK,
(c) the specific threat that it poses to British nationals overseas,
(d) the extent of the organisation's presence in the UK, and
(e) the need to support other members of the international community in the global fight against terrorism.[22]

It can be questioned to what extent an organisation on ceasefire and with a negligible presence in the UK, such as the PKK, can be said to satisfy the first four of these requirements to the requisite standard, given the level of restriction on the right to freedom of expression and association which ensues from an order for proscription. Of course, as the European Court of Human Rights has noted, a declaration of ceasefire is by no means an iron-clad guarantee that terroristic activities have been totally renounced.[23] However, the level of deference shown to the executive and at European level, the wide margin of appreciation afforded to states with regard to terrorism and threats to national security suggests that ministerial assertions about the organisations would be respected, despite claims to the contrary. Moreover, in the context of the post-9/11 situation and the subsequent "war on terrorism" the banning of foreign organisations with no history of terrorism in the UK, and the resultant interference with freedom of expression, it seems would likely be treated with more

[20] Handyside v. United Kingdom (1976) 1 E.H.R.R. para. 48.
[21] *PKK* [2002] EWHC 644 para. 25.
[22] Home Office Press Release 28th February 2001.
[23] See *Hogefeld v Germany* Hudoc Application No. 35402/97 20/01/00.

deference than might once have been the case. This is particularly so in light of the remarks of Lord Hoffman in *Rehman* in which he espoused the need for judicial deference to the executive in dealing with threats to national security on the grounds of the expertise of the Minister and the information to which he is privy as well as the legitimacy conferred to his decisions by way of the democratic accountability of the office.[24] However, proscription of groups with no history of terrorism in the UK can be questioned with regard to the proportionality of the action. The assertion that there is arguably no "pressing social need" to justify proscription of such groups as the PKK remains.

Another important issue gleaned from the jurisprudence of the European Court of Human Rights in assessing whether a restriction on freedom of expression is justified is consideration of the status of the person or people affected who claim an interference. In *Hogefeld v Germany*[25] journalists were prevented from interviewing Ms Hogefeld, a prominent member of the Red Army Faction. The refusal was premised on her status as one of the "main representatives" of the organisation, it being asserted that even vague statements by her could potentially be construed by supporters as an appeal to continue the activities of the organisation. As such, the restriction of her freedom of expression was found to have been justifiable and the application was therefore declared inadmissible. It was the case that the RAF had ceased violent activities several years earlier in 1992 and as such it can be questioned whether the interference with freedom of expression met a pressing social need. Of course declarations of ceasefire by such groups have traditionally been dealt with with some scepticism and activities could have been recommenced. Of interest here is the fact that the refusal to allow the interviews affected not just Ms Hogefeld's freedom of expression but also that of the journalist concerned as well as those members of the public who were denied the opportunity to consider the content of the journalistic item.

In *R v Attorney General's Reference No. 4 of 2002*[26] a question as to whether article 10 placed any constraints upon a prosecution for belonging or professing to belong to

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[24] [2003] 1 A.C. 153 para. 62.
[25] Hudoc application no. 35402/97 20/01/00.
[26] [2003] H.R.L.R. 15

a proscribed organisation[27] was dealt with by the Court of Appeal in an almost cursory manner: "...we find it difficult to see how this could ever be the case."[28] The court stated that section 11 does not interfere with any person's right to express himself freely except in the specific situation of professing membership to a proscribed group. In the view of both the Court of Appeal and the House of Lords, criminalizing the profession of membership of a proscribed organisation is both necessary and proportionate. The message in taking a stand against terrorist groups is clear and it is the case that in spite of the provision of section 11, opportunities for dissent continue to exist. However, following and in contrast to the commentary in relation to *Hogefeld v Germany*, section 11 has the effect of including even nominal membership in its scope, so that a vague statement as to membership by an individual on the peripheries of a proscribed organisation would be sufficient to result in conviction under the Act. Perhaps an improvement would arise through inclusion of some additional element such as a requirement that the individual concerned intended to further the aims of the proscribed organisation concerned. Moreover, the provision carries with it a maximum sentence of ten years imprisonment. Given these points it may be argued, despite the legitimate aim, that section 11 and its effect is disproportionate.

It is not just members of proscribed organisations who are affected by proscription with supporters similarly suffering an interference with their right to freedom of expression due to the proscription of the group. This was a point raised particularly in relation to the PKK where it was stated that the organisation has a vast body of supporters in favour of the self-determination of the Kurdish people, notwithstanding the use of violence in pursuit of that aim. It can be said that membership of and support for a proscribed organisation can be difficult to prove given the nature of terrorist groups. However, proscription of an organisation and the resultant offences flowing from such an order do have the effect of confronting the individual with the unenviable choice of committing a criminal offence by expressing support for the organisation in question, or having to engage in self-censorship in an attempt to avoid prosecution. An exacerbating factor is the fact that there is often no other outlet for political expression for those supporters of a proscribed organisation. It seems

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[27] Section 11(1) TA.
[28] [2003] H.R.L.R. 15 para. 43.

difficult to argue that to restrict the freedom of expression of potentially thousands of people due to the fact that they support the objectives, but not the means, of a particular organisation is proportionate to the aim pursued. This is particularly so given the degree of self-censorship required in order to ensure compliance with the law. Whilst for active members of a group, proscription could be said to act as encouragement to use democratic values such as the right to dissent, for those who simply support the aims, but not the violent means, of a proscribed group, proscription can have the opposite effect and stifle the values which promote democracy as an antidote to terrorism. It has been judicially asserted that the fact that proscription gives rise to such a serious interference with the rights of those involved with an organisation and its supporters means that a correspondingly more compelling justification for the proscription will have to be advanced.[29] In light of cases such as *Hogefeld* and *Zana v Turkey,*[30] it can be said that due to the potential restriction on the freedom of expression of those who do not advocate the use of violence or whose position is not likely to incite violence, that the power to proscribe organisations could be found to be lacking in its compatibility with article 10.

Flowing from the power to proscribe an organisation in the Terrorism Act are related criminal offences. Aside from the offence of membership of a proscribed organisation contained in section 11(1) of the TA, section 12 contains three related offences which are not contingent on membership of a proscribed organisation. Section 12(1) makes it an offence to invite support for such an organisation, which is not, or is not restricted to, the provision of money or other property,[31] and as such criminalizes even the most trivial espousal of support for the objectives of a proscribed organisation.[32] Given that it is the status of the group itself which triggers the offence this has the effect that even support for completely lawful activities undertaken by the organisation in question would result in the commission of an offence. The broad nature of this provision goes further than the comparable provisions in the US legislation, the purpose of which is said to be to prohibit material support and not advocacy of the beliefs supported by the group in question. A more

[29] [2002] EWHC 644 para. 89.
[30] (1997) 27 E.H.R.R. 667.
[31] Section 12(2) TA.
[32] Support in the form of money or other property is criminalized in section 15TA, which criminalizes any such support for the purposes of terrorism and as such does not require the proscription of the organisation.

tightly drawn provision in the Terrorism Act 2000 could prohibit provision of financial or other support to proscribed organisations whilst not curtailing freedom of expression of individuals with regard to support for the ends rather than the means utilised by the group. Whilst it is understandable to want to restrict financial support which assists groups in pursuing and carrying out violent activities, support for lawful activities is also prohibited. Some form of demarcation would be preferable though perhaps hard to achieve in practice. However, an attempt to allow support for lawful activities may be viewed as sending conflicting messages to the public with regard to the organisations in question given that the point of proscription is said to be to condemn particular groups for participation in violent and illegal activities. In addition, there may be some merit to the argument that infringement of pure speech as expression, regarding support for the ultimate objectives of a proscribed group is less justifiable than prohibiting the provision of financial or other such support as expression due to the ultimate use to which donations can be put.

Furthermore, the vague nature of inviting support for a proscribed organisation has potentially serious implications on the freedom of the press, given that a certain slant on an article written on the humanitarian activities of such an organisation could be deemed to amount to support of an organisation, or could be construed as likely to incite support in others. Such a possibility could have a detrimental effect on the notion of freedom of expression on both the part of the journalist and the ideal of a free press and on the part of those receiving such information. Indeed, as was acknowledged in the PKK case, the mere existence of legislation prohibiting an action can constitute a continuing interference with Convention rights which could be challenged in a pre-emptive fashion.[33] Arguably the choice between self-censorship or possible prosecution would be sufficient to challenge the restriction of the right to freedom of expression resulting from section 12(1) of the Terrorism Act. However, with regard to domestic challenge there is a strong indication, despite an acknowledgement that the circumstances of a particular case may give rise to a disproportionate interference with an individual's rights,[34] that such a restriction

[33] [2002] EWHC 644 para. 90.
[34] *Ibid.*, para. 91.

would be deemed to be justified on the grounds of national security and "the manifest public interest in the suppression of terrorism."[35]

Section 12(2) provides that it is an offence for a person to arrange, manage or assist in arranging or managing a meeting which he knows is-

(a) to support a proscribed organisation
(b) to further the activities of a proscribed organisation, or
(c) to be addressed by a person who belongs or professes to belong to a proscribed organisation.

(3) A person commits an offence if he addresses a meeting and the purpose of his address is to encourage support for a proscribed organisation or to further its activities.

The right to freedom of expression extends not simply to an individual's right to hold opinions and to express himself but also beyond that to the right to receive and impart information and ideas without interference by the State.[36] The offences in section 12, however, are capable of considerable impact on this right, as well as the right to freedom of association enshrined in article 11. Moreover, whilst the aim of such provisions is to deny terrorist organisations and their members the opportunity to legitimise the cause, the practical effect has much more far-reaching implications. This was acknowledged by Earl Jellicoe in his review of the PTA where it was stated that it expected a great deal of the police "to apply these provisions fully to proscribed organisations...while not affecting the free expression of views about Northern Ireland."[37] Indeed, to ban the arrangement, management or address of a meeting of three or more persons undeniably chills the freedom of expression of both the general public to receive such information and the press to report on such matters. This is due to the fact that a journalist arranging a meeting with members of a proscribed organisation for the purposes of investigative journalism would fall within the scope of the provision. Surely the realistic nature of terrorist organisations is that any meeting concerning the operational plans, capacity and management of a terrorist group would be held in utmost secrecy and as such it would be unlikely that the

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[35] [2003] H.R.L.R. 15 para. 42.
[36] Article 10(1) ECHR.
[37] Earl Jellicoe, *Review of the Operation of the Prevention of Terrorism (Temporary Provisions) Act 1976*. Cm. 8803. (London: HMSO, 1983) para. 212.

authorities would have any knowledge of it taking place. Rather a more likely scenario is that the situations in which prosecutions under section 12 would arise and subsequent interference with freedom of expression or association would occur would be those meetings held for reasons of investigative journalism, public concern or indeed on an unrelated subject held in the public domain. Concerns such as this were raised in both the House of Commons and the House of Lords regarding the choice between the risk of prosecution or restriction of the rights enshrined in articles 10 and 11 to which the response was that prosecutions under section 12 would be undertaken at the discretion of the Director of Public Prosecutions. However, the utilisation of discretion as opposed to a tangible rule on this matter will inevitably chill freedom of expression, regardless of whether a prosecution ensues or is even likely to do so.

Moreover, whilst there is no offence of attending such a meeting as appears in section 12, section 12(2)(c) criminalizes the arrangement of a meeting which is to be addressed by a member of a proscribed organisation, even if the subject matter of the meeting is to be totally benign. It may be possible to argue that to restrict a speech or meeting intended to support or further the activities of a proscribed organisation, is justifiable on the grounds of national security and that denial of the "oxygen of publicity" is the precise aim of proscription. Indeed it has been argued that the right to freedom of association should not be interpreted as including the right to associate for the purposes of committing a criminal act.[38] However, to extend this to addressing a meeting on a topic completely unrelated to terrorism or a proscribed organisation infringes the right to freedom of expression of both the speaker as well as the public in a far-reaching manner. Furthermore, this dilutes the principle of legal certainty given the fact that the average lay person is unlikely to be aware that to arrange a meeting at which a member of a proscribed organisation speaks on an inoffensive subject could, albeit unlikely, result in prosecution for an offence which carries a possible sentence of up to ten years imprisonment. A statutory defence exists in section 12(4) whereby such a person can prove that he had no reasonable cause to believe that the address mentioned in subsection 2(c) would support a proscribed organisation or further its activities. However, this applies only in relation to private meetings and is of no relevance with regard to a meeting of benign subject matter. In

[38] Draft Response of the Northern Ireland Human Rights Commission to the UK Government's White Paper "Legislation Against Terrorism" (Cm. 4178, 1998) para. 5.2.

such a case, the discretion of the DPP with regard to prosecution is likely not to provide a great deal of confidence.

Potential for further restriction of the right to freedom of expression exists within section 13 of the Terrorism Act, under which an offence is committed if a person in a public place (a) wears an item of clothing, or (b) wears, carries or displays an article in such a way or in such circumstances as to arouse suspicion that he is a member or supporter of a proscribed organisation. The impetus for this offence was the affront caused to the public by paramilitary displays at the funerals of members of such groups as the IRA. Though a fairly peripheral offence in terms of the armoury of British anti-terrorism law, it can be said that the scope of article 10 extends so as to include dress within its parameters,[39] and that such a criminalisation could be construed as an interference with the right to freedom of expression. This offence is essentially an exact replica of section 3 of the PTA 1989 under which there was one prosecution between 1974 and 2000. It must therefore be questioned whether inclusion of this offence was necessary, particularly given the fact that it is unclear to what extent it differs from that contained in section 1 of the Public Order Act 1936. Section 1 prohibits the wearing of an uniform signifying association with any political organisation or with the promotion of any political object by any person in a public place. Perhaps the dearth of prosecutions under section 13[40] make this a theoretical point, however, for this reason its place on the statute book must be questioned, particularly given the fact that whilst the provisions may not be used a great deal, interference with freedom of expression occurs through self-censorship. It is submitted that this provision cannot be said to be justified on the basis of any practical benefit as shown by the lack of use, save perhaps for the fear of negative public reaction if the offences flowing from proscription were to be abolished. Moreover, it can certainly be said that the paramilitary displays in Northern Ireland which catalysed the need for this provision, are much less a part of the landscape of the province since the peace process and as such the "pressing social need" could well be found to be lacking. Furthermore, the requirement that the reasons for a restriction be

[39] See *Stevens v UK* (1986) 46 D.R. 245.

[40] There has been just one prosecution initiated under this section since the enactment of the Terrorism Act.

both "relevant and sufficient"[41] are seemingly much harder to make out than was the case 25 years ago.

Disclosure of Information

Due to the "unpleasant ring [it has] about it in terms of civil liberties,"[42] the repeal of the section 18 PTA offence of withholding information was greeted in the most part as a positive development. Indeed, the controversial notion of a legal duty to aid the police and the dubious practice of targeting the families of those involved in terrorist activities, as well as its questionable practical effect all contributed to its demise. This is not to say that the use of compelled disclosure was removed completely from the anti-terrorist armoury; rather the Act retained the slightly more tightly formulated provision of requiring the disclosure of information gained during the course of a trade, profession, business or employment concerning the commission of an offence related to terrorist property.[43] However, despite the careful analysis which had led to its repeal only a few months before, the offence was reinserted into the Terrorism Act via section 117 of the ATCSA in virtually identical terms as had appeared in the PTA, save its now international scope.[44]

Section 38B(1) of the Terrorism Act applies where a person has information which he knows or believes might be of material assistance-

(a) in preventing the commission by another person of an act of terrorism, or
(b) in securing the apprehension, prosecution or conviction of another person, in the United Kingdom, for an offence involving the commission, preparation or instigation of an act of terrorism.

Placed alongside the previously mentioned offence contained in section 19 of the Terrorism Act as well as the offence of collecting information in section 58 of the Act, this area raises some very serious concerns regarding freedom of expression, in

[41] See *Jersild v Denmark* [1994] 19 E.H.R.R. 1 para. 31.
[42] Shackleton report, *Review of the Operation of the Prevention of Terrorism (Temporary Provisions) Acts 1974 and 1976.* Cm. 7324 (London: HMSO, 1978) para. 133.
[43] Section 19 TA 2000.
[44] A number of individuals have been charged with the offence under section 38B(1) following the events of July 7th and July 21st 2005.

particular the freedom of the press, in the UK. One of the acknowledged pillars of a healthy democracy is that of a free press, which in turn is premised on investigative journalism. To require disclosure of information gleaned not only places the journalist in question in potential danger from terrorist reprisals, but also weakens democracy by undermining the critical role of the press. Indeed, as has been acknowledged by the European Court of Human Rights "the protection of journalistic sources is one of the basic conditions for press freedom."[45] As such these legislative provisions place the journalist in the unenviable position of risking prosecution and a possible five year term of imprisonment or risking his professional credibility by the inability to guarantee the confidentiality of his sources. Moreover, this runs the risk of stifling democracy further by the possible reluctance of journalists to investigate issues in the first place. This form of self-declared prior restraint would be particularly harmful given the fact that it would have the effect that certain matters of public interest may never be brought into the public arena. As a result of this the House of Lords pressed for a specific exclusion with regard to journalists[46] so as to protect both free speech and the integrity of the press. However the duty owed to society was considered to override these concerns and the provision passed unamended.

The existence of a statutory defence contained in section 38B(4), namely that it is a defence for a person to prove that he had a reasonable excuse for not making the disclosure, has been hailed as an important safeguard in this area.[47] However, the admission was made that it was not possible to "give a cast-iron assurance that protecting sources will always be a reasonable excuse"[48] and this in itself offends the principle of legal certainty and can act as a deterrent to investigative journalism. Moreover, this seems to fly in the face of the European Court's statement in *Goodwin* that the confidentiality of a journalist's sources was fundamental to the notion of a free press. It seems that the argument that there should be no journalistic exemption because such a loophole would carry a risk of making it easier to launder terrorist money through press and media companies is arguably without foundation. Indeed it is such businesses as public houses and filling stations which tend to operate as a

[45] *Goodwin v UK* (1996) 22 E.H.R.R. 123 para. 39.
[46] This was in fact the case with regard to section 19 TA 2000, but the same point remains.
[47] Lord Falconer of Thoroton, Report Stage, vol. 614, col. 187, 20 June 2000.
[48] Lord Bassam, HL Debs. vol. 613, col. 653, 16 May 2000.

cover for illegal activity in the province[49] and as such this unwillingness to provide an exemption for journalists in relation to this duty and the consequent interference with article 10 is based on tenuous grounds. It is submitted that had the amendment passed it would have greatly strengthened the protection of freedom of expression and the press whilst not posing any serious harm to the public interest. Although of general public interest, protection of sources is of course not absolute. However rather than create a general duty on journalists to disclose information gleaned, perhaps a more proportionate response would have been to make use of section 10 of the Contempt of Court Act 1981. This provides that the court may order a person to disclose a source of information if it is satisfied that disclosure is necessary in the interests of justice or national security or for the prevention or disorder or crime, and as such offers a means of protecting the public interest where necessary whilst also maintaining the freedom of the press.

European jurisprudence has not looked favourably upon direct attempts by the state to suppress publication of matters deemed to be a threat to national security. This is due to the fact that "citizens must be permitted to receive a variety of messages, to choose between them and reach their own opinions on the various views expressed"[50] and this has led to vigorous scrutiny by the court. Moreover, whilst unrelated to terrorism and national security, the importance given to non-disclosure of journalistic sources was made clear in the case of *Goodwin v UK* where the court stated: "if journalists are forced to disclose their sources the role of the press in acting as a public "watchdog" could be seriously undermined because of the chilling effect that such disclosure would have upon the free flow of information."[51] However, whilst the point stands, of concern here was disclosure in the interests of justice as opposed to national security which given the wide margin of appreciation afforded the state in such matters is often deemed to constitute a pressing social need. The fact that sections 19 and 38B are re-enactments of earlier offences under the PTA, in no way lessens the potential interference with article 10, however the dearth of prosecutions of journalists is telling. The potential certainly exists for a chilling effect on freedom of the press and investigative journalism and were this to result in a press blackout of

[49] K. Maginnis HC Debs vol. 341, col. 198, 14th December 1999.
[50] *Cetin v Turkey* Hudoc. 00040153/98 ; 00040160/98 para. 64. See also *Ozgur Gundum v Turkey* (2001) 31 E.H.R.R. 1082.
[51] (1996) 22 E.H.R.R. 123 para. 3.

matters concerning national security, European supervision of the exercise of the margin of appreciation would almost certainly result, given the awareness that a healthy democracy is the best weapon against terrorism.[52]

Freedom of Expression under the First Amendment

Freedom of expression has been described by the Supreme Court as "the matrix, the indispensable condition, of nearly every other form of freedom."[53] However, despite the fundamental status accorded it, freedom of expression as is more often than otherwise the case in many countries, has faced recurrent challenge particularly at times when national security is threatened from both domestic and external sources. This is not a recent phenomenon; indeed the first example of such governmental interference came in the form of the Alien and Sedition Acts of 1798, a series of four pieces of legislation which, *inter alia,* made it a crime for any person to:

write, print, utter or publish, or...cause or procure to be written, printed, uttered or published, or...knowingly and willingly assist or aid in writing, printing, uttering or publishing any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress of the United States, or the President of the United States...[54]

The next era in which the political and security climate was deemed to warrant interference with the right to freedom of expression was that of World War I, and it was at this time, in 1919, that the first case asserting a violation of freedom of speech due to legislative fiat was heard by the Supreme Court. It was in this case of *Schenck v United States,*[55] that the "clear and present danger" doctrine was first mooted as a standard against which restrictions on freedom of expression could be tested. The court stated "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantial evils that Congress has a right to prevent."[56] In upholding the validity of the Espionage Act 1917, and disregarding the applicant's

[52] *Purcell v Ireland* App. No. 15404/89.
[53] *Palko v State of Connecticut* 302 US 319, 327 (1937) Benjamin Cardozo.
[54] Section 2 The Sedition Act 1 Stat. 596 Approved July 14th 1798.
[55] 249 US 47 (1919).
[56] *Ibid., p.* 52, Justice Holmes.

contentions of a legislative violation of freedom of speech, the Supreme Court began a line of case law which took a very firm, though not always unanimous, stance in favour of governmental restriction of freedom of expression when justified by the need to protect the country from a "clear and present danger."[57]

Freedom of expression was once again under threat due to the cold war, the phenomenon of McCarthyism and in particular due to the enactment of three pieces of legislation, namely the Smith Act 1940, the Subversive Activities Control Act 1950[58] and the Communist Control Act 1954. Such was the controversy surrounding these enactments that the McCarran Act 1950 was actually vetoed by President Truman on the ground that it would "make a mockery of our Bill of Rights."[59] Challenges to this legislation allowed the court the opportunity to further consider the still embryonic doctrine of clear and present danger. This proved to be a period in which the balancing act necessary in each case was more than apparent given the unpredictability of decisions fluctuating between the court as champion of civil rights and as defender of Congressional enactments.[60] However, it was not until 1965 and the case of *Lamont v Postmaster-General*[61] that a declaration of unconstitutionality was made with regard to an Act targeting Communist propaganda, in which it was stated that the Act was contrary to the "'uninhibited, robust and wide-open' debate and discussion that are contemplated by the First Amendment."

Though an enduring feature of the jurisprudence of the Supreme Court regarding the First Amendment and in particular freedom of speech, the clear and present danger test was modified and extended, particularly in dissent, so as to embrace a requirement of imminence. It was in *Abrams v US*[62] that one of the main proponents of the clear and present danger test, Mr Justice Holmes, stated that "...we should be eternally vigilant against attempts to check the expression of opinions that we loathe

[57] *Frohwerk v United States* 249 US 204 (1919), *Debs v United States* 249 US 211 (1919), *Abrams v United States* 250 US 616 (1919), *Gitlaw v New York* 268 US 652 (1925), *Whitney v California* 274 US 357 (1927).
[58] Also known as the McCarran Act.
[59] The United States Capitol Historical Society www.uschs.org/ last accessed January 15th 2004.
[60] See *Scales v United States* 367 US 203 (1961) and *Noto v United States* 367 US 290 (1961).
[61] 381 US 301 (1965).
[62] 250 US 616 (1919) at 630 emphasis added. See also *Whitney v California* 274 US 357 (1927) Justice Brandeis, concurring, at 372 onwards regarding the requirement of "imminence" in the clear and present danger test.

and believe to be fraught with death, unless they so *imminently* threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country." However, it was not until the 1969 case of *Brandenburg v Ohio*[63] that the requirement of imminence gained the full recognition of a unanimous court, and even resulted in the express rejection of the clear and present danger test by some.[64] Here the principle espoused was that "...the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing *imminent* lawless action and is likely to incite or produce such action."[65] Given that these issues have not been addressed by the Supreme Court since 1969, it is this requirement of imminence which currently stands. The extent to which this will continue remains to be seen. The nature of the terrorist threat as it currently stands, has seen the development and use of the concept of "sleeper cells" of terrorists settling in a country and waiting, sometimes years, to strike. This practice of course has the effect that any advocacy intended to incite or cause such terrorist violence is likely to have taken place a long time in advance of the ultimate act. As such a test of imminence may be less useful than in the past. It is plausible that in post-9/11 America, it could well be the case that the protection afforded freedom of expression by the ruling in *Brandenburg* will be diluted to previous standards due to the realisation of the vulnerability of the United States.

The Anti-Terrorism and Effective Death Penalty Act 1996 and the USA PATRIOT Act 2001

Designation of Foreign Organisations and Related Offences

In a similar vein to the role played by the power to proscribe in the UK, a great deal of America's anti-terrorist legislation relies on the designation of foreign organisations as terrorist as the key to many offences related to the support and membership of such groups.

[63] 395 US 444 (1969).
[64] *Ibid.*,see concurring opinions of Justice Black and Justice Douglas p. 459 onwards.
[65] *Ibid.*,p. 447.

Title III of the AEDPA 1996 was enacted with the purpose of providing the federal government with the fullest possible basis to prevent persons within the United States, or subject to the jurisdiction of the United States, from providing material support or resources to foreign organizations that engage in terrorist activities.[66] Section 302 contains the procedure for designation of organisations as terrorist on the basis that the Secretary of State finds that:

(A) the organization is a foreign organization;
(B) the organization engages in terrorist activity (as defined in section 212(a)(3)(B)); and
(C) the terrorist activity of the organization threatens the security of United States nationals or the national security of the United States.

As was the case with regard to the power to proscribe under the Terrorism Act 2000, many of the same arguments stand with regard to the designation power, in particular the effect that such an action can have on constitutionally protected rights. Indeed it goes without saying that prohibition of an organisation raises questions with regard to free speech and association. Indeed, as previously discussed in relation to the Terrorism Act, there is an undeniably chilling effect on the individual's right to freedom of speech and association simply due to the self-censorship which the existence of the provisions can cause.

However, an important distinction has developed in the jurisprudence of the Supreme Court between expression as pure speech and conduct as expression. Known as intermediate scrutiny, *O'Brien v U.S.*[67] established that "when "speech" and "non-speech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the non-speech element can justify incidental limitations on First Amendment freedoms..."[68] In questioning the constitutionality of a provision under this test it must be established that enactment of the provision is within the constitutional power of the Government, that it furthers an

[66] Title III section 301(b) AEDPA 1996.
[67] 391 US 367, 376-377 (1968) per Mr Chief Justice Warren.
[68] *Ibid.*

important or substantial governmental interest, that the governmental interest is unrelated to the suppression of free expression and that the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. It can be said that none of the above elements would be particularly difficult for the government to satisfy. This test of incidental infringement has the potential to interfere with the freedom of expression of a great number of people.

This distinction was utilised in a challenge to the successive designations of the People's Mojahedin Organisation of Iran to the US Court of Appeals in which it was held that the AEDPA is aimed at controlling conduct rather than communication. Indeed, relying on the earlier case of *Humanitarian Law Project v Reno*[69] the court reiterated that neither membership nor promotion of a designated group is prohibited by the statute, rather, prohibited is the giving of material support to such an organisation. "There is no constitutional right to facilitate terrorism by giving terrorists the weapons and explosives with which to carry out their grisly missions. Nor, of course, is there a right to provide resources with which terrorists can buy weapons and explosives...this interest is unrelated to suppressing free expression because it restricts the actions of those who wish to give material support to the groups, not the expression of those who advocate or believe the ideas that the groups supports." Unless and until this issue is dealt with by the Supreme Court, there is no doubt that a challenge to the provision of designation under the AEDPA on First Amendment grounds will be given short shrift.

Section 303 of the AEDPA prohibits the provision of material support or resources to a designated foreign terrorist organisation. Material support is defined in section 323 as currency or other financial securities, financial services, lodging, training, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, with the specific exception of medicine and religious materials. In accordance with intermediate scrutiny, and the fact that "no governmental interest is

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[69] No. 98-56062 (9th Cir. March 9, 2000).

more compelling than the security of the Nation"[70] there is seemingly little chance of success in challenging this provision on the grounds of the standard in *O'Brien.*

The provision of designation is said to be aimed at controlling conduct rather than communications and case law has established that association, communication with and advocacy of the aims of a terrorist group remains lawful. However, the definition of "material support" includes "personnel." This begs the question whether membership could be prohibited and prosecuted as the provision of material support. If this is the case the "speech" element of the First Amendment freedoms would likely be swallowed by the "non-speech" element of providing "material support." It is possible that "personnel" would be defined as active personnel, but no such restriction exists in the statute and so the potential for this to occur exists.

The curious effect of designation, and indeed the British equivalent of proscription, is the fact that support for the lawful activities of a designated organisation is prohibited whereas support for the violent activities of a non-designated organisation is perfectly lawful. *Elfbrandt v Russell* stated that a "blanket prohibition of association with a group having both legal and illegal aims would pose a real danger that legitimate political expression or association would be impaired."[71] On this basis the constitutionality of this prohibition on material support for the lawful or humanitarian activities of designated organisations could legitimately be challenged on First Amendment grounds. Indeed it can be argued that prohibiting the provision of support for the humanitarian activities of such organisations was the purpose of the legislation given that fundraising and contributions to the terrorist activities of a group was already prohibited.[72] Such a challenge arose in *Humanitarian Law Project v Reno.*[73] The first contention of the plaintiffs concerned the rule laid down in *NAACP v. Claiborne Hardware Co*[74] namely that "for liability to be imposed by reason of association alone, it is necessary to establish that the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims." On this basis it was argued in *HLP v Reno* that the prohibition of material support

[70] *Haig v Agee* 453 US 1, 307 (1976).
[71] 384 US 11 (1966) Per Mr Justice Douglas at 15 quoting *Scales v US* 367 US 203 (1961) at 229.
[72] 18 USC 2339A.
[73] 98-56062 (9th Cir. March 3, 2000).
[74] 458 US 886, 920 (1982) Per Justice Stevens.

regardless of the intention of the donor contravened the above rule as well as the right to freedom of association under the First Amendment. This however, was dealt with by the court on the grounds that the AEDPA does not prohibit membership of an organisation, praise or even the advocacy of support, rather it proscribes the provision of *material* support, there being no constitutional protection for the assistance of terrorism.[75] This stands to reason. However, it arguably misses the point with regard to support for the lawful aims and activities of a designated organisation. *American-Arab Anti-Discrimination Commission v Reno*[76] established the point that the government must establish a specific intent to further unlawful aims in order to punish advocacy. An attempt to equate the provision of material support with advocacy, which would as a result have been subject to the "clear and present danger" test, by reliance on this point fell on the ground that the act of fundraising does not enjoy the same strength of First Amendment protection as advocacy and pure speech.[77] It was held to be the case that regardless of the donor's intentions, he has no control over the ultimate use of his donation and the fungibility of money means that a donation in support of the lawful activities of a designated organisation has the effect of redistributing other resources so as to aid the group's unlawful objectives.[78] This causes difficulties with regard to legal certainty. An average lay person providing humanitarian aid would not necessarily be aware of any connection to a designated group, nor of the fact that in providing charitable aid in the field of education as an example, they may be laying themselves open to prosecution for the provision of material support. Technically this assertion with regard to the fungibility of money may be fair, yet a member of the public wishing to make a donation towards educational assistance in a particular country, which may be distributed by a branch of a designated group, may well feel frustrated and stifled by this reasoning. Moreover, there is some incongruity between being able to vocally support and praise a designated group and its pursuit of violence but not be able to provide charitable support and aid to a particular country.

The fact that the aim of section 303 is to prohibit aid to terrorist groups rather than to inhibit protected expression has the effect that the provision is again subject to the

[75] 98-56062, p. 2362 (9th Cir. March 3, 2000).
[76] 70 F. 3d 1045 (9th Cir. 1995).
[77] *HLP v Reno* p. 2363.
[78] *Ibid.*, pp. 2367-2368.

standard of scrutiny as laid down in *O'Brien v US*[79] In *Arab-American Anti-Discrimination Commission v Reno* it was established that section 303 is justified in accordance with the above test and as such was upheld as constitutional. Argument has been made to the effect that material support by members of an association is fundamental to its existence and that such a prohibition makes the right to associate with a chosen group an "empty formalism."[80] However, it seems inconceivable that provision of support to a group such as Al Qaeda would be permitted because of this weakening of the right to freedom of association. The Supreme Court has long been conscious of the fact that "while the Constitution protects against invasions of individual rights, it is not a suicide pact"[81] and this awareness is likely to be even more acute since the events of September 11th 2001.

Deportation and Exclusion

Deportation and exclusion of foreign nationals on the grounds of terrorism and terrorism-related offences[82] existed prior to these recent legislative enactments. However, in amending the provisions which existed previously, both the AEDPA and the USA PATRIOT Act extend the grounds upon which deportation and exclusion are possible with regard to aliens and in doing so make further inroads into those rights protected by the First Amendment. A corollary to the designation procedure in the AEDPA is the provision that any member or representative,[83] regardless of status of involvement in lawful activities, of a foreign terrorist organisation as designated by the Secretary of State is ineligible to receive a visa and gain admission to the United States. This is further extended in the USA PATRIOT Act where section 411 redefines the notion of representing a terrorist organisation so that it extends to a political, social or other similar group whose public endorsement of acts of terrorist activity the Secretary of State has determined undermines United States efforts to

[79] 391 US 367, 376-377 (1968).
[80] J. X. Dempsey and D. Cole, *Terrorism and the Constitution,* (The First Amendment Foundation, 2002 2nd ed.) p. 142.
[81] *Kennedy v. Mendoza-Martinez*, 372 US 144, 160 (1963). Mr. Justice Goldberg.
[82] See 8 USC 1182(a)(3)(B)(i).
[83] "Representative" is defined in section 411 as including an officer, official, or spokesman of an organization, and any person who directs, counsels, commands, or induces an organization or its members to engage in terrorist activity.

reduce or eliminate terrorist activities. This extends beyond the need for official designation of an organisation and as such the spectrum of organisations which could be affected is greatly increased by the fact that satisfaction of the legal criteria required for designation is unnecessary.[84] Moreover, the inclusion of social groups creates the potential that representatives of organisations affiliated with the humanitarian objectives of terrorist groups, such as the Humanitarian Law Project, could be subject to these immigration procedures. Section 411 of the USA PATRIOT Act establishes endorsement, espousal or persuasion by an alien of others to support terrorist activity or a terrorist organisation as a ground for removal as well being the spouse or child of an alien who is inadmissible under this section.[85] The reach of these immigration procedures is further extended by the definition of a terrorist organisation as an organisation designated under section 219, an organisation listed in the Federal Register by the Secretary of State as a terrorist organization, after finding that the organization engages in the commission, incitement, preparation or planning of a terrorist activity, or gathers information on potential targets for terrorist activity, or that the organisation provides material support to further terrorist activity, or is a group of two or more individuals, whether organized or not, which engages in the above activities. These measures extending the grounds for removal seem to be aimed at easing removal of those such as the perpetrators of 9/11. However, had they been in place prior to September 2001 their enactment would not have brought about the deportation of the 19 hijackers on the basis that they had no known political associations or affiliations and did not act in such a way as to fall within the ambit of the definition.

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[84] The legal criteria for designation of an organisation are: It must be a foreign organization, it must engage in terrorist activity, as defined in section 212 (a)(3)(B) of the INA (8 USC § 1182(a)(3)(B)), or terrorism, as defined in section 140(d)(2) of the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989 (22 USC § 2656f(d)(2)), or retain the capability and intent to engage in terrorist activity or terrorism and the organization's terrorist activity or terrorism must threaten the security of US nationals or the national security (national defense, foreign relations, or the economic interests) of the United States.

[85] Section 411 USA PATRIOT Act 2001. The latter is dependent on the activity which caused the inadmissibility having occurred within the last five years, and is subject to the exception that the spouse or child did not know or should not reasonably have known of the activity causing the alien to be found inadmissible under this section; or whom the consular officer or Attorney General has reasonable grounds to believe has renounced the activity causing the alien to be found inadmissible under this section.

Essentially, this has the effect that a resident alien may be deported or excluded on his return to the US, for exercising rights protected by the First Amendment. It may be the case, that a foreign national could be denied entry to the US because of his peaceful endorsement of the aims of, for example, the PKK in seeking to exercise the right of self-determination. These provisions therefore have the effect of enshrining guilt by association in the legislation. In addition, these provisions re-introduce exclusion on the basis of ideology as opposed to the actual acts of the individual. The Immigration and Nationality Act 1990 repealed those provisions allowing ideological exclusion in the McCarran-Walter Act so as to ensure that denial of visas was premised on actual involvement in terrorist activities rather than protected advocacy of beliefs. All that is required is a determination by the Secretary of State that the endorsement or support undermines the efforts of the US to reduce or eliminate terrorist activities. Indeed, to continue the example of the PKK, this continues to be the case despite the observance of a ceasefire. This interference is wholly executive in nature with no judicial involvement and no requirement that legal criteria be satisfied to any requisite standard. This allows the government to remove those who are vocal in their beliefs due to the fact that deportation/exclusion is carried out on an individual basis rather than with regard to a particular group as a whole. Whilst there may be some individuals whose support does actually undermine US efforts concerning terrorism, this is an uncertain and vague way of removing individuals.

These provisions seemingly draw a distinction between the rights of citizens as opposed to those of non-citizen or alien status as some form of justification for treating aliens less favourably on the basis of immigration status. However, it is asserted that that the construction of the First Amendment is such as to apply to all persons. The First Amendment amounts to a constraint on Congress with regard to enacting law rather than a constraint on the populace. The words of the 9th Circuit Court of Appeals clarify the importance of the protection provided by the First Amendment:

[T]he values underlying the First Amendment require the full applicability of First Amendment rights to the deportation setting...Because we are a nation founded by immigrants, this underlying principle is especially relevant to our attitude toward current immigrants who are part of our community...Aliens, who often have different cultures and languages, have been subjected to intolerant and harassing conduct in our

past, particularly in times of crisis...It is thus especially appropriate that the First Amendment principle of tolerance for different voices restrain our decisions to expel a participant in that community from our midst.[86]

Whilst the rights protected by the Constitution may not extend to foreign nationals outside the US, the effect of excluding or deporting a member or representative of a group who is deemed to undermine the efforts of the US in eliminating terrorism has an impact upon the rights of US citizens to receive information or ideas. This in turn can affect democracy by diminishing free debate. The constitutionality of the AEDPA was upheld in *HLP v Reno* despite the contention of the previously condemned notion of guilt by association. It can be said however, that such government action would arguably not satisfy the criteria laid down in the *O'Brien* test. Indeed the basis of the removal of aliens amounts to the suppression of freedom of expression due to the fact that the foundation of the removal provisions is one of guilt by association. As such the third element of the test is not satisfied. A further point is that although aliens outside the US are not entitled to the protection of the First Amendment, the International Covenant on Civil and Political Rights extends its protection to all people. Article 19(2) provides that everyone shall have the right to freedom of expression which shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice. However, this is subject to subsection (3) which provides that this may be subject to certain restrictions which are provided by law and are necessary:

(a) for respect of the rights or reputations of others or
(b) for the protection of national security or of public order, or of public health or morals.

However, the fact that these provisions extend to those involved solely with the humanitarian aspects of various organisations raises questions about the proportionality of the measures and the interference with freedom of expression on national security grounds. This is particularly so given the fact that the immigration foundation to the provisions means that domestic terrorism is not addressed in this

[86] *American-Arab Anti-Discrimination Comm. v Reno* 70 F.3d 1045, 1064 (9th Cir. 1995). This decision was however overturned by the Supreme Court.

way. The United States has not entered a derogation under article 19 and for this reason the US may be found to be in breach of its international obligations under the convention.

The fact that the perpetrators of the September 11th attacks were all foreign nationals seemingly acted as the impetus for the extension of the immigration provisions in the PATRIOT Act. However, the measures enacted arguably miss the point in that these provisions would probably not have prevented these attacks had they been in place at the time. Indeed, the lack of a known affiliation with a terrorist or even political group was notable in the case of each of the perpetrators, and as such exclusion or deportation on such grounds would not have occurred. Indeed, it is even arguable that gaining citizenship in the US might well have been possible which would similarly have rendered these provisions redundant. In this way these measures lack legal effectiveness in their objective of seeking to prevent terrorism without destroying the features of a democratic society by failing in both regards.

Conclusion

With regard to the anti-terrorism legislation in question, it is clear that the like procedures of proscription and designation give rise to very similar arguments and concerns pertaining to interference with the right to freedom of expression. However, with regard to the offences consequent on such designation, it is notable that in the UK it is the speech element of freedom of expression which is under threat. On the contrary, in the United States, the prohibition on material support and the focus on the aim of the legislative provision as a differentiation between "speech" and "non-speech" allows circumvention of the more exacting standard employed with regard to pure speech and advocacy. Indeed, this was likely the legislative intention given the nature of the test of imminence as laid down in *Brandenburg v Ohio* under which pure speech would otherwise be tested. The elements of the *O'Brien* test essentially equate to those considered by the European Court of Human Rights in a challenge under the Convention. However, whilst scrutiny under the Convention requires a "pressing social need" in order to justify the restriction as necessary in a democratic society, under *O'Brien* it must only be established that the interference with the guarantees of

the First Amendment arises out of an important governmental interest unrelated to the suppression of free expression. The specific aim of the government is likely almost never to be the abridgement of speech, and this establishes a much harder hurdle to overcome in making a declaration of unconstitutionality.

In the United Kingdom the broad definition of national security, the deference of the judiciary towards the executive and the wide margin of appreciation afforded by Strasbourg all lean towards justification of an interference with freedom of expression. Moreover, the power of derogation contained in article 15 can be utilised if necessary to prevent the United Kingdom being held in breach of the Convention. However, in the US the Bill of Rights cannot be overridden. Instead, deference to the decisions and legislative intentions of the executive is given effect through the interpretation of the court. This is highlighted by consideration of the court's history, particularly in times of crisis, in determining the constitutionality of statutes which raise issues under the First Amendment.

Proscription and the related offences under the previous legislation were notable for their symbolism, namely public condemnation for the actions of terrorist organisations. This continues to be the case with regard to the provisions of the Terrorism Act, as does the fact that these provisions are perhaps of less practical utility than other anti-terrorism provisions. Indeed in considering the necessity of such measures any pressing social need in a practical context is debatable with regard to organisations connected with Northern Ireland, as well as foreign organisations proscribed despite the lack of any discernable presence in the UK. With regard to such organisations, it can be argued that proscribing such groups fails to completely fulfil its condemnatory aim of deterring individuals from joining the group. Proscription does provide notice of the criminal activities of the group and sends a message of condemnation. However, those individuals who are sufficiently committed to want to join and actively support the group are likely to be aware of any illegality and are arguably unlikely to be deterred by an official denouncement of criminality. In addition, the symbolic nature of the provisions is highlighted by the difficulty which may ensue in trying to prove some of the offences, for example that of membership of a proscribed organisation. This difficulty is supported by the dearth of prosecutions under these provisions.

The extent of those potentially affected by an order for proscription, by way of suppressing what is sometimes the only outlet for political expression, is such as to justify an assertion that the measures are of disproportionate effect. A lack of proportionality can similarly be asserted with regard to the fact that the offence of professing membership of a proscribed organisation extends to peripheral members and not simply those of sufficient standing as to exert some degree of influence over recruitment to and the activities of the group. This effect would be mitigated by requiring fulfilment of an additional element that the individual actually intended to further the aims of the organisation, rather than reliance on the discretion of the prosecuting authorities.

The practical utility of proscription as an effective anti-terrorist measure can be questioned with its symbolic importance seeming to take precedence. However, practical benefit can be seen with regard to restricting fundraising and like activities for banned organisations. In the UK, the prohibition on arranging or addressing meetings in connection with a proscribed organisation may assist in preventing fundraising. However, the Terrorism Act criminalizes support in the form of money or other property in relation to terrorism in general in section 15 which is not restricted to such support for proscribed organisations. There is a divergence in this regard with the comparable provisions of the US legislation which focus on the provision of material support to designated organisations. The process of proscribing or designating an organisation which is of practical utility in preventing terrorist activities is more justifiable in its impact on free speech than measures enacted to punish beliefs, advocacy or political dissent. On this basis the provisions concerning the deportation and exclusion of aliens from the US interfere with the ideals of the First Amendment to a large extent. Whilst the First Amendment applies to resident aliens, those outside the US are subject to the protections of the ICCPR which appears to be disregarded with regard to these provisions. In addition, these provisions can be criticised on First Amendment grounds on the basis that the construction of the Amendment arguably prohibits Congress from acting in such a way as to interfere with the freedom of expression of all persons, with no restriction as to citizenship. Were this semantic argument to fail, deportation and exclusion of aliens affects the First Amendment rights of those remaining in the US by disregarding their right to

receive information and ideas. The exclusion and deportation provisions of the AEDPA and USA PATRIOT Act are reminiscent of the now repealed power to exclude as existed under the PTA. Interestingly, however, exclusion in the UK required actual involvement in terrorism. The provisions in the United States have brought about a return to the McCarran-Walter era and the notion of ideological exclusion on the basis of the fact that these provisions punish involvement in First Amendment activities.

An overriding theme exists in both jurisdictions. Essentially, in balancing the interest in national security and the right to freedom of expression, maintaining the health of democracy is seen as paramount in defeating the threat posed by terrorism. Tipping the balance in favour of the promotion of national security is often deemed to be acceptable given the belief that overcoming terrorism by the protection of democracy will ultimately safeguard fundamental rights for all.

Chapter 6

Anti-Terrorism Legislation, Liberty and Due Process

Anti-Terrorism Legislation, Liberty and Due Process

In responding to the attacks of September 2001, both the United Kingdom and the United States placed the notion of a suspect community on a legislative foundation by directing the most severe provisions of the legislation solely at the non-nationals or aliens of each country. Indeed, under the Anti-terrorism, Crime and Security Act 2001 and the USA PATRIOT Act 2001, as well as, interestingly, the Anti-terrorism and Effective Death Penalty Act 1996, there exists the potential to indefinitely detain individuals subject to immigration proceedings. This approach raises interesting questions with regard to the notion of due process and the extent to which safeguards are in place to minimise interference with the rights of the individual, so as to amount to justifiable action by the executive rather than arbitrary and discriminatory curtailment of rights and liberties. In addition, the approach of the British government in enacting such legislative provisions resulted in a derogation from the ECHR, just a few months after the progress of the Terrorism Act had allowed the removal of the previous derogation which had been in place since 1989. A declaration of incompatibility was issued by the House of Lords in December 2004 in *A v Secretary of State for the Home Department*[1] in relation to the detention of suspected international terrorists under Part IV of the ATCSA. This prompted the enactment of further legislation in the form of the Prevention of Terrorism Act 2005.

Detention Under the Terrorism Act

One of the main rationalisations for the power of arrest in British anti-terrorism legislation has long been the fact that arrest acted as a gateway through to a system of detention quite unlike that which exists under the Police and Criminal Evidence Act 1984 (PACE), where the maximum period of detention for a serious arrestable offence is 96 hours.[2] Section 41(3) of the Terrorism Act 2000 provides for an initial period of detention of 48 hours following arrest under the Act. As was the case under the PTA,[3] this may be extended for up to a further five days under schedule 8 to the

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[1] [2005] 2 A.C. 68.
[2] Section 42 PACE.
[3] Section 14 PTA 1989.

Act.[4] However, in contrast to the administrative approach under the PTA under which an extension of detention was authorised by the Secretary of State, the Terrorism Act provides that an application for such an extension must be made to a judicial authority.[5] This remedies the flaws of the approach under the PTA which resulted in the European Court of Human Rights finding the UK to be in violation of article 5(3) in the case of *Brogan and Others v UK.*[6] Further detention may be granted if there are reasonable grounds for believing that it is necessary to obtain relevant evidence whether by questioning or otherwise or to preserve relevant evidence and provided the investigation is being conducted diligently and expeditiously.[7] Part of this regime provides the detainee with the opportunity to make oral or written representations to the judicial authority about the application and to be legally represented at the hearing.[8] However, the judicial authority may exclude both the applicant and his legal representative from any part of the proceedings.[9] Furthermore, an officer may also apply to the judicial authority for an order that specified information be withheld from the applicant and anyone representing him provided there are reasonable grounds to believe that if the information were disclosed one of the following consequences would occur:[10]

(a) evidence of an offence under any of the provisions mentioned in section 40(1)(a) would be interfered with or harmed,
(b) the recovery of property obtained as a result of an offence under any of those provisions would be hindered,
(c) the recovery of property in respect of which a forfeiture order could be made under section 23 would be hindered,

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[4] Schedule 8 to the Terrorism Act was amended by section 306 of the Criminal Justice Act 2003 which extends the maximum period of detention from seven to fourteen days. The current Terrorism Bill 2005 contains a clause extending pre-charge detention to a maximum period of three months. Review of such detention would take place before a judicial authority on a weekly basis. The Draft Terrorism Bill is available at: www.homeoffice.gov.uk/docs4/home_sec_letter.html
[5] "Judicial authority" means (a) in England and Wales, the Senior District Judge (Chief Magistrate) or his deputy, or a District Judge (Magistrate's Courts) who is designated for the purpose of this Part by the Lord Chancellor, (b) in Scotland, the sheriff, and (c) in Northern Ireland, a county court judge, or a resident magistrate who is designated for the purpose of this Part by the Lord Chancellor. Para. 29(4)
[6] (1989) 11 E.H.R.R. 539. As discussed in Chapter 2.
[7] Sch. 8 para. 32(1) TA.
[8] *Ibid.*
[9] Sch. 8 para. 33(3) TA.
[10] Sch. 8 para. 34 TA.

(d) the apprehension, prosecution or conviction of a person who is suspected of falling within section 40(1)(a) or (b) would be made more difficult as a result of his being alerted,

(e) the prevention of an act of terrorism would be made more difficult as a result of a person being alerted,

(f) the gathering of information about the commission, preparation or instigation of an act of terrorism would be interfered with, or

(g) a person would be interfered with or physically injured.

Whilst of course such provisions hamper the involvement of the detainee in the judicial process enacted, it is fair to say that the implementation of an independent hearing is an improvement on the previous administrative system, notwithstanding the limitations which can be imposed on the proceedings from the point of view of the detainee. However, the limitations which can be imposed would, if ordered, have the effect that from the individual's point of view, the procedure enacted under the TA 2000 differs very little from that under the previous PTA regime. Of course the independence and therefore additional safeguard inherent in judicial proceedings places the individual in a stronger position than was previously the case. However, in contrast to the provision of a special advocate under the ATCSA 2001, under section 41 and schedule 8 when the detainee and his legal representative are excluded from proceedings, no such provision is made. Of course in terms of duration, the potential exists, under the ATCSA, for a far more severe deprivation of liberty that that under section 41 TA. However, arbitrary interference with an individual's liberty can occur for even short periods and as such safeguards should be in place for protection of the individual.

Under schedule 8, a detainee under the Act is afforded the right to consult privately with a solicitor as soon as is reasonably practicable, at any time.[11] The right to have a solicitor present during a police interview in England and Wales was placed on a statutory footing by PACE in 1984, however this did not extend to detainees in Northern Ireland. This was challenged in *R v Chief Constable of the RUC, ex p.*

[11] Sch. 8 para. 7(1) TA.

Begley; R v McWilliams[12], however the House of Lords declined the opportunity to develop the common law right of access to legal advice so as to extend it to the interview room. It was stated that the treatment of suspects detained under section 14 in Northern Ireland was part of a deliberate legislative policy and therefore any attempt to extend this right was held to be "beyond the powers of the House of Lords."[13] The position of detainees, particularly in Northern Ireland, was thereby strengthened to a large extent by the provisions of the Terrorism Act. As was the case under the PTA, the right of access to a legal advisor may be delayed for up to 48 hours where a police officer reasonably believes that access to legal advice at the time at which the detainee desires to exercise that right will have any of the following consequences:[14]

(a) interference with or harm to evidence of a serious arrestable offence,
(b) interference with or physical injury to any person,
(c) the alerting of persons who are suspected of having committed a serious arrestable offence but who have not been arrested for it,
(d) the hindering of the recovery of property obtained as a result of a serious arrestable offence or in respect of which a forfeiture order could be made under section 23,
(e) interference with the gathering of information about the commission, preparation or instigation of acts of terrorism,
(f) the alerting of a person and thereby making it more difficult to prevent an act of terrorism, and
(g) the alerting of a person and thereby making it more difficult to secure a person's apprehension, prosecution or conviction in connection with the commission, preparation or instigation of an act of terrorism.

The right to legal advice is enshrined in article 6(3) of the European Convention, amounting to the right to defend oneself, the right to choose legal assistance and the right to free legal assistance if one is indigent and if the interests of justice so require, applying to pre-trial stages as well as to the trial itself. As such the provisions of the

[12] [1997] 1 WLR 1475.
[13] *Ibid.* p. 1481, per Lord Browne-Wilkinson.
[14] Sch. 8 para. 8 TA.

Terrorism Act delaying access to or preventing private consultation with a legal advisor potentially fall foul of the guarantees of the Convention. The overall potential length of detention and the severity of the possible penalty exacerbates the detrimental effect of delayed access to a lawyer. In *Murray v UK*[15] the court held that in the interests of fairness it was imperative that access to a lawyer be allowed at the initial stages of police questioning and therefore that the delay in access to a solicitor for the first 48 hours of detention was a breach of article 6(1) read with article 6(3).[16] In *Magee v UK*[17] the court similarly found there to have been a violation of article 6(1) in conjunction with article 6(3)(c) as a result of the denial of access to legal advice for 48 hours. The court declared that "to deny access to a lawyer for such a long period and in a situation where the rights of the defence were irretrievably prejudiced is-whatever the justification-incompatible with the rights of the accused under article 6."[18] In *Averill v UK*[19] the Court held that the denial of access to legal advice for *24 hours* resulted in a violation of article 6(3)(c) in conjunction with article 6(1) because fairness required that the accused have such access before being questioned. It has been noted that whilst such a denial of access is not an automatic breach of article 6, it is likely that a large reliance on evidence obtained during that period at trial will be found to be unfair.[20] The jurisprudence on this point is therefore clear and such a stance is surely correct. The outcomes sought to be avoided in delaying access to legal advice are, from the demands of policing, valid as reasons for delay. However, given the breadth of the consequences listed as justifying delay, the vulnerability of the individual detained should take precedence unless perhaps it can be shown to a very high degree of probability that one of the feared outcomes *will* occur. To have otherwise places the individual detained under the terrorism legislation in an extremely vulnerable position. It is in attempting to counter the coercive interrogation to which an individual can be subjected during extended detention that access to legal advice is so fundamentally important.

[15] (1996) 22 E.H.R.R. 29.
[16] This resulted in the passing of section 58 of the Youth Justice and Criminal Evidence Act 1999 which prohibits the drawing of inferences at trial where the suspect was questioned without the opportunity of consulting with a lawyer.
[17] (2001) 31 E.H.R.R. 35.
[18] *Ibid.*, para. 44.
[19] (2001) 31 E.H.R.R. 36.
[20] S. H. Bailey, D. J. Harris and D. C. Ormerod, *Civil Liberties Cases and Materials* (5th ed. Reed Elsevier (UK) Ltd 2001) p. 592.

In addition, schedule 8 provides that if there are reasonable grounds for believing that if the right of access to legal advice is exercised one of the above consequences will occur, it is possible for an officer of at least the rank of Commander or Assistant Chief Constable to give a direction that consultation with a solicitor may only take place in the sight and hearing of a qualified officer.[21] It can of course be argued that supervised access to a solicitor is preferable to a complete denial of this right. However, supervision can negate the utility of the right by circumscribing the lawyer-client relationship. In the case of *Brennan v UK*[22] access to legal advice was delayed for 24 hours and the first meeting of the accused with his solicitor was supervised by a police officer who warned that no names should be mentioned and that the interview would be stopped if it was deemed that anything being said could hinder the investigation. It is acknowledged that the right of access could be restricted for good cause, such as if there were reasonable grounds to suspect the solicitor of complicity in passing information on to suspects still at large or other such conduct. However the court stated that the right of the accused to communicate with his advocate out of hearing of a third person is part of the basic requirements of a fair trial and follows from article 6(3)(c).[23] The court found that the "presence of a police officer would have inevitably prevented the accused from speaking frankly to his solicitor and given him reason to hesitate before broaching questions of potential significance to the case against him."[24] Therefore the court declared there to have been a violation of article 6(3)(c) read in conjunction with article 6(1).[25] The power to defer access to legal advice causes additional concern when considered in conjunction with article 3 of the 1988 Criminal Evidence (Northern Ireland) Order[26] (1988/1987) and sections 34-37 of the Criminal Justice and Public Order Act 1994 which allow inferences of guilt to be drawn from the silence of an accused. This drew comment from Strasbourg, when the court drew attention to the importance of legal assistance for the accused early on in a police interrogation where such a dilemma may arise.[27] It seems from this that it

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[21] "A qualified officer" means a police officer who (a) is of at least the rank of inspector, (b) is of the uniformed branch of the force of which the officer giving the direction is a member, and (c) in the opinion of the officer giving the direction, has no connection with the detained person's case. Sch. 8 para. 9(4) Terrorism Act.
[22] (2002) 34 EHRR 18 See also *S v Switzerland* (1992) 14 E.H.R.R. 670.
[23] *Ibid.,* para. 58.
[24] *Ibid,.* para. 62.
[25] *Ibid,.* para. 63.
[26] SI 1988/1987 (NI 20).
[27] *Averill v UK* (2001) 31 E.H.R.R. 36 para. 57; see also *Murray v UK* (1996) 22 E.H.R.R. 29.

is likely that where such adverse inferences may be drawn that any delay in access to legal advice would be found to be a violation of article 6.

Detention of Suspected International Terrorists Part IV ATCSA

After the progression of the Terrorism Act in introducing judicial oversight into the extended detention process, Part IV of the Anti-Terrorism, Crime and Security Act 2001 represents somewhat of a return to pre-Terrorism Act days, where internment was a feature on the legislative landscape and the UK's fulfilment of its obligations under the ECHR was subject to a long-standing derogation under article 5(1). Indeed, the core of Part IV, essentially the indefinite detention of non-British citizens suspected of involvement in international terrorism, requires a derogation regarding article 5(1), due to the coercive nature of the provisions.

The powers in Part IV and the consequent derogation represent an attempt on the part of the government to reconcile its obligations under article 5 with those of article 3 and the jurisprudence of the European Court, whereby a member state is prevented from deporting a person suspected of involvement in international terrorism to their country of origin or a neutral country if there are grounds to believe that the individual would face torture, inhuman or degrading treatment contrary to article 3 of the Convention.[28] This results in a somewhat difficult situation when the government is unable to prosecute a suspected terrorist, perhaps due to the sensitivity of the evidence involved, is unable to detain him due to the prohibition on arbitrary interference with the liberty of the individual and is unable to remove him from the UK due to the risk of article 3 treatment. Article 5(1)(f) contains an exception to the provisions of article 5 which provides that "the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition." However the period of detention contemplated here would be insufficient for the purposes of the government, therefore resulting in the derogation to article 5. Indeed, the European Court stated in *Chahal v UK*[29] "any deprivation of liberty under Article 5(1)(f) will

[28] See *Soering v UK* (1989) 11 E.H.R.R. 439 paras. 90-91 and *Chahal v UK* (1997) 23 E.H.R.R. 413 para. 74.
[29] (1997) 23 E.H.R.R. 413 p. 417.

be justified only for as long as deportation proceedings are in progress. If such proceedings are not prosecuted with due diligence, the detention will cease to be permissible."

The starting point to the Part IV power of detention is certification by the Secretary of State that the individual concerned is a suspected international terrorist. This is based on a reasonable belief that the presence of the individual in the United Kingdom poses a risk to national security as well as reasonable suspicion that the person is a terrorist.[30] "Terrorist" is defined as a person who-

(a) is or has been concerned in the commission, preparation or instigation of acts of terrorism,[31]
(b) is a member of or belongs to an international terrorist group, or
(c) has links with an international terrorist group.[32]

The term "national security" was defined by the House of Lords in *Secretary of State for the Home Department v Rehman*[33] where Lord Slynn stated that:

> ...in contemporary world conditions, action against a foreign state may be capable indirectly of affecting the security of the United Kingdom. The means open to terrorists both in attacking another state and attacking international or global activity by the community of nations, whatever the objectives of the terrorist may well be capable of reflecting on the safety and well-being of the United Kingdom or its citizens.[34]

The breadth of the definition contained in section 1 of the Terrorism Act 2000 as well as that of national security provided in *Rehman* creates a wide scope for the use of the provisions of Part IV. Indeed, aside from the restriction that the powers in Part IV do not extend to British citizens, the criteria for designation as a suspected international terrorist are such that the potential exists for a large number of people, unrelated to Al Qaeda and the events of September 2001, to fall prey to this power of indefinite detention. Of further concern is the fact that under the definition of "terrorist" in

[30] Section 21(1) ATCSA.
[31] In this part "terrorism" is afforded the same meaning as in section 1 Terrorism Act 2000.
[32] Section 21(2) ATCSA.
[33] [2003] 1 A.C. 153.
[34] *Ibid.* para. 16, per Lord Slynn.

section 21(2) it is possible to be classified as a terrorist on the grounds that an individual "has *links* with an international terrorist group." The lack of any clarification of this vague criterion prompted the Joint Committee on Human Rights to comment on the "risk of arbitrariness"[35] in the application of such a provision. This resulted in the insertion of section 21(4) which provides that a person has links with an international terrorist group only if he supports or assists it. Whilst this obviously removes the risk of certification as a result of social or family connections, there remains the possibility that certification and subsequent detention could result from the exercise of an article 10 right such as an expression of support for an international terrorist group, due to a lack of specification that the necessary support be of a material kind. The Joint Committee on Human Rights noted that in order to avoid a potential violation of article 10(1) "supports" must be interpreted as meaning "supports in a material or active way"[36] which would be in keeping with section 303 of the AEDPA, as discussed in chapter 5. Given the coercive nature of the consequences which flow from certification, more stringent criteria would be preferable to ensure that such a severe deprivation of liberty as is possible under the Act is not exercised against those uninvolved in acts of terrorism but who fall within the peripheries of the definition. As it stands the scope of the provisions go beyond dealing with the threat the legislation was designed to meet and therefore cannot be said to be proportionate to the aim pursued. Moreover, it is entirely possible that an individual could remain in detention even if the organisation to which he is alleged to be a member were to renounce all violence.[37] Indeed, despite the announcement of a ceasefire by the PKK in 1998, the organisation remains a proscribed organisation in the United Kingdom, providing some indication that a terrorist organisation will not necessarily be deemed to no longer be a threat following the renouncement of terrorist activities. In this way, it is entirely possible that individuals alleged to belong to certain terrorist organisations could remain detained under section 23 long after a ceasefire announcement, if there continues to be no country to which the detainee can be removed.

[35] Joint Committee on Human Rights, *Anti-Terrorism, Crime and Security Act Bill,* Second Report (2001-02 HL 37, HC 372, 16th November 2001) para. 37.
[36] Joint Committee on Human Rights, *Anti-Terrorism, Crime and Security Bill: Further Report,* (2001-02 HL 51, HC 420, 5th December 2001) para. 19.
[37] H. Fenwick, "The Anti-Terrorism, Crime and Security Act 2001: A Proportionate Response to 11th September?" [2002] 65 M.L.R. 724 p. 736.

Certification as a suspected international terrorist is the gateway through to the core provision of Part IV, namely the power to detain an individual who is subject to action under the Immigration Act 1971,[38] despite the fact that his removal or departure from the UK is prevented (whether temporarily or indefinitely) by a point or law which wholly or partly relates to an international agreement, such as article 3 of the ECHR, or a practical consideration,[39] suggested as being the unavailability of routes to the country of intended removal.[40] Although the purpose of detention under Part IV is said to be detention solely with a view to deportation or removal as soon as a safe destination is found, this is not made clear in the Act. Moreover, the way in which section 23 is written, providing that removal or departure may be prevented by a point of law *or* a practical consideration, such as a lack of travel documentation, implies that detention may continue regardless of whether the detainee has indicated a desire to be removed or indeed whether a safe country has been identified. Indeed, should the individual concerned opt to leave the UK and risk the possibility of article 3 treatment or even leave the UK for a country known for example for its support for terrorism, there is no clear provision in the Act that this would be possible or permitted by the government. If it were the case that the detainee could not exercise such a course of action, then detention pending immigration proceedings would seem to be an alternative label for "indefinite internment."[41] However, evidence was given by the Home Secretary to the Joint Committee on Human Rights, that should a detainee opt to be removed to a country, even one with known terrorist connections such as Iraq, Libya or Syria, they would be released, thereby providing some degree of assurance that detention under the Act is not internment by another name.[42] Indeed, this is supported by the fact that of the sixteen foreign nationals so far detained under Part IV, two have voluntarily left the UK for Morocco and France.[43] However, it remains to be seen what will happen in practice should a detainee opt to

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[38] In particular paragraph 16 of Schedule 2 to the Act (detention of persons liable to examination or removal) and paragraph 2 of Schedule 3 to that Act (detention pending deportation). Section 23(2) ATCSA .
[39] Section 23 ATCSA.
[40] Anti-Terrorism, Crime and Security Bill 2001 Explanatory Notes para. 80.
[41] JCHR, Second Report, n. 35 above para. 23.
[42] Minutes of Evidence taken before the Joint Committee on Human Rights 14th November 2001, question 8.
[43] Privy Counsellor Review Committee, *Anti-Terrorism, Crime and Security Act 2001: Report,* 18th December 2003, available at http://www.homeoffice.gov.uk/docs3/newton_committee_report_2003.pdf para. 183. Also known as the Newton Report.

be removed to a country such as Iraq. It must be said that there seems to be some sort of incongruity, particularly given the definition of national security developed by the House of Lords, with the notion that an individual must be detained in the UK because of the threat posed to the country, however on removal he is free to continue potentially terroristic activities which threaten the UK either directly or indirectly. It is commendable that the government has not resorted to out and out executive detention, however somewhat of a paradox undoubtedly exists.

Despite the large amount of executive discretion involved in the procedures under Part IV, certification and detention under the Act are overseen by the Special Immigration Appeals Commission (SIAC) which was created under the Special Immigration Appeals Commission Act (SIACA) 1997 and represents the only forum for judicial challenge to the decisions of the Secretary of State. Indeed, the ATCSA excludes both judicial review and habeas corpus as means of challenging certification and instead provides a certified individual with the right of appeal to SIAC as well as requiring that the commission conduct a review of each certificate as soon as is reasonably practicable at the end of six months beginning with the date on which the certificate is issued,[44] and then every three months thereafter.[45] The exclusion of any other form of legal proceedings can be said to be mitigated by the fact that section 35 of the Act confers upon the commission the status of a superior court of record, thereby granting the same powers as the High Court.[46] From a decision of SIAC there is a right of appeal on a point of law to the Court of Appeal, and from there, with leave, to the House of Lords.[47]

SIAC was created following the adverse judgement of the European Court in *Chahal v United Kingdom*[48] where it was held that proceedings for habeas corpus and for judicial review in cases of deportation involving national security did not satisfy the requirements of article 5(4). This was done in order to remedy the weaknesses of the previous system, under which the individual was not entitled to legal representation, the adjudicating panel had no power of decision and its advice to the Home Secretary

[44] Or starting on the date that any appeal was determined, whichever is later.
[45] Section 21(8)-(9) ATCSA.
[46] JCHR, Second Report, n. 35 above para. 43.
[47] Section 7 SIACA 1997.
[48] (1997) 23 E.H.R.R. 413.

was not binding.[49] To the contrary, SIAC is an independent judicial tribunal which can receive sensitive information and which may appoint a special advocate to represent the interests of the individual concerned in instances when the individual and his legal representation are excluded from proceedings on national security grounds. For these reasons the procedure under SIAC goes some way towards remedying the defects inherent in the previous system and as such makes the absence of provision for judicial review or habeas corpus proceedings less significant than might otherwise have been the case.[50] However, questions can be asked over the suitability of SIAC for its role in relation to suspected terrorists due to the civil nature of its original remit. Indeed, the use of SIAC in relation to proceedings concerning the deprivation of an individual's liberty is far removed from the purpose of its original inception.

As mentioned, proceedings before SIAC may take one of two forms. Section 25 of the Act provides a suspected international terrorist with a right to appeal against his certification within three months of issuance. SIAC may cancel a certificate if it considers that there are no reasonable grounds for a belief or suspicion fulfilling the requirements of section 21(1), or if it considers that the certificate should not have been issued for some other reason.[51] However, an important proviso to the appeals process is contained in section 27(9) which provides that "[c]ancellation by the Commission of a certificate issued under section 21 shall not prevent the Secretary of State from issuing another certificate, whether on the grounds of a change of circumstance or otherwise." The vague nature of the words "or otherwise" was drawn to the attention of Parliament and indeed conceded up to a certain point by the Home Secretary when the Joint Committee on Human Rights stated that such a provision "...could result in cases being batted backwards and forwards indefinitely between the Secretary of State and the Commission, and would not offer adequate protection for detainees against arbitrary interference with their right to liberty under Article 5 of the ECHR."[52] However, the wording remains unchanged despite an undertaking by

[49](1997) 23 E.H.R.R. 413 para. 130.
[50] For discussion of national security as an exception to open justice see J. Jaconelli, *Open Justice: A Critique of the Public Trial,*(OUP, 2002) chapter 4.
[51] Section 25(2) ATCSA.
[52] JCHR, Further report, n. 36 above para. 18.

the Home Secretary that the term "otherwise" would be considered further.[53] Instead, assurance was given by Lord Rooker that the "...intention is that the Secretary of State will issue a fresh certificate only if it is justified. We will rely heavily on SIAC, which would rightly take a dim view of any Secretary of State who seemed to be ignoring its decision. I am sure that it would cancel any inappropriately made future certificates in short order. Furthermore, it might well be a breach of Article 5(4) of the European Convention on Human Rights, and perhaps also of Articles 6 and 13, for a Secretary of State to adopt such a course."[54]

Section 5(3)(b) of SIACA 1997 and rule 19 of the Rules of Procedure governing SIAC provide for hearings to take place in the absence of the individual and his legal representative when it is deemed by the commission to be necessary to do so in order to ensure that information is not disclosed contrary to the public interest, or indeed for any other good reason.[55] In such an instance provision is made that a special advocate may be appointed in order to represent the interests of the individual concerned.[56] However, whilst the special advocate may make written and oral submissions to the commission and may cross-examine witnesses, the individual cannot call witnesses and contact between the individual, his legal representative and the special advocate is limited to instances before material is served to the special advocate by the Secretary of State unless permission from SIAC is given,[57] meaning that instructions cannot be taken in refutation of the material disclosed by the Secretary of State. Indeed, section 6(4) SIACA provides that the special advocate appointed shall not be responsible to the person whose interests he is appointed to represent. Moreover, though the Act makes provision for appeal from a decision of the commission, no provision is made in either the ATCSA or the SIACA for the special advocate to represent the individual's interests on appeal if excluded from all or part of the hearing on national security grounds. The Home Secretary provided reassurance during debates that the nominated special advocate would be able to continue his role on appeal to the Court of Appeal or, if leave is given, to the House of Lords. However, despite the desire to

[53] Minutes of evidence, n. 42 above.
[54] HL Debs. vol. 629, col. 544, 29th November 2001.
[55] See section 5(3)(b) SIACA 1997 and rule 19 Rules of Procedure SI 1998 (No. 1881), as amended by SI 2000 (No. 1849).
[56] Section 6(1) SIACA.
[57] The Special Immigration Appeals Commission (Procedure) Rules 2003 SI 2003 (No. 1034).

achieve the "avoidance of doubt"[58] this point was not included in the Act, thus leaving the role of the special advocate at appeal on somewhat of a discretionary footing. Indeed, in *Secretary of State for the Home Department* v *Rehman*[59] the special advocate was asked by the Court of Appeal to appear during closed proceedings. However this was not repeated before the House of Lords, thereby demonstrating that this safeguard is on a less than solid foundation.[60] The protection offered by the special advocate in representing the detainee in closed proceedings goes some way to mitigating what would otherwise be a process tipped firmly in favour of the state and as discussed previously is a vast improvement on the lack of representation in closed proceedings which may be ordered under section 41of the Terrorism Act. However, although the special advocate acts in the interests of the detainee, the fact that both communication with and disclosure to the detainee and his legal representative is severely limited hampers this safeguard. Due to these limitations there is an important difference between the relationship between the individual and the special advocate, as opposed to the normal client/lawyer relationship. Moreover, the lack of transparency in the proceedings has the effect that it is not possible for the detainee or his legal representative to determine how the case is handled in closed proceedings and how the interests of the detainee are represented by the special advocate. Of course, a system such as this is preferable to any completely closed alternative.[61]

In the face of these due process concerns, it is clear that the balance is not evenly weighted between the individual and the state and that the individual is in a disadvantaged position before the SIAC. However, it can be said that the fact that a full hearing is available before the SIAC with the opportunity to appeal as well as the fact that the individual is represented by a special advocate in closed proceedings offers reasonable protection to the rights of the individual. In comparison to such detention in the United States, it can be said that detention under Part IV is at least subject to some safeguards. Indeed, though the central provision is that of detention without trial, it is subject not simply to an executive determination as to status, but rather to objective criteria as well as restrictions of nationality and immigration

[58] HC Debs, vol. 375, col. 389, 21st November 2001, Jean Corston.
[59] [2003] 1 A.C. 153.
[60] JCHR, Further Report, n. 36 above paras. 22-23.

control. Furthermore, whilst Part IV provides for detention without trial, the role of the SIAC has the effect that it is not a process which is entirely devoid of judicial oversight. The right of appeal bestowed on the detainee as well as the periodic reviews required to be undertaken by the commission provide an important element of independent oversight.

Due process concerns continue to arise as a result of the procedure under Part IV and the differences between the procedure under SIAC and that of a more conventional court. However, the guarantees of article 6 of the Convention play no part in this regard due to the fact that detention results from immigration rather than criminal proceedings. A sound argument can be made that detention under Part IV is not for the purpose of a criminal charge due to the fact that it is precisely because a criminal prosecution cannot be sustained that detention is ordered so as to remove the threat posed by certain individuals. Article 6 also applies to the determination of civil rights and obligations. However, the European Commission of Human Rights has held that immigration rights do not fall within the confines of article 6.[62] Even if the provisions of Part IV were considered to be the determination of civil rights and obligations only article 6(1) would be applicable, due to the fact that articles 6(2) and 6(3) are only applicable in the determination of a criminal charge.[63] It is clear that this form of detention under the Act fails to satisfy the basic requirements of due process. Indeed, primarily, the nature of Part IV is such that the process disregards the fundamental presumption of innocence, rather it reverses it so that detention is premised on executive certification with the potential that the commission may quash the certification on appeal. Furthermore, if the detainee were to waive his right to appeal, mandatory review by the SIAC does not take place for six months, amounting to a disproportionate exercise of executive discretion. However, the right of appeal provides a much needed element of independent examination by way of a properly constituted judicial tribunal. It is the case under this procedure that the fact that closure of proceedings can be ordered places the detainee at a disadvantage, particularly given the difficulty of launching an effective defence in the face of

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[61] For discussion of the use of SIAC and the role of the special advocate see House of Commons Constitutional Affairs Committee, *The Operation of the Special Immigration Appeals Commission and the Use of Special Advocates,* 7th Report 2004-2005, HC 323-I.
[62] *X, Y, Z, V and W v UK* App. No. 3325/67.
[63] Fenwick, n. 37 above p. 751.

unknown evidence, when prohibited from providing evidence on his own behalf or from questioning witnesses. The role of the special advocate does not completely rectify the inequality of the situation due to the restrictions on contact between the various parties to the appeal, as well as the lack of transparency to the whole proceeding. However, it seems to be the case that the safeguards provided mitigate the obvious effect of the procedural requirements which exist in favour of the state.

Whilst no violation of article 5 could be found due to the derogation which came into force on 13th November 2001,[64] this was only the case should the derogation itself be found to be valid.[65] However, the extent to which the necessary criteria were satisfied with regard to the derogation was a point of great contention, dominating the debates in legal challenges to the validity of the provisions of Part IV, in particular *A v Secretary of State for the Home Department*.[66] Article 15 provides "In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law."

Despite common references to the "war on terror" the government based the need for derogation on the notion of a public emergency threatening the life of the nation rather than on a claim that this is a time of war. The European Court of Human Rights has stated that this refers to "an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed."[67] The need for such a contentious measure as detention without trial was said by the government to stem from the threat to the country posed by international terrorists following the events of September 11th 2001. The horror of those atrocities was felt the world over. However until the bombings in London in July 2005 no international terrorist attacks, let alone any perpetrated by Al Qaeda, had been carried out in the UK since it was deemed necessary to enter a derogation to the ECHR. Moreover, at the time it was stated by

[64] The Human Rights Act 1998 (Designated Derogation) Order 2001 (S.I. 2001/No. 3644).
[65] The derogation was quashed by the House of Lords in *A v Secretary of State for the Home Department* in December 2004.
[66] [2005] 2 A.C. 68.
[67] *Lawless v Ireland* (1979-80) 1 E.H.R.R. 15 para. 28.

the Home Secretary that "[t]here is no immediate intelligence pointing to a specific threat to the United Kingdom..."[68] However, it was still deemed that the threat was sufficient to warrant enactment of measures so coercive that derogation was required. The House of Lords as well as the lower courts in this matter found there to be in existence an emergency threatening the life of the nation. This was premised on the fact that the SIAC, though not the Court of Appeal nor the House of Lords, had examined closed material to this effect and given the fact that the commission had not misdirected itself as to the law, this was said to be a finding that SIAC, as the fact-finding tribunal, was entitled to make. Furthermore, the House found that following the events of September 11th the government could not be faulted for finding a public emergency to exist. The final basis of the House of Lords' finding was premised on the weight to be afforded to the decision of the Home Secretary and Parliament, due to the political nature of the issue to be determined. Indeed at the European level, a wide margin of appreciation has traditionally been given to states in the determination of this criterion "...[b]y reason of their direct and continuous contact with the pressing needs of the moment..."[69] This notion of deference to the executive was asserted in the House by Lord Hoffmann in *Rehman* in 2003 when he stated that the events of September 11th:

...are a reminder that in matters of national security, the cost of failure can be high. This seems to me to underline the need for the judicial arm of government to respect the decisions of ministers of the Crown on the question of whether support for terrorist activities in a foreign country constitutes a threat to national security. It is not only that the executive has access to special information and expertise in these matters. It is also that such decisions, with serious potential results for the community, require a legitimacy which can be conferred only by entrusting them to persons responsible to the community through the democratic process. If the people are to accept the consequences of such decisions, they must be made by persons whom the people have elected and whom they can remove.[70]

In keeping with this there was a broad consensus in the House of Lords that this question is one for the executive and Parliament. Indeed, this deference was such that even those members of the House who were somewhat hesitant in this regard were prepared to give the benefit of the doubt to the Secretary of State's assessment.[71] The

[68] HC Debs vol. 372, col. 925 15th October 2001, David Blunkett.
[69] *Aksoy v Turkey* (1997) 23 E.H.R.R. 553 para. 68.
[70] [2003] 1 A.C. 153 para. 62.
[71] Para. 154, Lord Scott.

UK's earlier derogation from article 5 was upheld in *Brannigan v McBride v UK*[72] on the grounds that the number of deaths, maimings, explosions and bombings in Northern Ireland clearly indicated the existence of a state of emergency.[73] This situation differs markedly to that of the period between the derogation entering into force in 2001 and the quashing of the derogation order in December 2004 in which there was a complete dearth of attacks in the UK. However, whilst the existence of a state of emergency during this period is questionable, the attacks of July 2005 have highlighted the threat posed to the UK by Al Qaeda.

Lord Hoffmann was the only member of the House to find that this requirement of article 15 had not been met. This was on the basis that whilst a threat of similar attacks in the UK to those of 9/11 is a real one, it cannot be said to be such as to threaten the fabric of society, the mechanisms of government and as such the "life of the nation" can be said to remain strong in the face of this adversity. This interpretation goes beyond that of the lives of citizens and damage to property and instead considers the strength of democracy in the face of a terrorist threat. The unattractive aspect to such an interpretation would arise if the country were to be confronted with an attack of the strength of that of 9/11. Following those atrocities it cannot be said that the institutions of government were imperilled or the existence of the US as a civil community was threatened, however, the deaths of over 3,000 people in such circumstances could not be considered as anything other than an emergency threatening the life of the nation, in spite of the fact that the fabric of democracy survived.

It is of concern that it was possible for foreign nationals to be held indefinitely in the UK on the basis of terrorist attacks which occurred in another country in 2001. Waiting until there is evidence in the form of an atrocity is obviously unacceptable. However when dealing with such a measure as a potentially indefinite deprivation of liberty, it would preferable for a derogation, which deprives individuals of the basic provisions of the ECHR, to be premised on something more substantial than "...foreign nationals...who are a threat to the national security of the United

[72] (1993) 17 E.H.R.R. 539.
[73] *Ibid.*, para. 49.

Kingdom."[74] This is because derogation by a state goes further than affecting simply that state but also has an effect on the integrity of the Convention as a whole. On a different note, a valid argument can be made that the derogation was without sufficient grounds on the basis that it was entered not because of a public emergency, but because article 3 prevents removal of asylum seekers from the UK who face persecution abroad.[75] Indeed, derogation from the Convention in order to circumvent the requirements of a non-derogable article is extremely dubious.

Article 15 further requires that the measures in question are strictly required by the exigencies of the situation, which was explained in *Ireland v UK* as a requirement that "[t]here must be a link between the facts of the emergency on the one hand and the measures chosen to deal with it on the other. Moreover, the obligations under the Convention do not entirely disappear. They can only be suspended or modified "to the extent that is strictly required" as provided in Article 15."[76] The fact that the United Kingdom was the only country party to the Convention to have deemed it necessary to derogate from the ECHR in the aftermath of the events of September 11th is telling indeed and forces the question of the necessity of the measures enacted. However, the UK's derogation in the early stages of post 9/11 action could possibly be considered to have been a demonstration of the UK acting in a forthright manner with regard to its Convention obligations. Although, perhaps the United Kingdom's history with derogations from article 5 due to terrorist violence made the post September 11th derogation an easy habit to return to. It is however accepted that as the closest ally to the United States, the UK is more likely to be under threat than any other European country.[77]

It is important to remember that derogation from Convention obligations is intended as a temporary measure which requires permanent review of the need for emergency measures. It is the case that between adoption of the derogation as a course of action in 2001 and July 2005 there were no international terrorist attacks carried out on UK

[74] [2005] 2 A.C. 68.
[75] Opinion of David Pannick QC prepared for Liberty (the National Council for Civil Liberties) on the derogation from Article 5(1) of the European Convention on Human Rights to allow for detention without trial 16th November 2001 Appendix to JCHR 5th Report.
[76] (1978) 2 E.H.R.R. 25.
[77] The threat to the UK was eventually borne out in July 2005. However, prior to this, in March 2004 Al Qaeda attacked the rail network of Madrid, Spain.

soil. This raises questions with regard to the exigencies of the situation and of the threat used to justify the derogation. Moreover, in that lengthy period of time the government should have sought to consider measures which would satisfy its obligations under the ECHR and allow the derogation to be removed. In addition, a derogation should be kept under review whilst in effect and the measures adapted so as to continually address the requirements of the situation at hand. It seems therefore that an argument can be made that in the over three years in which the derogation was in place with no attacks, and also no intelligence of a specific threat to the UK, that the "review" system in place should have identified that the derogation did not necessarily meet the exigencies of the situation as required as was initially believed to be the case. Whilst there may be a good argument for the need for these powers and the derogation, the "exigencies of the situation" should not have equated to derogation just in case of an attack. The point has been made that the provisions in Part IV of the ATCSA went beyond that which was required by the exigencies of the situation on the grounds that the broad provisions of the Terrorism Act, such as directing terrorist activities under section 56 or incitement to commit terrorist acts abroad, were enacted precisely to enable prosecution of suspected terrorists through the criminal process where pursuit of a more specific criminal offence was not possible.[78]

The excess of these provisions is further highlighted by the fact that detention results from certification as a suspected international terrorist, with no requirement of proximity to Al Qaeda or the events of September 11th. In making the order, the government specified that "[t]he derogation is available only in relation to the international terrorist threat manifested on 11 September 2001. The Government has made that clear and the position has been confirmed by SIAC and the Court of Appeal. The derogation does not therefore extend to other forms of international terrorism."[79] However, the measures of Part IV extended much further than indicated by the derogation order and allowed for the indefinite detention of *any* suspected international terrorist. In this way the measures went further than was strictly required by the exigencies of the purported emergency and as such sufficient proportionality was not achieved. International terrorism is a threat which has existed

[78] C. Gearty, First Report of the Home Affairs Select Committee, *The Anti-Terrorism, Crime and Security Bill 2001*, para. 26.

for decades, however it never posed such a threat as to justify the provision of indefinite detention of such actors. In this way, it is unlikely that the derogation would have been accepted as valid had it been so broad in its scope as to encompass all suspected international terrorists. However, the fact that the derogation order made specified the threat posed as limited to Al Qaeda and the events of September 11th meant that the Act actually exceeded the parameters of the order by providing for the detention of actors unrelated to those said to be threatening the security of the United Kingdom. This wide scope created a power to detain those against whom it may have been possible to bring criminal charges rather than detain, or indeed those who had committed no offence at all.[80] Of course, following the events of July 7th 2005 there is likely to be more acceptance of a wider-ranging order given the reality that the country is under a real and on-going threat. However, preliminary investigations have shown the perpetrators to be linked to Al Qaeda and as such the order in its narrowest form would be sufficient for the intended purposes.

A discrepancy exists with regard to the stated objective of the legislation as protecting the United Kingdom against acts of terrorism at the hands of Al Qaeda and the actual effect of the provisions of Part IV, under which deprivation of liberty and dilution of the protection of due process occurred on a discriminatory basis. This was as a result of the fact that the powers contained therein were triggered by immigration proceedings and therefore extended only to non-British nationals. Indeed this was held to be the case by the House of Lords in *A*, which resulted in the issuance of a declaration of incompatibility.

It was submitted by the government that the measures pursued the legitimate aim of protection against terrorism. However, whilst the measures themselves can be said to have pursued a legitimate aim it can be questioned whether the difference in treatment on the ground of national origin can be said to have had such an aim. It is clear that the provisions under Part IV ATCSA treated nationals and non-nationals suspected of being international terrorists differently. Indeed, surely, pursuance of an aim such as the prevention of terrorism is such as to require no difference in treatment towards

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[79] *Counter-Terrorism Powers: Reconciling Security and Liberty in an Open Society: A Discussion Paper,* February 2004 available at http://www.homeoffice.gov.uk/docs3/CT_discussion_paper.pdf
[80] Fenwick, n. 37 above p. 737.

such actors if the threat can be said to emanate from more than one class of persons. It is the case that the measures were premised on immigration control which inherently forms a distinction between British nationals and non-nationals. The argument of the government on this point was accepted by the Court of Appeal in *A* as justifying the difference in treatment of both groups, the justification being founded on the distinction between nationals with a right of abode in the UK and non-nationals who could not be deported and as such had no right to remain in the UK but rather a right not to be removed. This approach however disregards the security context in which the legislation was enacted with the purpose of protecting the UK from terrorist attacks. Whilst discrimination between nationals and non-nationals may be justified with regard to immigration measures the same cannot be said in the context of security. Given that the measures in Part IV encompassed *any* suspected international terrorist, the comparison should correctly be drawn between non-national suspected international terrorists and those of the same group who have British nationality. Indeed Lord Bingham determined British nationals to be the correct comparator group due to the shared characteristics of the two groups, namely the fact that the appellants in the case were suspected international terrorists who were irremovable from the UK with the only difference being nationality. This is in accordance with the SIAC's finding that those who could not be expelled did have a right to remain and as such could not be detained unless suspected of committing a criminal offence. Such a perspective is attractive given the plethora of wide-ranging provisions contained in the Terrorism Act which could be utilised to this end. In addition such an approach would not have required a derogation from article 5. The argument that it is only foreign nationals who pose a threat to the security of the United Kingdom cannot be sustained. The reality is that the security of the UK is threatened not just by those of non-British nationality but also by British citizens who fall within the definition of suspected international terrorist. This can be supported by the fact that of the perpetrators of the London bombings, three had been born and raised in Great Britain and the fourth had lived in this country since he was a child. However, it is the case that any British citizen accused of representing a terrorist threat to the country could not be detained unless suspected of a criminal offence and rather would be tried under any number of applicable provisions according to the requirements of due process and the criminal justice system. There does not seem to be sufficient justification for this difference in treatment according to nationality, particularly given the fact that the

state bears a heavy burden of justification in cases of discrimination on the grounds of national origin.[81] Moreover, this had the effect that the measures did not go far enough to meet the threat posed to the UK by all terrorist actors, by the exclusion of UK nationals from its ambit. In addition they extended too far in the fact that they allowed the certification of non-nationals, for example, for supporting a terrorist organisation, but who in all reality posed no threat to the security of the UK. This leads to the conclusion that the measures cannot be said to have been strictly necessary and indeed failed for lack of proportionality.[82] It is on this basis that detention under Part IV of the Act can be said to have been discriminatory on the grounds of national origin and therefore in breach of article 14 of the Convention. This is supplemented by the fact that no derogation was made from article 14 and as such the measures provided in Part IV in breaching this article had the effect that the measures were not consistent with the UK's other obligations under international law and as such failed to comport to the requirements of article 15 in an additional way.

Ironically, in trying to ensure proportionality, the application of the measures in Part IV had a discriminatory effect and paradoxically overcoming this would have required widening the application of the provisions so that British nationals suspected of involvement in international terrorism could also be so detained. Of course such an approach would have been unattractive due to the fact, as stated by Lord Woolf, that it would not "promote human rights"[83] and would expand the Act's intrusive effect to an even wider group. The effect of expansion of such measures to UK nationals would be the creation of a prison with four walls, akin to internment, as opposed to confinement with three walls which has been used to describe the detention of non-nationals under Part IV. However, given the fact that of those non-nationals so detained under the Act only two chose to be removed abroad, this shows that the threat of treatment contrary to article 3 which detainees faced abroad was such as to add a fourth, albeit invisible, wall to their incarceration. This demonstrates the problematic circularity of trying to reconcile these measures with the Convention obligations of the United Kingdom. Moreover, the threat of international terrorism

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[81] *Gaygusuz v Austria* (1997) 23 E.H.R.R. 364.

[82] Moreover, measures taken to deal with a pressing social need must accord with the requirements of democratic society. This presupposes the notions of pluralism, tolerance and broadmindedness. *Handyside v UK* (1976) 1 E.H.R.R. 737.

[83] [2004] Q.B. 335 para 49.

faced by the United Kingdom emanates from those of British and non-British nationality and in this way the assertion that the legitimate aim of preventing terrorism could be achieved by detaining or deporting only non-national suspected terrorists raises questions with regard to the legitimacy and extent of the threat claimed to exist. This highlights the fact that there was no sufficient basis for justifying the difference in treatment of two analogous groups both of which form the same threat to the UK. On this basis, the measures were invalid on the grounds of discrimination and indeed for failing to meet the exigencies of the situation.

Traditionally a large degree of deference has been shown by the courts in the United Kingdom to the government in finding a political resolution for a political problem, namely matters of national security. This proclivity has resulted in a jurisprudence in which the judiciary have, far from being seen as the defender of rights and liberties, been seen as providing the actions of the executive in this regard with judicial approval. The case law in this area is well rehearsed. In *Council of Civil Service Unions v Minister for the Civil Service*[84] it was stated that "The decision on whether the requirements of national security outweigh the duty of fairness in any particular case is for the government and not for the courts...in any event the judicial process is unsuitable for reaching decisions on national security."[85] In the sphere of executive detention on grounds of national security, the Court of Appeal stated in *R v Secretary of State for the Home Department, ex parte Cheblak*[86] that national security was "the exclusive responsibility of the executive." The case of *Liversidge v Anderson*[87] similarly forms part of this tradition, in which the majority of the House of Lords stated that "Those who are responsible for the national security must be the sole judges of what the national security requires." Most recently in *Rehman* the deference accorded to the executive in the area of national security was once again clearly stated by the House of Lords, most notably in the words of Lord Hoffmann. The unfortunate record in this area is what makes the findings in *A* so remarkable. Particular attention can be drawn to the difference in the position of Lord Hoffmann who contrary to his words of extreme deference in *Rehman* was the only member of the House of Lords to find that no state of emergency was in existence in the UK in *A*.

[84] [1984] 3 All ER 935.
[85] Lord Fraser at 944.
[86] [1991] 2 All ER 319.

Prior to this case, it is Lord Atkin's famous dissent in *Liversidge v Anderson* which remains perhaps the most well-known judicial stance taken in defiance of the executive's will in the area of national security: "In this country, amid the clash of arms, the laws are not silent."[88] This quotation is befitting the situation which faced the House in *A* and commendably their Lordships followed the stand of its author so as to produce a decision in keeping with Lord Atkin's lone dissent.

The case of *A* heralded a long awaited example of active judicial oversight in the area of national security. The House balanced the security of the country and the deference to be shown to the executive in determining the security situation with a strong defence of the rights of the individual and the international obligations of the country. However, the effect of the case was that, due to the nature of the challenge and the powers of the courts under the Human Rights Act 1998, the detainees remained in detention for many weeks following the decision. This was in order to allow the government to enact further provisions in order to deal with the detainees in a way compatible with the UK's human rights obligations, with the result that the country's comprehensive anti-terrorism armoury is ever increasing. The effect of this is the constant need for judicial vigilance.

Addendum

In response to the House of Lords decision in *A* the government enacted further legislation in the form of the Prevention of Terrorism Act 2005, making provision for the imposition of "control orders" "for purposes connected with protecting members of the public from a risk of terrorism."[89] The Secretary of State may make a control order against an individual if he has been granted permission to make the order by the High Court[90] and:

> (a) has reasonable grounds for suspecting that the individual is or has been involved in terrorism-related activity; and

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[87] [1942] A.C. 206.
[88] *Ibid,*. p. 244.
[89] Section 1(1) PTA 2005.

> (b) considers that it is necessary, for purposes connected with protecting members of the public from a risk of terrorism, to make a control order imposing obligations on that individual.[91]

With regard to derogating orders, the Secretary of State must make an application to the High Court whereby an immediate preliminary hearing must be held in order to determine whether or not to make such an order and if such an order is made, to give directions regarding a full hearing to determine whether to confirm the order.[92] The preliminary hearing may be held in the absence of the individual, without providing notice of the application for the order to the individual and without the individual having had the opportunity of making representations to the court.[93] Similarly, the full hearing is essentially the same as that provided under Part IV of the ATCSA before the SIAC, despite the inherent problems and disadvantages to the individual discussed previously.

The nature of the provision places the individual subject to an order under certain obligations and restrictions considered necessary for the purpose of preventing or restricting the individual's involvement in terrorism-related activity. The Act includes a broad list of such restrictions, which can be added to by the Secretary of State. The order may impose, *inter alia,* a prohibition or restriction on the possession or use of specified articles or substances; a restriction in respect of the individual's work or other occupation; a restriction on association or communications with specified persons; a restriction as to place of residence; a restriction on movement; a requirement to report to a specified person at a specified time every day.[94] However, there is no requirement of a correlation between the activities of which the individual is suspected and the restrictions imposed. Due to the recognition of the fact that such an order may curtail the right to liberty under article 5 of the ECHR, the Act makes provision for two types of order: derogating, made by the Secretary of State and non-derogating, made following the grant of authority to the Secretary of State by the High Court. The opportunity of challenge to a court exists, however, the individual

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[90] Section 3 PTA 2005.
[91] Section 2(1) PTA 2005.
[92] Section 4(1) PTA 2005.
[93] Section 4(2) PTA 2005.
[94] Section 1(4) PTA 2005.

will only succeed if the court finds the decision of the Secretary of State to have been flawed.[95] The provisions relating to control orders are currently due to expire in March 2006.

Due Process in the United States

The concept of due process finds its roots in Magna Carta in which it was promised "No free man shall be taken or imprisoned or deprived of his freehold or his liberties or free customs, or outlawed or exiled, or in any manner destroyed, nor shall we come upon him or send against him, except by a legal judgment of his peers or by the law of the land."[96] This was later enacted in the Statute of Westminster in 1354 as "...no man, of what state or condition he be, shall be put out of his lands, or tenements, nor taken, nor imprisoned, nor indicted, nor put to death, without he be brought in to answer by due process of law."[97] Though without explicit definition, this universal notion has been described by the Supreme Court as "...a system of rights based on moral principles so deeply embedded in the traditions and feelings of our people as to be deemed fundamental to a civilized society as conceived by our whole history. Due process is that which comports with the deepest notions of what is fair and right and just."[98] Essentially, due process of the law amounts to the application of certain fundamental principles so as to curb any arbitrary interference with the rights of the individual by the government and to attempt to achieve some notion of parity between the individual and the state.

It was originally deemed that "due process" referred simply to procedural requirements in court: "The words "due process" have a precise technical import, and are only applicable to the process and proceedings of the courts of justice; they can never be referred to an act of legislature."[99] This, of course, circumvented some elements of fundamental justice and resulted in a notion dictated by the legislature. However, this was complemented, in the 1890s, by the addition of the concept of

[95] Section 10 PTA 2005.
[96] Chapter 39 Magna Carta.
[97] 28 Edw. III c.3 (1354).
[98] *Solesbee v Balkcom* 339 US 9, 16 (1950).

substantive due process of law which provides a check on other notions such as equality before the law, clarity of law as well as providing a check on the legislature. "It is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave congress free to make any process "due process of law," by its mere will."[100] With regard to both procedural and substantive due process, the test for constitutionality essentially asks whether the governmental action is arbitrary, capricious, unreasonable, irrational, irrelevant or invidious in either content or procedure.[101]

With regard to the Constitution, the notion of due process is incorporated into several of the amendments without specific mention, such as the Sixth Amendment which states the right of the accused to a speedy and public trial by an impartial jury, to be confronted with the witnesses against him, to be able to obtain witnesses in his favour and to have the assistance of counsel for his defence.[102] However, due process is explicitly stated in the Fifth and Fourteenth Amendments, both of which act to protect the individual from arbitrary interference by the government with life, liberty or property. "The 14th Amendment, it has been held, legitimately operates to extend to the citizens and residents of the states the same protection against arbitrary state legislation affecting life, liberty, and property as is offered by the 5th Amendment against similar legislation by Congress."[103] The former, in conjunction with other provisions of the Bill of Rights such as the Sixth Amendment, applies only to actions by federal government, and the latter, with the requirements of the Fifth as well as other amendments deemed to be inherently contained, provides protection against actions by state governments. Although the equal protection clause is contained in the Fourteenth Amendment, discriminatory action by the federal government will, depending on the circumstances, fall foul of the due process protection of the Fifth Amendment.

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[99] Alexander Hamilton, *The Founders' Constitution*, Volume 5, Amendment V, Document 13 available at http://press-pubs.uchicago.edu/founders/documents/amendV_due_processs13.html

[100] *Murray v Hoboken Land & Imp. Co.* 59 US 272, 276 (1855).

[101] H. J. Abraham and B. A. Perry, *Freedom and the Court. Civil Rights and Liberties in the United States,* Oxford University Press, 1994 (6th ed.) p. 96.

[102] Amendment VI.

[103] *Hibben v Smith,* 191 US 310, 325 (1903).

Anti-Terrorism and Effective Death Penalty Act 1996 and USA PATRIOT Act 2001

Both the AEDPA and the USA PATRIOT Act contain provisions concerned with the detention and removal of aliens suspected of involvement with terrorism from the United States. This approach is particularly striking with regard to the AEDPA given the fact that the Oklahoma city bombing, chronologically the most recent catalyst for the enactment of the legislation, was in fact perpetrated by domestic actors.

Detention and Removal of Alien Terrorists

Section 401 of the AEDPA adds a new title to the Immigration and Nationality Act (INA), which provides for the creation of the alien terrorist removal court. The procedure of this is initiated on application by the Attorney-General that the individual in question is an alien terrorist who is physically present in the United States and who would pose a threat to national security if removed under Title II of the Act. For these purposes an alien terrorist is an alien who has engaged, is engaged, or at any time after admission engages in any terrorist activity.[104] Terrorist activities are defined extensively in the Act and include committing or incitement to commit a terrorist activity indicating an intention to cause death or serious bodily injury, preparing or planning a terrorist attack, soliciting funds, membership of a terrorist organisation and affording material support to such an organisation.[105] The application may be supplemented by any other information or testimony, including that of a classified nature, and is considered *in camera* and *ex parte.* Approval of an application by a single judge of the removal court results in a public hearing before the five judge court.

The Act makes provision for the individual concerned to be present before the hearing and to be represented by counsel, who will be appointed by the judge should the alien be unable to afford to obtain it. During the hearing, the alien is provided with the opportunity to introduce evidence on his own behalf and to question witnesses. However, evidence obtained under FISA shall be admitted and there shall be no

[104] 8 USC 1227(a)(4)(B).

suppression of evidence allegedly obtained unconstitutionally or otherwise. Moreover, the Federal Rules of Evidence, the purpose of which is said to be "...to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined"[106] do not apply in removal proceedings.

Any evidence which the Attorney General deems would pose a risk to the national security of the country or to the security of any individual on disclosure shall be heard *ex parte* and *in camera.* This is, however, a broad criterion which could easily be satisfied under either head, particularly in the case of the latter where it could readily be claimed that the security of an informer would be put at risk were the evidence to be disclosed. In instances when this occurs, the government is obliged to submit to the court for approval, a summary of the classified evidence which must be "sufficient to enable the alien to prepare a defence." This standard is said to provide necessary due process protection to the individual concerned whilst also ensuring the confidentiality of sensitive information or government sources,[107] a role played by the special advocate in the United Kingdom.

In the United States the procedure for a removal hearing includes the provision of a judge-appointed special attorney to assist the alien by reviewing the classified information disclosed *in camera* as well as challenging through an *in camera* proceeding the veracity of the evidence contained in the classified information,[108] in addition to the provision of an evidential summary. Provision of such a summary is preferable to the situation in the UK in which the evidence presented during closed proceedings remains a secret to the appellant and his legal representative. In the United States disclosure to the alien and his legal representative of classified information is prohibited in the same way as in the United Kingdom. However, the position of an individual before the alien terrorist removal court is certainly strengthened by the provision of an evidential summary. In isolation, the sufficiency

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[105] 8 USC 1182(a)(3)(B)(iv).
[106] Federal Rules of Evidence rule 102.
[107] Statement of Anti-Defamation League And American Jewish Congress B'nai B'rith International, Hadassah, and The Jewish Council for Public Affairs on H.R. 2121 -- The Secret Evidence Repeal Act Before the House Committee on the Judiciary, May 23, 2000.

of a summary could easily be called in to question given the inability to challenge the information contained therein as well as the difficulty of mounting an effective defence on the basis of abridged information. However in combination with a special attorney appointed to challenge the veracity of the evidence, the position of the individual is strengthened in reference to the comparable situation in the UK, where the ability of the individual to rebut the evidence on which certification is made is negligible.

With regard to the provisions enacted in both jurisdictions, certainly some degree of balance is provided with regard to the interests of the individual and the state. However given the ease with which material can be judged to be sensitive as a result of national security interests, particularly with regard to the deferential attitude taken towards the executive in such matters, the point can be made that undue interference with the individual's due process rights will occur on a regular basis. Moreover, the ease with which information can be classified, or closed proceedings invoked, provides the state with the opportunity to "over-classify" information in order to attempt to gain an unfair advantage in such proceedings. This has been shown to be the case in the United States in the past where the government has based deportation proceedings on secret evidence of political and terroristic affiliations, only to disclose information previously classified when challenged in court.[109]

Following receipt of the evidence, the government and the alien are both given "fair opportunity" to present argument as to the sufficiency of the evidence as a justification for removal. However, as previously mentioned, this "fair opportunity" is severely weighted in favour of the government. This is so not simply as a result of the fact that the alien must base his case on an evidential summary but also because the applicable standard of proof is the lowest civil standard, namely a showing by preponderance of the evidence, as opposed to the criminal standard of beyond reasonable doubt. There may be some foundation to this in light of the holding that deportation is not a criminal prosecution within the meaning of the Bill of Rights.[110] However, it has also been held by the Supreme Court that the drastic effect of a

[108] 8 USC 1534(e)(F).
[109] J. X. Dempsey and D. Cole, *Terrorism and the Constitution. Sacrificing Civil Liberties in the Name of National Security,*(First Amendment Foundation, 2002) p. 128-131.

deportation order should be based on a higher standard of proof than that which applies in a case of negligence. Therefore, it has been held that in such proceedings, the government must establish the facts supporting deportability by clear, unequivocal, and convincing evidence.[111] It has since been held that with regard to expatriation, a showing on the preponderance of the evidence is satisfactory due to the civil nature of the proceedings, which therefore does not offend the requirements of the Fifth Amendment.[112] However, this was stated with regard to the fact that expatriation proceedings do not threaten a loss of liberty. Contrary to this, Title IV of the AEDPA makes provision for the indefinite detention of any individual against whom an application for removal under the Act has been made[113] and so application of a higher standard than the usual civil standard seems more likely and more just.

A permanent resident alien who is so detained is entitled to a release hearing before the same judge, in which release will be granted if the alien can demonstrate that he (i) is a person lawfully admitted for permanent residence in the United States, (ii) is not likely to flee if released upon such terms and conditions as the court may prescribe (including the posting of any monetary amount), and (iii) will not endanger national security, or the safety of any person or the community, if released. Demonstration of these points, especially the third, will be onerous, given the difficulty of proving a negative which is of course exacerbated by the limited information provided to the alien regarding the grounds for his detention. Yet this flawed system stands in contrast to the prospects of those not eligible for such a hearing, such as non-citizens present in the US on the basis of a visa. This could be said to be in violation of the guarantees contained in the Fourteenth Amendment as a result of this discriminatory access to a removal hearing. Once removal is ordered, the alien, or on refusal, the Secretary of State, will elect a destination country, subject to the proviso that removal will not impair any treaty obligations, such as article 7 of the ICCPR, nor adversely affect the foreign policy of the United States.[114] This of course has the same effect as the equivalent provisions in the UK whereby a person cannot be deported to a country in which they may face cruel, inhuman or degrading

[110] *Harisiades v Shaughnessy*, 342 US 580, 594 (1952).
[111] *Woodby v Immigration Service*, 385 US 276, 286 (1966).
[112] *Vance v Terrazas,* 444 US 252, 266 (1980).
[113] 8 USC 1536.
[114] 8 USC 1537(b)(2)(A)(B).

treatment or punishment. The effect of this, however, is that the alien may be indefinitely detained even if *he* has *chosen* to risk such treatment in his designated country, rather than remain detained in the United States.

A supplement to the alien removal procedures contained in Part IV of the AEDPA 1996, are the provisions of the USA PATRIOT Act which essentially provide for the preventive detention of non-citizens. Indeed, in conjunction with section 411, as discussed in chapter 5 which widened the class of non-citizens deportable on the grounds of terrorism, under section 412 the Attorney-General has the power to certify any non-citizen as a suspected terrorist and to detain that person, potentially indefinitely, on the basis of that certification. The Attorney-General may certify an alien if he has reasonable grounds to believe that the alien is:

(a) engaged in any activity to violate any law of the United States relating to espionage or sabotage or to violate or evade any law prohibiting the export from the United States of goods, technology, or sensitive information,[115]

(b) engaged in any activity a purpose of which is the opposition to, or the control or overthrow of, the Government of the United States by force, violence, or other unlawful means,[116]

(c) is or has engaged, or is likely to engage in, or has incited terrorist activity, or is a representative or member of a foreign terrorist organisation as designated by the Secretary of State, or of a political, social or other similar group whose public endorsement of terrorist activity the Secretary of State has determined undermines US efforts to reduce or eliminate terrorist activity,[117]

(d) is engaged in any other activity that endangers the national security of the United States.[118]

It is notable that under the AEDPA membership of a foreign terrorist organisation is said not be prohibited due to the protection of the ideals of the First Amendment, as confirmed by the 9th Circuit Court of Appeals in *Humanitarian Law Project v*

[115] Section 212(a)(3)(A)(i), section 237(a)(4)(A)(i) Immigration and Nationality Act (INA) 8 USC 1182, 1227.
[116] Section 212(a)(3)(A)(iii), section 237(a)(4)(A)(iii) INA.
[117] Section 212(a)(3)(B), see also section 237(a)(4)(B) INA.
[118] Section 236A(a)(3)(B) INA.

Reno.[119] However, under the above provision, membership of such an organisation is sufficient to justify detention under the PATRIOT Act. The definition of "terrorist activity" in the Act broadly includes the threat or attempt to use a weapon with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property.[120] This is broad enough to include the suspected involvement of an alien in a pub fight or a domestic dispute and it is on such a basis, with this negligible link to terrorism, that such an alien could be subjected to prolonged detention by way of executive fiat. Moreover, in a case of impromptu violence such as might occur in a pub, the alien could be detained despite the spontaneous nature of the incident and the fact that he poses no on-going threat in any way, thereby amounting to preventive detention of an extreme kind. Of further concern is the fact that potentially indefinite detention is authorised on the basis that the Attorney General *has reasonable grounds to believe* that the alien is a suspected terrorist. This standard however, is only sufficient under American law to authorise a stop and frisk,[121] as opposed to a full arrest which requires probable cause under the Fourth Amendment. On this basis, questions are raised with regard to the use of such a low standard as justification for such detention. Whether constitutional challenge on this basis would succeed remains questionable on the basis of deference to the executive with regard to terrorism and national security. The differing decisions emanating from various US courts make any kind of prediction difficult. The Supreme Court has previously noted the heightened deference which may be applicable with regard to the decisions of the executive concerning national security.[122] However, it is notable that in the cases challenging the designation as and detention of enemy combatants, the stance of the Supreme Court was not deferential and instead showed great respect for individual liberty and the requirements of due process.

Under the section 412 certification and detention procedure, the Attorney General must either commence removal proceedings, charge the alien detained with a criminal offence or release him within seven days. However, if removal proceedings are commenced the alien shall be detained in custody until his removal from the US is

[119] 98-56062 (9th Cir. March 3, 2000). See Chapter 5.
[120] Section 212(a)(3)(B)(vi)(b) and (vi) 8 USC 1182.
[121] *Terry v Ohio* 392 US 1 (1968).

complete.[123] The provision provides that detention shall be maintained irrespective of any relief from removal for which the alien may be eligible, or any relief from removal which has been granted to the alien, until the Attorney General determines that the alien is no longer certifiable as a suspected terrorist. This of course has the effect of condemning the individual to prolonged detention despite the fact that he is legally not removable. The executive nature of this provision and the secrecy surrounding the evidence on which the certification is based denies any opportunity to examine or challenge the evidential basis of the Attorney General's determination, or indeed the absence of a determination negating the original certification. It must be noted however, that the provision is inherently contradictory in that an alien shall be detained despite having been granted relief for removal, but it is also stated that "[i]f the alien is finally determined not to be removable, detention pursuant to this subsection shall terminate." This could, however, potentially provide some measure of protection for the individual so detained if the courts sought to remedy this contradiction through reliance on this latter clause, thereby prohibiting continued detention following a grant of asylum or some other form of relief from deportation. Whether this is so remains to be seen.

The Act contains what is termed a "limitation on indefinite detention" in that it is provided that an alien who is detained subject to removal proceedings, but whose deportation is unlikely in the reasonable foreseeable future may be detained for additional periods of six months, only if the release of the alien will threaten the national security of the US or the safety of the community or any person. This is supplemented by a six monthly review by the Attorney General under which he may revoke certification and release the alien on such conditions as are deemed appropriate. In addition, the detainee may make a request in writing every six months that the Attorney General reconsiders the certification and may submit documents or other evidence in support of that request. This provision of renewing detention in six monthly increments as a limitation on indefinite detention as well as six monthly review by the Attorney General is certainly preferable to the indefinite detention imposed upon the detainees at Guantanamo Bay or citizens such as Jose Padilla. In addition, the fact that an individual detained under section 412 is able to submit

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[122] *Zadvydas v Davis* 533 US 678 (2001).

evidence in support of a request to revoke certification on a regular basis also places the individual in a stronger position than others detained under US policy. However, whilst such provisions represent an acknowledgment by the executive of the dangerous potential inherent in such a detention provision, the likelihood that "national security reasons" will prevent the alien from being informed of the evidence on which the certification is based will negate any utility in allowing the detainee to submit evidence in support of a request for reconsideration. Indeed, it is difficult to disprove an unknown quantity. Furthermore, increments of six months do not act as a bar to indefinite detention. Of course, as mentioned, such a system is preferable to indefinite detention as experienced by some in the war against terror, however, the ease with which it is possible for detention to be renewed given the secrecy surrounding the reasons for certification prevent this from being an effective method of restricting prolonged detention. Moreover, in contrast to the position under the AEDPA concerning the removal of aliens suspected of terrorist involvement, certification, detention and subsequent review fall into the domain of the executive by way of the fact that the Attorney General is responsible for all such fundamental elements of the procedure. Indeed, at no stage is provision made for independent oversight and in this way, though certain measures are in place in order to act as safeguards for the individual, the process is fundamentally reminiscent of those detained as enemy combatants.

The only form of recourse to the courts for an individual detained under section 412 is by way of an action for habeas corpus, with the Act specifically excluding any other form of judicial review.[124] Appeal is possible only to the United States Court of Appeals for the District of Columbia, thereby causing untold problems to the detainee in any other part of the country both financially and in terms of access to justice. It must be said that the role played by the SIAC under the ATCSA provides more rigorous scrutiny of detention for the individual than that provided for in the United States. However, limited though recourse to the courts in the United States may be, it exists nonetheless and therefore may well be considered as satisfying the requirement of procedural protections for the detainee.

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[123] Section 236A(a)(1)(2) INA as inserted by section 412 PATRIOT Act.

In light of the knowledge that some of the 9/11 hijackers were in violation of immigration law for remaining in the US despite the expiry of their visas, section 412 apparently seeks to rectify the flaws in the previous system by taking a pre-emptive approach in extending the powers available for use on immigration grounds. This heavy-handed attempt at rectification has the same effect for a known terrorist planning a chemical attack, an alien suspected of playing a role in a pub fight and an alien guilty of a minor immigration violation. Moreover, the system enacted in section 412 is such that it exists at the restriction of due process. Amendment of the INA through the PATRIOT Act provides the executive with the power of indefinite detention yet omits any form of a prompt and independent judicial hearing and allows the detainee no opportunity to examine the evidence on which his detention is based. Moreover, no guidance is provided with regard to what must be undertaken by the Attorney General in certifying an individual and whilst provision is made for a writ of habeas corpus no mention is made of the role of the courts in examining the Attorney General's decision, the standard against which the evidence will be tested, nor the role of the detainee in such proceedings. Indeed, perhaps it is an awareness of these shortcomings and a fear that these provisions would fail to withstand constitutional scrutiny that has prevented use of detention under section 412 thus far.

With regard to the provisions contained in the AEDPA and the PATRIOT Act, a constitutional question obviously arises as a result of the potential for the indefinite detention of non-citizens, as well as on the ground of the discriminatory nature of the provisions contrary to the requirement of equal protection before the law contained in the Fourteenth Amendment. The Supreme Court has made clear the fact that the due process clause is applicable to all persons within the United States, including aliens, whether their presence is lawful, unlawful, temporary, or permanent,[125] and therefore acts to prevent any deprivation of liberty which is not subject to due process of law. The non-punitive nature of the potentially indefinite detention possible under both Acts is certainly at odds with the notion of imprisonment for deterrent or retributive purposes following trial and conviction for a criminal act. However, indefinite detention is permissible in certain narrow non-punitive situations where there is special justification for the detention and sufficient procedural protections for the

[124] Section 236A(b)(1) INA as inserted by section 412 PATRIOT Act.

individual detained.[126] A sufficiently narrow non-punitive reason would be where the danger posed to the community at large is such that it outweighs the individual's constitutionally protected interest in avoiding physical restraint, [127] such as in the case of "harm threatening mental illness."[128] It therefore is likely that extended detention of a suspected terrorist for the purposes of deportation could be held to be justifiable as a result of a threat posed by terrorism to the security of the population or to the national security of the US.

This is particularly so in light of the Supreme Court's comment in *Zadvydas v Davis,* where in finding that the Attorney-General was not authorised to detain a removable alien indefinitely beyond the removal period or for a period necessary to secure removal, the court made the comment that justifying such detention on the basis of protecting the community can be upheld only when limited to "a small segment of particularly dangerous individuals, say suspected terrorists..."[129] Indeed, the court made specific mention of the fact that in deciding *Zadvydas* it gave no consideration to "terrorism or other special circumstances where special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security."[130] It seems therefore that a suspected terrorist falls into a sufficiently narrow category of dangerousness so that detention under either Act would not, on its face, be found to fall foul of the Constitution.

The protection of the due process clause is applicable to an alien within the US, albeit one subject to a final removal order, and as such detention of this nature which may permanently deprive an individual of his liberty, must be carried out pursuant to the requirements of due process in order to provide a degree of protection against arbitrary detention by the state. It has been suggested that the fact that a case has never been brought before the Alien Terrorist Removal Court is due in part to the fact that the requirements under the Act, in particular the provision of a summary of the classified evidence which is sufficiently detailed so as to enable the alien to build a

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[125] *Zadvydas v Davis* 533 US 678 (2001).
[126] *Ibid.*
[127] *Ibid.*
[128] *Kansas v Hendricks*, 521 US 346, 356 (1997).
[129] *Zadvydas v* Davis 533 US 678 (2001).

defence, is deemed to be unworkable. This is on the grounds that compliance requires that the summary be sufficiently detailed in order to be approved by the judge and yet national security could easily be compromised by a report which is too specific in its content.[131] Should this be correct, it goes some way towards the condemnation of the removal provisions under Title IV of the AEDPA in that attempted compliance with the requirements of due process have made the provision unworkable and as such these efforts to curb arbitrary detention by the executive cannot be sustained thereby highlighting the severe nature of the removal provisions. The difficulty of reconciling these two opposing interests regarding the provision of an unclassified summary of classified evidence used to deport an alien is highlighted in the case of *Kiareldeen v Ashcroft.*[132] In a petition for a writ of habeas corpus, the application was granted with the District judge describing the provision of such a summary as "lacking in either detail or attribution to reliable sources."[133] However, the Court of Appeals for the Third Circuit, though dealing primarily with a claim for payment of legal fees under the Equal Access to Justice Act, discussed deportation on the basis on secret evidence stating "[t]hat the FBI would be unwilling to compromise national security by revealing its undercover sources, is both understandable and comforting. That a court would then choose to criticize the FBI for being unwilling to risk undermining its covert operations against terrorists is somewhat unnerving."[134] It may be significant that the Court of Appeals judgment came after September 11th, with the appeal actually being filed on 10th September 2001.

Conclusion

From the outset, the point must be made that if the terrorist threat faced by the country is deemed to be so serious that stringent legislative measures must be taken then the government is entitled to enact measures such as those found in the ATCSA, AEDPA, and PATRIOT Act. However, it is the case that enactment of such provisions must take place in light of the rights and obligations enshrined in such documents as the

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[130] *Ibid.*
[131] S. R. Valentine, *Flaws Undermine Use of Alien Terrorist Removal Court,* February 22nd 2002, available at http://www.wlf.org/upload/2-22-02valentine.pdf p. 2.
[132] 273 F.3d 542 (3rd Cir. 2001).
[133] *Kiareldeen v. Reno*, 71 F.Supp.2d at 414.

ECHR and the US Constitution. Indeed, the legitimacy and lawfulness of such measures as extended or even indefinite detention without trial is premised upon proportionality, and the requirements of due process in order to achieve some kind of balance between the security needs of the country as well as the rights of the individual. Such an approach can be seen in the provisions concerning extended detention contained in the Terrorism Act 2000, whereby the incorporation of judicial oversight brought the UK in line with the jurisprudence of the European Court and allowed the removal of the country's long-standing derogation to article 5. Questions remain however with regard to the rights of a detained individual in particular in relation to the compatibility of restrictions on access to legal advice with article 6. Due to the vulnerability of the individuals subject to extended detention as well as the length of possible detention and the severity of the potential penalty involved, delayed access to legal advice will often be found to be incompatible with the rights of accused under article 6. The same can be said with regard to supervised meetings with a legal advisor. Evidence obtained during this period of denied access is likely to be found to be unfair due to the circumstances in which it was obtained. The theme in this regard seems to be that whilst the need to counter terrorism is such as to allow states a margin of appreciation with regard to compliance with Convention obligations, the leeway provided is such as to place the individual in a more vulnerable position. This therefore requires strict adherence to the rights of the individual protected by the Convention.

With regard to Part IV ATCSA, the questions raised by the derogation from article 5 have been answered by the House of Lords. Indeed, in finding the derogation to be unlawful on the basis of its disproportionate interference with the right to liberty as well as the discriminatory effect of the provisions, the House took a refreshingly active stance in adjudicating upon the government's attempt to balance the security of the country with the liberties of the individual.

The provisions of Part IV are supplemented by a process of appeal and review by SIAC much improved on that which existed previously, and indeed preferable to that which exists under the US legislation, particularly in light of the executive approach

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[134] 273 F.3d 542, 552 (3rd Cir. 2001).

taken under the PATRIOT Act with regard to certification, detention and review, which is reminiscent of pre-Terrorism Act days. This can perhaps be attributed to the UK's long struggle with terrorism and experience with anti-terrorism legislation as well as, cynically, with the influence of many adverse judgments from the European Court of Human Rights on British legislation and policy in its fight against terrorism. However, problems exist with the measure of due process that SIAC provides, not least because the provisions of Part IV extend the role of the Commission into an area removed from its original purpose. This has the effect that the liberty of the individual is at stake before a tribunal without the safeguards available in the criminal justice system. In addition problems exist with regard to those safeguards in place, such as the role of the special advocate.

Preventive detention under the PATRIOT Act is similarly discriminatory. The severe nature of these provisions is not mitigated however, by the inclusion of any form of independent oversight. Rather, the whole process from certification to review is carried out by the Attorney General, with the only form of recourse to the courts being limited to an action for habeas corpus in the Court of Appeals for the District for Columbia. Despite the flaws and limitations of SIAC, comparison with this procedure in the US shows the measure of due process and the protection given to the rights of the individual to be lacking.

Neither the provisions under the AEDPA nor the PATRIOT Act have been used since enactment which perhaps indicates an awareness on the part of the administration that the provisions may fail to withstand constitutional challenge. This also casts doubt on the necessity of such measures in the first place. Due process protections can be said to exist on the face of the provisions, albeit at a minimal level which may turn out to be inadequate in certain circumstances, should the provisions ever be utilised. As it stands, terrorists are deemed to fall into a category of sufficient dangerousness as to justify such detention as long, as is the case, as procedural safeguards are in place.

It is of great concern with regard to both jurisdictions that such provisions have been enacted without heed to the experience of the UK with internment in the 1970s; indeed whilst it seems that the US did not learn from this part of the United Kingdom's policy with regard to Northern Ireland, neither did the UK itself. The

provisions as enacted, as well as the practice in the US of incarceration under the "enemy combatant" label, have the effect of placing the detainees in a similar position to the internees of the 1970s. That policy ended in failure prompting a rise in terrorist violence and importantly provoking an increase in those joining paramilitary organisations. It can be said that internment actually worsened the situation in the province, undermining the opinion of the people with regard to the ability of the authorities to control the problem. With this experience, it is hard to understand the actions of both governments in enacting measures powerfully reminiscent of this unfortunate episode in the UK's anti-terrorist history. Of concern is the possibility that rather than act as an effective measure of prevention, these provisions will serve to increase the ranks of Islamic extremist, and indeed other terrorist, organisations. In addition, such undemocratic and repressive measures undermine the UK and US and the principles for which they stand in the eyes of other countries across the world. Indeed, it may be seen that if two of the most powerful nations in the world deem it necessary and appropriate to detain individuals without trial and adequate adherence to due process protections, that such a path is desirable for other less developed and democratic countries. These provisions and their effect on important democratic values undermine the position of both countries as role model for the rest of the world.

The incorporation of procedural protections certainly mitigates the arbitrary interference of the state with the rights of the individual, and indeed, may be deemed sufficient so as to avoid an adverse ruling regarding these provisions in either jurisdiction. It is all too easy to try to justify the existence of such measures in the United Kingdom by way of comparison with the United States, or indeed in the US, by way of the argument that in comparison to the detention of enemy combatants, an individual detained under the Act is in a more fortunate position. Rather, it must be considered whether such unpalatable provisions are actually necessary and if so whether they are proportionate. With regard to the US a good case can surely be made to answer the former question negatively. The House of Lords ruling in *A* forced reconsideration of the provisions resulting in yet more legislation in the form of the Prevention of Terrorism Act 2005. It can be said that in the years preceding this that consideration should have been given to measures which would address the situation at hand without going further than required and without requiring a

derogation from the ECHR. It seems to be the case that both countries should have used the benefit of the time that passed following enactment of these provisions to reconsider the need for and justification of the legislation in place. The events in London in July 2005 have provided another example of legislative reaction. Care must be taken in ensuring that these events and those of September 11th do not cast a permanent shadow over democracy.

Chapter 7

Detention and Due Process in the War on Terror

Detention and Due Process in the War on Terror

The events of September 11th not only prompted the enactment of the controversial PATRIOT Act, but also triggered what has become known as the war on terror. This term has become synonymous with the words "enemy combatant", an expression which has been used to justify the indefinite detention of several hundred people since 2001. Moreover, the enemy combatant classification places the individual outside of the protections of the Constitution and as such deprives the detainee of the basic guarantees of due process. Indeed, a military order issued by President Bush makes provision for trial by military tribunal for non-citizens, far removed from the due process protections required in ordinary civilian trials.[1]

The term has been applied both to American citizens who are detained on US soil, as well as aliens incarcerated in Guantanamo Bay, Cuba. Litigation is currently pending before the Supreme Court challenging the lawfulness of the detention of a US citizen seized in Afghanistan and detained in the US,[2] as well as the lawfulness of the detention of an American citizen captured and detained on US soil.[3] A third case has also been brought on behalf of a number of the Guantanamo detainees questioning whether US courts have jurisdiction to consider challenges to the legality of the detention of foreign nationals in Cuba.[4] Previous hearings on these cases have, in particular with regard to the cases concerning the detention of US citizens, produced conflicting decisions resulting in confusing jurisprudence, requiring analysis of the main arguments now facing the Supreme Court.

Though not provided legislatively in the PATRIOT Act, it would be remiss not to discuss the utilisation of the label "enemy combatant" in the war on terror. This has raised many fundamental questions with regard to the constitutional rights and due process of those detained as such, in particular US citizens. Indeed this categorisation has given effect to a principle which has lain dormant in the United States since World War II, namely that a US citizen may be indefinitely detained upon designation

[1] Military Order, *Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism,* Issued November 13th 2001
[2] *Hamdi v Rumsfeld* No. 03-6696 Decided on June 28th 2004.
[3] *Padilla v Rumsfeld* No. 03-1027 Decided on June 28th 2004.
[4] *Rasul et al. v Bush* No. 03-334, No. 03-343 Decided on June 28th 2004.

as an enemy combatant by the President, and consequently deprived of certain rights guaranteed by the Constitution. Executive detention of foreigners in Guantanamo Bay, Cuba and citizens in the United States has raised important questions regarding executive authority, judicial oversight and fundamental rights in times of war and national security crises. Application of the term enemy combatant to United States citizens has resulted in a dual-faceted system of justice. Individuals against whom there is deemed to be sufficient evidence can be brought to trial in the usual way,[5] whereas if the individual concerned is believed to be of intelligence value an enemy combatant designation places that person outside the scope of the criminal law and into detention of indefinite duration and negligible constitutional protection. Two cases, currently pending before the United States Supreme Court, fall into this latter category. The facts of each case, namely the capture of a US citizen fighting for the Taliban in Afghanistan and his eventual transfer to custody in America, and the detention of a citizen following his seizure in the United States, are sufficiently distinguishable to prevent their amalgamation before the Supreme Court and as such provide the opportunity to explore the scope of this executive power in both a foreign and domestic theatre.[6]

The reliance placed on the enemy combatant classification requires a brief consideration of the concept and its roots in American law. It is derived primarily from the 1942 case of *Ex parte Quirin*[7] which concerned the habeas corpus petitions of six German saboteurs, one of whom claimed American citizenship through the naturalization of his parents, who were captured and detained in the United States whilst on a mission to destroy key war and industry facilities. Following a Presidential proclamation on July 2nd 1942 declaring the jurisdiction of military tribunals to be applicable to anybody acting under the direction of an enemy power, for the purpose of "...committing or attempting or preparing to commit sabotage, espionage, hostile or warlike acts, or violations of the law of war..."[8] the petitioners were tried by military commission. In denying the applications for habeas corpus and establishing the authority of the President to create such military tribunals with the

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[5] For example the prosecution of John Walker Lindh, *US v Lindh* 227 F. Supp. 2d 565 E. D. Va , 2002.
[6] The detention and status of enemy combatants in Guantanamo Bay, Cuba will be discussed in the following section.
[7] 317 US 1 (1942).
[8] *Ibid.* p. 22.

authority of Congress, the Court distinguished the facts of *Quirin* from those in the case of *Ex parte Milligan.* In this case the Supreme Court held that military tribunals "...can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed"[9] on the basis of the "enemy belligerent" status applied to the German saboteurs, which was held not to apply to the petitioner in *Milligan.* Indeed, in stating unlawful combatants to be subject to capture and detention as well trial and punishment by military tribunals for acts which render their belligerency unlawful, the Court defined enemy combatants as those "...who without uniform come...secretly through the lines for the purpose of waging war by destruction of life or property."[10] The Court pronounced such belligerents to be offenders against the law of war subject to trial and punishment by military tribunals, as opposed to lawful combatants who may be detained as prisoners of war by opposition forces. Despite the fact that this definition is tied narrowly to the facts of *Quirin*[11] the case has been used as a precedent to justify the deprivation of constitutional rights to American citizens detained indefinitely as part of the war on terror.

The root of this enemy combatant term stems from the classification in international law of lawful and unlawful combatants. Classification as a lawful combatant results in prisoner of war status and therefore the protections of the third Geneva Convention.[12] This is achieved in article 4 of the Convention, paragraph 2 of which requires satisfaction of four criteria for members of militias and other volunteer corps, including those of organized resistance movements seeking prisoner of war status, namely;

(a) having been commanded by a person responsible for his subordinates;
(b) having a fixed distinctive sign recognizable at a distance;
(c) having carried arms openly; and
(d) having conducted operations in accordance with the laws and customs of war.

[9] *Ex parte Milligan* 71 US (4 Wall) 2, 121 (1866)
[10] *Ex parte Quirin* 317 US 1, 31 (1942).
[11] The petitioners travelled to the US by submarine and landed clandestinely at two separate locations on the East coast of the country in June 1942. Once onshore they buried their German military uniforms, changed into civilian clothes and travelled to different parts of the country with the intent to cause destruction to facilities key to the American war effort.
[12] Geneva Convention Relative to the Treatment of Prisoners of War, art. 4

With regard to the detainees held at Guantanamo Bay, Cuba, it has been determined by the US Department of State that neither Taliban nor Al Qaeda detainees qualify for prisoner of war status under the Convention. Although the Taliban was not recognised as the legitimate government of Afghanistan by either the United States or the United Nations, Afghanistan was a party to the Geneva Conventions and as such the United States determined that the Convention did apply to the Taliban. However, Taliban detainees have been denied prisoner of war status.[13] This is due to the fact that whilst it may be possible to identify a formal command structure, the Taliban did not satisfy the requirements of having a fixed and distinctive sign recognisable at a distance, nor did they carry arms openly. Indeed, the Taliban sought, in the same way as Al Qaeda, to make it extremely difficult for opposition forces to be able to distinguish them from the civilian population. Such tactics cannot be said to be in compliance with the laws and customs of war. As a foreign terrorist group Al Qaeda is not a party to the Geneva Conventions and as such it was held by the US government that its members were not entitled to POW status. Even if the Convention were applicable, POW status would be denied with regard to non-fulfilment of the four criteria. Indeed, the nature of a terrorist group is such that a formal command structure is not necessarily discernible and differentiation from the civilian population is rarely possible. Moreover, the use of covert tactics and the targeting of civilians would amount to contravention of the laws of war.

The US government has declared that despite the fact that Taliban and Al Qaeda detainees do not qualify for POW status they will continue to be treated in a manner consistent with the principles of the Convention and as such will be accorded many POW principles as a matter of policy.[14] However, an important effect of the enemy combatant classification is the fact that under a military order issued by President Bush on November 13th 2001, any individual who is or was a member of Al Qaeda, has engaged in, aided or abetted or conspired to commit acts of international terrorism or has knowingly harboured one or more such individuals shall be subject to trial by

[13] *Status of Detainees at Guantanamo,* US Department of State Fact Sheet, 7th February 2002, available at http://www.state.gov/p/sa/rls/fs/7910.htm

[14] Ibid. Included amongst the privileges not extended to the detainees are: access to a canteen to purchase food, soap, and tobacco, a monthly advance of pay, the ability to have and consult personal financial accounts and the ability to receive scientific equipment, musical instruments, or sports outfits.

military commission.[15] The detention of those held at Guantanamo Bay is currently pending before the Supreme Court and will be dealt with in the following section, however, the denial of POW status to Taliban fighters and members of Al Qaeda is relevant to the consideration of US citizens detained in the United States as enemy combatants.

Yaser Esam Hamdi, a US citizen born in Louisiana, was captured in Afghanistan allegedly fighting for the Taliban shortly after the attacks of September 2001. He was taken to Guantanamo Bay and then transferred to detention in the United States when it was discovered that he may not have renounced his American citizenship. In contrast, Jose Padilla, was arrested in Chicago's O'Hare airport in May 2002. Suspected of plotting with Al Qaeda to detonate a radioactive bomb in the United States, he was transferred to military custody as a "grave danger to the national security."[16] Both arguably fall within the terms of the November 13th military order, Hamdi as an alleged member of the Taliban and Padilla as an individual who is alleged to have conspired to commit acts of international terrorism with the aim of causing injury or adverse effects to the US and its citizens, if not as a member or former member of Al Qaeda. However, the fact of their American citizenship exempts them from trial by military commission for their alleged crimes[17] and instead places them in legal limbo where they have been held since their capture without any of the constitutional protections normally accorded US citizens. Indeed classification of Hamdi and Padilla as enemy combatants has placed them outside the protection of the Constitution. This stands in contrast to the position of John Walker Lindh or indeed even the alleged 20th hijacker, Zacarius Moussaoui, a French national, who both find themselves ensconced within the criminal justice system subject to the constitutional protections inherent therein.

The Hamdi and Padilla cases raise many similar issues, with both challenging the lawfulness of their detention through a habeas corpus petition and seeking an order for access to counsel. However, the cases have been dealt with very differently and

[15] Military Order, n. 1 above.
[16] T. Frieden (2004) US to ask Supreme Court to block release of suspected terrorist, www.cnn.com, January 7th 2004.
[17] Military Order, n. 1 above section 2(a).

have been confined to their individual facts which has resulted in confused jurisprudence that has been left to the Supreme Court to clarify.

Detention of US Citizens

Hamdi v Rumsfeld

Following his transfer from Guantanamo Bay, Cuba to the Norfolk Naval Station Brig, Virginia in April 2002, Hamdi's father, Esam Fouad Hamdi, filed a petition for a writ of habeas corpus[18] seeking, *inter alia,* an order for access to counsel. This was so ordered by the District Court for the Eastern District of Virginia. This decision was reversed on appeal by the government to the Fourth Circuit Court of Appeals on the grounds that the District Court failed to give proper weight to matters of national security or foreign policy or sufficient considerations to the implications of such an order. The Court of Appeal remanded the case back to the lower court for further proceedings to establish whether Hamdi could properly be classified as an enemy combatant. In so doing the court acknowledged the deference due the political branch regarding military decisions made in the course of combat operations. However it refused to dismiss the petition as requested by the government stating that to do so would be to embrace "...a sweeping proposition -- namely that, with no meaningful judicial review, any American citizen alleged to be an enemy combatant could be detained indefinitely without charges or counsel on the government's say-so."[19]

In its consideration, the District Court was instructed by the Court of Appeals to consider the sufficiency of an affidavit from Michael Mobbs, Special Advisor to the Under Secretary of Defense for Policy,[20] regarding the seizure of Hamdi and his classification as an enemy combatant, as justification for its continued detention and denial of constitutional protections of Hamdi. Whilst acknowledging the deference to which the executive is entitled with regard to military designations of individuals and the responsibility of the government to protect against further unprovoked attack, the court sought to balance this against the importance of meaningful judicial review

[18] *Hamdi v Rumsfeld* 243 F. Supp. 2d 527 (E.D. Va 2002) (No. 2:02cv439) (entered June 11th 2002).
[19] *Hamdi v Rumsfeld* 296 F. 3d 278 (4thCir. 2002).
[20] Hereinafter the Mobbs declaration.

when such designations substantially encroach upon the constitutionally guaranteed rights of US citizens.[21] "It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties…which makes the defense of the Nation worthwhile."[22]

Having found that Hamdi was entitled to due process of law as provided by the Fifth Amendment, the court found that rather than enabling "meaningful judicial review" as contended by the government, the Mobbs declaration amounted to "…little more than the government's "say-so" regarding the validity of Hamdi's classification as an enemy combatant."[23] To accept the assertion in the Mobbs declaration that Hamdi's classification as an enemy combatant is justified, without access to further information such as statements made by Hamdi, notes taken from interviews with him or the screening criteria used for establishing status, would, according to the court, "…abdicate any semblance of the most minimal level of judicial review…[and would amount to] little more than a rubber-stamp."[24] For this reason the District Court refused to find that the government was justified in declaring Hamdi to be an enemy combatant on the basis of the Mobbs declaration and made an order for additional information to be produced.

On appeal the Fourth Circuit remanded the case with directions to dismiss the petition.[25] In contrast to the searching enquiry attempted by the District Court into the circumstances of Hamdi's capture and detention and the materials regarding his enemy combatant status, the Fourth Circuit took a much more deferential approach. Whilst reiterating the fact that the detention of US citizens must be subject to judicial review,[26] citizenship was stated not to affect the legality of a citizen's detention as an enemy combatant: "[c]itizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful."[27]

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[21] *Hamdi v Rumsfeld* 316 F. 3d 450, 462 (4th Cir. 2003).
[22] *Ibid.* quoting from *US v Robel* 389 US 258, 264 (1967).
[23] 342 F. Supp. 2d 527, 535 (E.D. Va 2002).
[24] 316 F. 3d 450, 462 (4th Cir. 2003).
[25] No. 02-7338 January 8th 2003.
[26] *Ibid.* p. 464.
[27] *Ibid.* p. 475 quoting from Ex parte *Quirin* 317 US 1, 37 (1942).

In its consideration of the sufficiency of the Mobbs declaration as justification for Hamdi's detention, the District Court found that meaningful judicial review of Hamdi's detention, at a minimum, must consider whether the government's classification was made pursuant to appropriate authority, whether the criteria used to detain a US citizen on American soil met sufficient procedural requirements so as to be consistent with the Fifth Amendment's prohibition against governmental deprivation of life, liberty or property without due process of law, the basis on which it has been determined that the continued detention of Hamdi without charges or access to counsel serves national security and whether a different process is required by the Geneva Convention or the Joint Services Regulations. However, the Fourth Circuit found that its responsibilities to review Hamdi's detention would be fulfilled simply by identification of the source of the authority relied on by the executive to detain the individual and then consideration of the basic facts relied upon to support a legitimate exercise of that authority. Both avenues of inquiry were easily satisfied by the government. Legal authority was found in the President's war powers as provided in Article II section 2 of the Constitution: "The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several states, when called into the actual Service of the United States."[28] With regard to factual justification for the use of the President's war powers to detain a US citizen, the Mobbs declaration was found to be sufficient, despite the District Court's concern that to accept the affidavit without further information would amount to "little more than a rubber stamp" as opposed to meaningful judicial review.

Padilla v Rumsfeld

Jose Padilla was arrested on May 8th 2002 on a material witness warrant[29] in order to secure his testimony before a grand jury proceeding. Padilla filed a petition for a writ of habeas corpus following a presidential order on June 9th 2002 designating him as an enemy combatant[30] due to that fact that he was deemed to represent "...a continuing, present and grave danger to the national security of the United States, and

[28] Article II Section 2 US Constitution.
[29] 18 USC 3144.
[30] Available at http://news.findlaw.com/hdocs/docs/padilla/padillabush60902det.pdf

detention…is necessary to prevent him from aiding Al Qaeda in its efforts to attack the United States or its armed forces, other government personnel, or citizens;"[31]

Despite finding that Padilla had no Sixth Amendment right to counsel on the ground that as a detainee of the Department of Defense he is not an "accused" in a "criminal proceeding," the District Court for the Southern District of New York held that he be allowed to consult with counsel for the purpose of prosecuting his habeas petition, as opposed to a general right to counsel. This was based on the fact that Padilla had the right to make fact-based arguments as provided in the Habeas Corpus statutes. Indeed 18 USC 2243 (2000) provides that "The applicant or the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts." Furthermore, 18 USC 3006A(2)(B) provides that a court hearing a habeas petition may appoint counsel for the petitioner if "the interests of justice so require." The District Court stated: "Padilla's need to consult with a lawyer to help him do what the statute permits him to do is obvious."[32] The decision of the Fourth Circuit in *Hamdi v Rumsfeld*[33] reversing the order of the District Court providing unmonitored access to counsel, was deemed not to impact on the decision in *Padilla.* This was for the reason that equivalent access was not granted as well as the fact that Padilla had been allowed access to counsel following his arrest as a material witness, prior to his enemy combatant designation "…and thus no potential prophylactic effect of an order barring access by counsel could have been lost."[34]

On appeal to the Second Circuit[35] the court departed dramatically from prior decisions in both Hamdi and Padilla. It held that Padilla's detention was not authorized by Congress, and absent such authorization, the President did not have the power under Article II of the Constitution to detain an American citizen detained on US soil outside a zone of combat as an enemy combatant. As a result of this the court remanded the case to the District Court with instructions to issue a writ of habeas corpus directing Secretary Rumsfeld to release Padilla from military custody within 30 days.

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[31] *Ibid.* para 5.
[32] 233 F. Supp. 2d 564, 602 (S.D.N.Y. 2002).
[33] 296 F. 3d 278 (4th Cir. 2002).
[34] 233 F. Supp. 2d 564, 602 (S.D.N.Y. 2002).
[35] *Padilla v Rumsfeld* Docket Nos. 03-2235 (L); 03-2438 (Con.) Decided: December 18, 2003 (2nd Cir. 2003).

The circumstances of seizure and detention in both cases and the fact that the courts have stipulated that the judgments are limited to the specific facts of the case in question, has resulted in both cases being heard separately before the Supreme Court. However, a petition to expedite consideration of Padilla's case was granted, given the related issues and matters of fundamental importance, so that it could be heard on the same day as Hamdi's petition.[36]

Fundamental to these cases is President Bush's designation that both Hamdi and Padilla are enemy combatants, thereby placing them outside the protection offered by the Constitution. Therefore, the authority of the President to make such a classification has been called in to question, with the Court of Appeals in both cases reaching opposing decisions on this crucial point. Under the separation of powers doctrine, the law making function of government rests with Congress, therefore the President must demonstrate that the power to indefinitely detain citizens has been granted by Congress or is inherent in the constitutionally provided war powers. The latter is contended by the government, and indeed was accepted by the Fourth Circuit. It is the case that capture and detention of both lawful and unlawful combatants are an integral part of war,[37] and Hamdi was indeed captured on the ground in Afghanistan, although his incommunicado detention in a different country almost three years later certainly raises some questions. In contrast Padilla was detained on US soil, far from any zone of combat and was initially detained as part of the criminal justice system as a material witness. To describe his seizure and detention as an exigency of war can certainly be argued as taking advantage of the war on terror so as to seemingly designate the United States as a zone of combat. Use of the enemy combatant classification to deprive a citizen of his due constitutional rights creates a precedent which has the potential to affect thousands of people and damage the credibility of the United States internationally.

[36] See Motion to Expedite Consideration of Petition for Certiorari and to Establish Expedited Schedule for Briefing and Argument if Certiorari is Granted, available at http://news.findlaw.com/hdocs/docs/padilla/rumspad11604usmot.pdf

[37] *Ex parte Quirin* 317 US 1, 31 (1942).

The Fourth Circuit Court of Appeals took the view that the Mobbs declaration[38] was sufficient to confirm that Hamdi's detention is in accordance with a legitimate exercise of the war powers provided under article II, section 2 of the Constitution. Moreover, the Fourth Circuit emphasised the deferential position of the Courts in reviewing the exercise of the President's constitutionally allocated war powers due to the view that the Constitution does not specifically contemplate any role for the courts in the conduct of war.[39] In contrast, the Second Circuit Court of Appeals, in considering the seizure and detention of a citizen on US soil, found that a fundamental role exists for the courts where the exercise of the Commander in Chief power is challenged on the ground that it collides with the powers constitutionally assigned to Congress[40]

The Second Circuit utilized the threefold framework established by Jackson J in *Youngstown Sheet & Tube Co. v Sawyer*[41] for reviewing the validity of action by the executive. First, when the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. Second, when the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is some degree of overlap in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Finally, when the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject.[42] The Second Circuit correctly found that the detention of Padilla fell within Jackson J's third category. This was due to the finding that the existence of the "Non-Detention Act," which provides that "No citizen shall be imprisoned or otherwise detained by the

[38] The affidavit from the Special Advisor to the Under Secretary of Defense for Policy, Michael Mobbs.
[39] *Hamdi v Rumsfeld* 316 F. 3d 450, 474 (4th Cir. 2003).
[40] *Padilla v Rumsfeld* 352 F. 3d 695, 713 (2nd Cir. 2003).
[41] 343 US 579 (1952). In order to avert a nation-wide strike of steel workers which he believed would place national security at risk, President Truman issued an Executive Order, based upon the powers conferred by the Constitution as President and Commander in Chief, directing the Secretary of Commerce to seize and operate the steel mills.
[42] *Ibid.* pp. 637-638

United States except pursuant to an Act of Congress"[43] amounted to an "explicit congressional denial of authority"[44] and therefore placed the seizure and detention of American citizens on US soil within the third category of *Youngstown.* The government contended that the power to detain Padilla derives from the inherent power of the Commander in Chief under article II section 2. However, for the President to order the detention of a citizen amounts to a usurpation of the law-making power of Congress and therefore violates the separation of powers doctrine. This was agreed by the court which found that whilst Congress may have the power to authorize the detention of American citizens under the circumstances of Padilla's case, the President, acting alone, does not.[45]

A compelling argument voiced in both cases against an executive power to detain citizens is founded on the existence of section 4001(a) of Title 18 of the US Code. This was enacted in 1971 in an attempt to purge American history of the taint of the internment of Japanese-American citizens, on the basis of Executive Order 9066, during World War II. Section 4001(a) came to be enacted as part of the repeal of the Emergency Detention Act 1950[46] which authorized executive detention in time of war or internal security emergency of those "as to whom there is reasonable ground to believe...will engage in, or probably will conspire with others to engage in, acts of espionage or of sabotage."[47] However, repeal of the provision would have removed it from the statute books, and in its place left a void reminiscent of that which existed prior to 1950. Rather, a clear congressional statement on detention of citizens as opposed to silence would, under *Youngstown*, strengthen protection against executive internment. This desire to increase congressional control over the detention of US citizens certainly stands as an obstacle to the governmental contention that the President's Commander in Chief powers override the provision of section 4001(a) and the requirement of congressional authorisation.

In both cases the government contended that section 4001(a) pertains only to civilian rather than military detentions. It is asserted that the intention of the repeal of the

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[43] 18 USC 4001(a).
[44] 352 F. 3d 695, 712 (2nd Cir. 2003). Internal quotation marks omitted.
[45] *Ibid.*
[46] 50 USC 811-826 (repealed 1971).
[47] Emergency Detention Act 1950 section 103(a).

Emergency Detention Act was to limit the authority of the Attorney General, as a civilian, to authorise the internment of civilians. This is said to be supported by the placement of section 4001(a) in Title 18 of the United States Code, codifying the law on crimes and criminal procedure. Furthermore, section 4001(b)(1) reads "[t]he control and management of Federal penal and correctional institutions, except military or naval institutions, shall be vested in the Attorney General, who shall promulgate rules for the government thereof, and appoint all necessary officers and employees in accordance with the civil-service laws, the Classification Act, as amended, and the applicable regulations"[48] and it is this specific exclusion of military and naval institutions which the government contends may also be read in to subsection (a). Furthermore, weight was given to the decision in *Quirin* which established that "[c]itizenship in the United States of an enemy belligerent does not relieve him from the consequences of [his] belligerency."[49] It was contended that Congress would have made its intentions explicit had it sought to overrule this precedent and provide a bar to the seizure and detention of American citizens.[50]

The Second Circuit in *Padilla* was not persuaded by the assertion that the placement of section 4001(a) in Title 18 restricted its reach to civilian detentions, stating "[n]o accepted canon of statutory interpretation permits "placement" to trump text, especially where, as here, the text is clear and our reading of it is fully supported by the legislative history."[51] The Court also rejected the argument with regard to section 4001(b)(1) on the grounds that it had been enacted long before subsection (a) and consequently shared nothing more than a "common code designation." Moreover, the court found that the absence of any such distinction in section 4001(a) could be read to mean that it applies to both civilian and military detentions.[52] The most persuasive argument that section 4001(a) prohibits military as well as civilian detention of all citizens, absent congressional authorisation, aside from the intention on enactment to limit the executive power of arbitrary internment, can be found in the case of *Howe v Smith.*[53] In this case, the Supreme Court stated that the "...plain language of section

[48] 18 USC 4001(b)(1).
[49] 317 US 1, 37 (1942).
[50] 316 F. 3d 450, 468 (4th Cir. 2003).
[51] 352 F. 3d 695, 721-722 (2nd Cir. 2003).
[52] *Ibid.*
[53] 452 US 473 (1981).

4001(a) proscrib[es] detention of *any* kind by the United States, absent a congressional grant of authority to detain."[54]

Regardless of whether the power to detain citizens indefinitely can be said to form an inherent part of the President's Commander in Chief powers, the government asserts that such detention is lawful under section 4001(a) as provided under the Joint Resolution for the Authorization for Use of Military Force.[55] Section 2 states that "...the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harboured such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." The phrase "...*all* necessary and appropriate force..." is said to necessarily include the capture and detention of any and all hostile forces arrayed against US troops."[56] The Second Circuit Court of Appeals in finding that the plain language of the Joint Resolution contains nothing authorising the detention of American citizens captured on US soil, stated that it may be possible to infer a power of detention in the battlefield context.[57] This is seemingly correct given the important role played by battlefield detentions as part of the exigencies of war. Moreover, it seems unlikely that Congress would authorise the indefinite detention of American citizens in anything less than an explicit fashion, given the stain left on American history by the World War II detention of Japanese-Americans and the subsequent desire to make amends with those affected by way of reparations under the 1988 Civil Liberties Act.

Of crucial distinction between the cases of *Hamdi* and *Padilla* is location; indeed there is a vast difference between capture and detention in a zone of combat for the duration of hostilities and seizure and detention thousands of miles away on US soil when the alleged threat posed cannot be said to be imminent. However, whilst it may be possible to argue that the initial detention of *Hamdi* in order to prevent him returning to aid the enemy is both necessary and lawful, this is far removed from the

[54] *Ibid.* p. 476. Emphasis added.
[55] Pub. L. No. 107-40, 115 Stat. 224 (2001) September 18th 2001.
[56] *Rumsfeld v Padilla* Petitioners Brief on Petition for a Writ of Certiorari p. 15 available at http://news.findlaw.com/hdocs/docs/padilla/rumspad11604certpet.pdf
[57] 352 F. 3d 695, 723 (2nd Cir. 2003).

deprivation of due process and incommunicado detention he has been subjected to since his initial detention and subsequent transfer to the United States. Indeed notwithstanding the initial place of capture, both *Hamdi* and *Padilla* are in comparable positions with regard to their indefinite detention within the United States without access to counsel or due process guarantees.

It can be contended that the power to detain is a part of the Joint Resolution as a logical corollary to the power to use military force. This may be superficially attractive, particularly with regard to battlefield detentions as part of the President's war powers, however indefinite detention of citizens on American soil is precisely what section 4001(a) was enacted to prevent. Indeed, the purpose of section 4001(a) was to require clear congressional authorisation for the detention of citizens and to infer this power from a vague Act of Congress defeats this purpose entirely. Moreover, in the past the Supreme Court has declined to read broad executive powers of detention into military authorisations absent a clear declaration of the power claimed: "We must assume, when asked to find implied powers in a grant of legislative or executive authority, that the law makers intended to place no greater restraint on the citizen than was clearly and unmistakably indicated by the language they used."[58] Even if the Joint Resolution could be said to act as congressional authorisation for detention it could only be deemed so with regard to battlefield detentions, and not detention of citizens seized on US soil or indeed to authorise the denial of a citizens' constitutional rights following capture in a zone of combat. The use of this power of indefinite detention against citizens within the borders of the US represents a serious infiltration of the Commander in Chief's war powers into the domestic arena and as such violates the separation of powers doctrine: "Congress, not the Executive, should control utilization of the war power as an instrument of domestic policy."[59]

Governmental arguments of national security are of course with merit and detention of those fighting for the enemy in a zone of combat is a necessary and appropriate action in wartime so as to prevent the detainee returning to fight for the enemy.

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[58]*Ex Parte Mitsuye Endo* 323 US 283, 300 (1944) See also *Duncan v Kahanamoku* 327 US 304 (1946).
[59] *Youngstown Sheet & Tube Co. v Sawyer* 343 US 579, 644 (1952).

However, it would be a massive exaggeration of the notion of judicial deference to government in times of national security crisis for the Supreme Court to allow indefinite and incommunicado detention of citizens without recourse to the courts. Moreover, this is particularly so given the fact that the nature of the war on terror is such that those detained as enemy combatants could conceivably be held for the duration of their lives. The argument that those detained during previous conflicts were also held for the foreseeable future, is one which cannot be applied to detainees of the current war. Firstly, due to the predictable longevity of eradicating the world of terrorism and the fact that it is a war fought against many enemies on many fronts and secondly the detainees of prior conflicts would have been subject to the protections of the Geneva Conventions due to their POW status, something denied to both Hamdi, Padilla and those detained at Guantanamo Bay.

Hamdi's battlefield capture and subsequent detention is accepted as an exigency of war. The fact that he is a citizen does not prevent this. Indeed, in *In Re Territo*[60] the Ninth Circuit Court of Appeals affirmed that a United States citizen fighting against the US for the Italian army could lawfully be held within the United States as a prisoner of war.[61] As discussed previously, citizenship does not prevent classification as an enemy combatant. However, the creation of this legal limbo in which POW status has been denied Hamdi and both he and Padilla have been deprived of due process is simply a means of circumventing both the Constitution and the criminal justice system. It is this isolation from all pretence of justice which makes any comparison drawn with *Quirin* unpersuasive. Whilst the cases may be superficially similar, the defendants in *Quirin*, though classified an enemy belligerents were afforded due process rights, such as access to counsel and an independent hearing, far beyond that experienced by both Hamdi and Padilla. Moreover, whilst the defendants in *Quirin* were self-confessed combatants working for an enemy government, Hamdi continues to dispute his enemy combatant status. Ironically however, while he is denied the opportunity of a hearing he is unable to disprove the main contention which keeps him detained in this way.

[60] 156 F. 2d 142 (9th Cir. 1946).
[61] *Ibid.* pp. 146-147.

The decision of the Fourth Circuit that what constitutes a zone of combat and who should be classified as an enemy combatant remain matters for the executive bestows a power to detain on the government which is essentially without limit. Indeed, in the case of US citizens, the executive has moved from detention of a citizen fighting for the enemy in a zone of combat, to indefinite and incommunicado detention of that citizen far removed from the battlefield, and then further to the preventive detention of a citizen suspected of plotting a terrorist attack. The fact that no charges have been brought against Padilla in the two years since his seizure is indeed telling and demonstrates the preventive rather than punitive nature of his detention.

Whilst it is contended that as a combatant to hostilities Hamdi will be released when US troops no longer have a role to play in Afghanistan, the reality is very different. Hamdi, in the same way as the detainees held in Cuba, has not been afforded POW status and therefore the protection of the Geneva Convention and as such his prompt repatriation following the cessation of hostilities will not necessarily be honoured.[62] For the hundreds of detainees on whose behalf legal action has not been brought permanent detention is a very real possibility. In the case of Padilla, the disparate nature of Al Qaeda and the fact that the US may never be in a position to declare that the organisation no longer poses a threat means that his preventive detention may similarly never cease. The importance of judicial oversight and due process in these cases is clear.

Detainees at Guantanamo Bay, Cuba

The term enemy combatant has also been utilized in regard to foreign nationals detained as part of the war on terror in Guantanamo Bay, Cuba. Since 2001 nearly 700 people from 42 countries have been incarcerated there. Despite the release of some, the vast majority remain.

Described as "a prison beyond the law"[63] the establishment of this detention facility in Cuba was one of quite specific design. Whilst it could have been established

[62] Geneva Convention relative to the Treatment of Prisoners of War article 118.
[63] J. Margulies, *A Prison Beyond the Law,* Virginia Quarterly Review available at http://www.virginia.edu/vqr/page.php/prmID/59

essentially anywhere, the choice of Guantanamo Bay was no accident. It was leased to the United States on a permanent basis on February 23rd 1903, following its occupation by the States at the end of the Spanish-American War. America offered to end the occupation on the condition that the Cuban government "sell or lease to the United States the lands necessary for coaling or naval stations" and Guantanamo Bay has, under the terms of an indefinite lease, been in American hands ever since. For the annual price of $4,085, a sum that is never cashed by the Cuban government, the United States exercises complete jurisdiction and control over and within the area, whilst ultimate sovereignty rests with the Republic of Cuba.[64] It is this anomaly which means that Cuban law is inapplicable within the marked boundaries, whilst the territory is also beyond the jurisdiction of the US courts.

Rasul v Bush, Al Odah v United States

The Supreme Court is currently considering the consolidated cases of *Rasul v Bush* and *Al Odah v US*[65] which concern the legal actions of fourteen petitioners: two Australian citizens and twelve Kuwaiti citizens. All have been detained at Guantanamo Bay since early 2002 and have, through "next friends,"[66] challenged the legality of their detention given their assertions that they have never been combatants against the US, nor engaged in terrorist acts, and have not been charged with any offence or allowed access to counsel or any court or tribunal. The question which both cases pose is whether United States courts lack jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at Guantanamo Bay?

Both the District Court and the Court of Appeals for the District of Columbia circuit held that the habeas petitions of the detainees could not be heard for lack of jurisdiction. This was premised on the Supreme Court case of *Johnson v*

[64] Article III Agreement Between the United States and Cuba for the Lease of Lands for Coaling and Naval stations; February 23, 1903.
[65] *Rasul et al. v Bush* No. 03-334. This case was decided on June 28th 2004. The decision of the Supreme Court is discussed in the addendum to this chapter.
[66] A petitioner who is unable to act on his own behalf is permitted by federal law to file a petition for habeas corpus through a close friend or relative as a "next friend." 28 USC 2242.

Eisentrager[67] which concerned the habeas corpus petitions of 21 German citizens who had been captured by US forces in China, tried and convicted of war crimes by an American military commission in Nanking, and incarcerated in occupied Germany. The court held that United States courts lack jurisdiction to entertain the habeas claims of aliens detained outside the sovereign territory of the United States. This forms the basis of the government's contentions in both cases.

The Supreme Court found six points to be determinative in *Eisentrager*, namely that the detainees were (a) enemy aliens who (b) had never been or resided in the United States, (c) they were captured outside the territory of the United States and held there in military custody as POWs. Further, they were (d) tried and convicted by a military tribunal sitting outside the United States for (e) offences against the laws of war committed outside the States and (f) imprisoned at all times outside the US.[68] The government contends that "the Guantanamo detainees are in all material respects indistinguishable from the prisoners in *Eisentrager*"[69] due to the fact that they are aliens with no connection to the United States who were taken into the custody of the US military abroad and are being held outside the sovereign territory of the United States. However, it is possible to discern some fundamental differences between the detainees in Guantanamo Bay and those in *Eisentrager*. It was noted by the Court of Appeals in *Rasul,* that the label of "enemy aliens" in *Eisentrager* was appropriate, not because the detainees had been convicted of war crimes, but because they were nationals of a country at war with the US. This can be contrasted with the Guanatanmo detainees because some are citizens of countries with which the United States is allied. The government contend that the term "enemy alien" applies to any forces engaged in combat against the United States, stating that "nothing in *Eisentrager* suggests that an "enemy alien" is limited to a national of a country that has formally declared war on the United States."[70] However, to follow this argument would create a broad power, exercisable at the discretion of the executive. Moreover, of crucial importance is the fact that all the petitioners in *Rasul* assert that they have never been combatants against the United States or ever engaged in acts of terrorism.

[67] 339 US 763 (1950).
[68] *Ibid.* p. 777.
[69] Brief for the Respondents in Opposition p. 12 available at
http://supreme.lp.findlaw.com/supreme_court/briefs/03-334/03-334.resp.pdf
[70] *Ibid.* p. 14.

It is for this very reason that access to some form of independent hearing or tribunal is imperative. Presently, the detainees appear to be denied the opportunity to disprove the main allegation which keeps them detained.

A further reason to distinguish *Eisentrager* is on the basis that the detainees there were convicted criminals, who had been tried by military tribunal subject to the requirements of due process. This stands in contrast to the petitioners in *Rasul* who have been detained for over two years without trial, or access to counsel. They have also been denied the opportunity of a hearing under article 5 of the Geneva Convention in order to establish their correct status under international law. Whilst the action in *Eisentrager* was an attempt to seek some kind of justice through the civilian courts, provision of a military tribunal, removed from the protections and procedures of criminal justice, would be a step forward in the case of those detained in Cuba.

To deny the application of the writ of habeas corpus to the Guantanamo detainees strips the writ of its purpose, which is acknowledged as being "...to relieve detention by executive authorities without judicial trial."[71] Moreover, the point of the writ is to examine the basis of executive detention to which anybody can be subjected, regardless of birth or nationality. In this case, of importance is the fact that hundreds of people are *detained by executive fiat*, not that hundreds of *aliens* are so detained. This is reflected in the habeas corpus statute contained in 28 USC 2241which refers to a prisoner, regardless of citizenship, held in custody under or by colour of the authority of the United States in violation of the Constitution or laws or treaties of the United States.[72] It is submitted that the argument that habeas corpus is inapplicable because the detainees were seized abroad and have since been detained beyond the territory of the US lacks merit. With regard to the argument concerning the status of Guantanamo Bay, the Solicitor General, Theodore Olson, has previously described the area as within the "territorial jurisdiction" of the United States and "under exclusive United States jurisdiction."[73] Furthermore, an opinion, albeit divided, of the

[71] *Brown v Allen* 344 US 433, 533 (1953).
[72] 28 USC 2241(c).
[73] 6 Opinions of the Office of Legal Counsel of the Department of Justice Counsel 236, 242 (1982) (opinion of Asst. Attorney General Olson). Petitioners brief on the merits *Rasul* p. 43 available at http://supreme.lp.findlaw.com/supreme_court/briefs/03-334/03-334.mer.pet.pdf

Ninth Circuit has found that "at least for habeas purposes, Guantanamo is a part of the sovereign territory of the United States."[74] Essentially, if the Supreme Court were to find in favour of the government it would gut the writ of habeas corpus of all meaning, given that its role has never been more necessary, as well as providing a varnish of judicial legitimacy to this form of executive detention. Moreover, a finding that US courts lack jurisdiction to hear the claims of the detainees would essentially amount to an acknowledged suspension of the writ of habeas corpus by way of executive fiat and thus a violation of the separation of powers doctrine. Article II section 9 clause 2 of the Constitution provides that suspension of the writ may only occur by way of congressional authorization and the Supreme Court has often reiterated the requirement of a clear and unambiguous statement of congressional intent to repeal habeas jurisdiction.[75] This cannot be said to be the case here. Ambiguity surrounds the Authorisation for the Use of Military Force and whether a power of detention is thereby conferred, it can be categorically said that no congressional pronouncement regarding suspension of the writ has been made.

The Fifth Amendment provides that "No person shall be deprived ... of...liberty...without due process of law..." however a constitutional right of action for the Guantanamo detainees may be undesirable. Indeed, the Supreme Court has previously rejected the notion that aliens are entitled to certain constitutional protections, such as the Fifth Amendment, outside the sovereign territory of the US.[76] It may be possible to make a successful argument regarding the position of Guantanamo Bay as part of the sovereign territory of the United States. However, in *Harris v McRae*[77] it was said that when a case may be decided on either constitutional or non-constitutional grounds, the latter should be preferred, and so it is more likely that the Supreme Court will find a statutory right to habeas corpus under section 2241, as opposed to a constitutional right, as the Second Circuit did with regard to the right to counsel in the case of *Padilla.*

[74] *Gherebi v. Bush* 352 F.3d 1278, 1290 (9th Cir. 2003).
[75] *INS v St. Cyr* No. 00-767. Decided June 25, 2001.
[76] See *US v Verdugo-Urdiquez* 494 US 259, 269 (1990), See also *Zadvydas v Davis* 533 US 678 (2001).
[77] 448 US 297, 306-307 (1980).

The establishment of a detention facility in a territory where "ultimate sovereignty" resides with the government of another country in an attempt to place the detainees beyond the reach of US courts is one of semantic deception. The attempt to follow *Eisentrager* as closely as possible, has the effect that an area occupied continuously by the US for over one hundred years, where American law is applicable to anyone on the base[78] and prosecutions take place in Virginia, is incorrectly likened to wartime China. Termed the "Guantanamo fiction"[79] the suggestion that the "ultimate sovereignty" of Cuba means anything in practice is certainly an attempt by the US government to circumvent the notions of justice and the law by engaging a clause viewed by all, particularly the Americans, as essentially worthless. Indeed, were Cuba, as the ultimate sovereign, to attempt to assert its authority in and over Guantanamo Bay, it would be swiftly and categorically rejected by the US.

If the Supreme Court were to find in favour of the US government a dangerous precedent would be created, acknowledging the ability of the government to act outside the rule of law and beyond the scrutiny of the courts. Acceptance of the situation at Guantanamo Bay essentially lays the foundation for similar action by the government both in this regard and in other areas. Indeed, the normalisation of repression is a common side-effect of emergency measures. If indefinite and incommunicado detention without trial or due process is an acceptable government measure in the war on terror, it would arguably also be effective in, for example, the "war on crime", showing that acceptance as an emergency measure risks contamination of the whole criminal justice system.

Military Tribunals

On November 13th 2001 President George W. Bush issued a Military Order on the detention, treatment, and trial of certain non-citizens in the war against terrorism. This made provision for individuals subject to the order to be tried for violations of

[78] Marguiles, n. 63 above p. 5.
[79] *Ibid.*, p. 6.

the laws of war and other applicable laws by military tribunal.[80] The authority to establish military tribunals has been provided by Congress in 10 USC 821 and also forms part of the President's powers as Commander in Chief under the Constitution. Moreover, the Supreme Court has also acknowledged the jurisdiction of such tribunals with regard to trials for offences against the laws of war; "An important incident to the conduct of war is the adoption of measures by the military command not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war." [81] Concern can be expressed however, with regard to the breadth of the President's military order. Whilst it is possible to argue that the attacks of September 11th were acts of war and indeed that the Joint Resolution provides the President with authorisation to take action against the perpetrators of the attacks, the definition of to whom the order applies goes far beyond those involved in the September 11th attacks. For the purposes of the order a relevant individual is defined as a non-citizen with respect to whom there is reason to believe that he:

(i) is or was a member of the organization known as Al Qaeda;
(ii) has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefore, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or
(iii) has knowingly harboured one or more individuals described in subparagraphs (i) or (ii) of subsection 2(a)(1) of this order; and

(2) it is in the interest of the United States that such individual be subject to this order.

The extension of the order beyond those responsible for the 2001 attacks not only attempts to put in place a system of military justice for future acts of international terrorism, but also creates the potential that military tribunals will be used for offences which do not violate the laws of war. To use such tribunals for unrelated acts of

[80] Section 1(e) Military Order, *Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism,* Issued November 13th 2001, n. 1 above. The terms tribunal and commission are used interchangeably.
[81] *Ex parte Quirin* 317 US 1, 28-29 (1942).

terrorism also potentially places the President's action within the third category of *Youngstown,* given the fact that there is no congressional authorisation to use all appropriate and necessary force against anybody other than "those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks on September 11, 2001, or harboured such organizations or persons..." Moreover, the draft list of crimes released by the Department of Defense, can be said to show some intention to use these tribunals to try acts of terrorism unrelated to September 11th, given the inclusion of offences which were not committed on that day such as "employing poison or analogous weapons."[82]

In accordance with the order, on March 21st 2002, the Department of Defense issued the regulations which would govern the commissions.[83] The procedures outlined represent a process removed from the ordinary justice system. Indeed in answering whether the quality of justice envisaged for the Guantanamo detainees complies with minimum international standards for the conduct of fair trials, Lord Steyn stated "The answer can be given quite shortly: It is a resounding No."[84] The Secretary of Defense, Donald Rumsfeld, stated that establishment of a system which differs from both the federal court system and the military court system was the intended result so as to deal with the "unusual situation" at hand.[85] However it has been contended by critics of the tribunals that such a system is preferred by the government so as to avoid compliance with fundamental standards of procedural fairness, international legal requirements and constitutional due process requirements.[86] Moreover, the fact that access to the federal court system is precluded is of great concern given that the process starts with a designation by the president and ends with a requirement for his ultimate approval. This concern is heightened by the President's reference to the detainees at Guantanamo Bay as "killers,"[87] resulting in assertions that the outcome of

[82] Department of Defense, Military Commission Draft Crimes and Elements Instruction February 28th 2003 available at http://www.defenselink.mil/transcripts/2003/t02282003_t0228commission.html
[83] Department of Defense, Military Commission Order No. 1 March 21st 2002 available at http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf
[84] Lord Steyn, *Guantanamo Bay: The Legal Black Hole,* November 23, 2003 available at http://www.fcnl.org/civil_liberties/guantanamo.htm
[85] D. Rumsfeld, DoD News Briefing on Military Commissions, March 21st 2002, available at http://www.defenselink.mil/transcripts/2002/t03212002_t0321sd.html
[86] See Statement In Opposition To The Use of the Military Commissions Authorized by President Bush and the Department of Defense available at http://www.cnss.org/somc.doc
[87] Remarks by the President to the Travel Pool, March 20th 2002, available at http://www.whitehouse.gov/news/releases/2002/03/20020320-17.html

the tribunals is essentially pre-determined and as such that they represent an appearance of justice as opposed to an impartial search for the truth. To what extent such a procedure would be acceptable if it were applied to US citizens abroad is questionable.

The Department of Defense guidelines make provision for a commission which consists of at least three, but no more than seven officers, in the US armed forces, therefore with no independent fact-finding tribunal. A two-thirds majority of the commission must be satisfied beyond reasonable doubt to secure a guilty verdict, with a unanimous vote required with regard to a sentence of death. It is worth noting, however that even if found not guilty of the charges there is no guarantee of release, a reality acknowledged by the Department of Defense itself.[88] The regulations do provide legal representation for the accused. This may take the form of an appointed military officer, who is a judge advocate of one of United States armed forces, termed a "Detailed Defense Counsel" or the accused has the right to appoint his own civilian attorney, at his own expense, provided he has been deemed eligible for access to classified information.

Whilst the presumption is towards an open and public hearing, it is within the power of the commission to close all or some of the proceedings in order to protect classified or sensitive information, the physical safety of participants, intelligence or law enforcement sources, methods and activities or national security interests. In the event of such a determination, which given the breadth of the grounds for closure is a seemingly likely event, both the accused and his civilian counsel will be excluded from proceedings even if authorised to hear classified information. Detailed defense counsel cannot be so excluded. However anything presented during a closed session can not be disclosed to those excluded which has the effect that the accused and his civilian attorney may not even be aware of the evidence upon which the charges are based thereby hampering the ability to rebut the evidence and launch an effective defence. This is even more important given the fact that there is no limit as to what can be considered in evidence by the commission, the standard for admissibility being simply that it would have probative value to a reasonable person.

[88]DoD General Counsel William J. Haynes, DoD News Briefing on Military Commissions, n. 85 above.

No independent appellate procedure is provided for in the regulations. Provision for a three member review panel has been made, which shall review the record of the trial and can return the case for further proceedings if it is determined that a material error of law occurred. However, convictions and sentences are not final until approved by the President, or if so designated, by the Secretary for Defense as provided in section 4(c)(8) of the military order of November 13th 2001.

Use of the military tribunals is yet to occur, so it is not possible to assess their impact on the individual.[89] However, given the breadth of the military order there is the potential that their use will not be confined to the trial of those involved in the September 11th attacks. This would take their use outside the scope of Congress' Joint Resolution authorising the President to take action as well as usurping the role of the criminal justice system which has been used effectively to bring to justice perpetrators of both domestic and international acts of terrorism committed on American soil, without violating constitutional requirements of due process. The danger of military tribunals is heightened when combined with the fact that those potentially subject to the commissions are confined without rights and access to the outside world. Given the fact that it is possible and indeed likely that the majority, if not the totality, of the tribunals will be held in secret, abuse of the tribunals may well be an occurrence of which the outside world is unaware.

A vital point which must be made is the fact that there is no suggestion that the US cannot detain people as part of the war on terror. The point is simply that this cannot be done solely at the discretion of the executive without any recourse to the courts in order to establish the legality of the government's actions, and indeed to determine that those incarcerated deserve to be so for reasons objectively assessed by an independent tribunal. The current situation has been described as "...a monstrous failure of justice"[90] and this can only be rectified by the Supreme Court.

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[89] 4 arraignments took place in August 2004. The tribunals were then halted following a ruling by a federal judge that the government did not follow proper procedure to determine whether the individual concerned in the challenge, Salim Ahmed Hamdan, was a POW. If he was found to be a POW the appropriate forum for trial would be federal court and not a military tribunal. On 8th August 2005 the Appeals Court ruled against Hamdan. An appeal to the Supreme Court is currently pending.
[90] Steyn, n. 84 above.

Conclusion

Of crucial difference between Hamdi and Padilla is location and this issue is central to the question of the lawfulness of their initial capture. As an alleged participant in the hostilities in Afghanistan, Hamdi's seizure on the battlefield is authorised under the President's constitutionally provided war powers as Commander in Chief. These powers however, do not authorise the detention, under the enemy combatant classification, of a US citizen, already held in US custody.

However, the use of these powers in the domestic arena to ensure the indefinite detention of a US citizen who was already held in US custody, amounts to a clear usurpation of Congress' law making powers and is therefore a violation of the separation of powers doctrine. To suggest otherwise would give the executive an extremely broad discretion to designate essentially anywhere a zone of combat so as to utilise the enemy combatant classification and the power of indefinite detention. Furthermore, section 4001(a) demonstrates a clear congressional intention to prohibit such a form of executive detention of citizens. This section is also given force by the finding of the Supreme Court that absent clear congressional authorisation to detain, the section prohibits "any kind of detention by the United States..."[91] Whilst it is possible that a power of battlefield detention could be conferred from the Joint Resolution authorising use of military force which would undermine this argument with regard to Hamdi, the plain language of the Resolution provides no indication whatever that it should be treated as authorising the domestic detention of citizens by the executive, and as such a strong argument can be made that Padilla's detention is prohibited under section 4001(a). Moreover, whilst it may be found that Hamdi's battlefield capture is not prohibited by section 4001(a) due to a power of detention implied in the Joint Resolution, it cannot seriously be contended that his subsequent detention in violation of the Constitution has been similarly implied under the power to use appropriate and necessary force. Indeed, with regard to both Hamdi and Padilla, the nature of their detention and the denial of their constitutional rights essentially amounts to an abuse of the current hostilities, the enemy combatant classification and the notion of judicial deference. It is highly unlikely that the

[91] *Howe v Smith* 452 US 473 (1981).

Supreme Court would allow the current situation to continue. To find in favour of the government would not only consign Hamdi and Padilla to the potential for detention for the rest of their lives but would also render the relevant parts of the Constitution devoid of meaning. Indeed, more would be lost than the freedom of two men.

In answering the jurisdictional question posed in Rasul, there are legitimate grounds for the Supreme Court to decline to follow the precedent offered by the government in the form of *Eisentrager,* not least the fact that a strong argument can be made asserting that Guantanamo Bay is part of the sovereign territory of the United States. Moreover, in contrast to the detainees in *Eisentrager,* who were seeking further relief through the civilian courts having already been subject to a military hearing in which they had been afforded the requirements of due process, the petitioners in Rasul all protest their innocence. However, they will never get the opportunity to offer proof of their contentions, should the Court find that the US courts lack the necessary jurisdiction to hear any cases emanating from Cuba. The writ of habeas corpus exists to deal with situations such as this and denial of its application would essentially amount to acknowledgment of executive suspension of the writ.

A finding in favour of the government would create a dangerous precedent. Indeed, establishment of the detention facility in Guantanamo Bay represents an attempt by the government to deny the jurisdiction of the courts. This negates that which the Founders sought to achieve in establishing a tripartite system of checks and balances. In the words of James Madison "The accumulation of all powers, legislative, executive, and judiciary, in the same hands...may justly be pronounced the very definition of tyranny."[92]

Addendum

Since writing, the Supreme Court has ruled in the cases of *Hamdi v Rumsfeld*, *Padilla v Rumsfeld* and the consolidated cases of *Rasul v. Bush* and *Al-Odah v. United States.*

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[92] The Federalist No. 47, *The Particular Structure of the New Government and the Distribution of Power Among Its Different Parts,* February 1, 1788.

Hamdi v Rumsfeld

No. 03-6696. Argued April 28, 2004--Decided June 28, 2004.

A majority of the Supreme Court set aside the judgment of the 4th circuit Court of Appeals and remanded the case for further proceedings in the lower court. The majority confirmed the right of the government to detain US citizens as enemy combatants when they have been seized on the battlefield engaged in active hostilities. However, in doing so it was held that the approach of the 4th circuit afforded too little protection to Hamdi, and as such the court set out in general terms the due process to which a detainee such as Hamdi was entitled.

The majority found the Authorization for the Use of Military Force (AUMF) to be explicit congressional authorisation for the detention of individuals who are part of or support forces hostile to the United States or coalition partners on the basis that detention of those seized on the battlefield fell sufficiently within the conduct of military action with which the AUMF dealt. This therefore amounted to satisfaction of section 4001(a). It was stated that the AUMF does not authorise detention for the purpose of interrogation but rather for the purpose of preventing an enemy combatant from returning to the battlefield. While US forces remain in Afghanistan such detentions will form part of the use of necessary and appropriate force authorised by the AUMF. This however does not address the situation of a detained enemy combatant should the war on terror continue following a withdrawal of forces from Afghanistan. In addition, acceptance of the AUMF in satisfaction of the requirements of section 4001(a) results in a large discrepancy between Congress' treatment of alien terrorists on US soil and that of citizens such as Hamdi. Indeed the PATRIOT Act prescribes the process by which an alien terrorist may be detained in the United States, limiting detention to seven days without criminal charges being brought or deportation proceedings being commenced. Questions therefore arise with regard to whether Congress intended to authorise the detention of citizens through the vague terms of the AUMF which makes no mention of detention. There is however, a vast difference between the terms of enacted legislation and that of a resolution put in place only a few days after the attacks of September 11th. On the basis that detention is used for the purpose of preventing the return of a combatant to battle there is merit

to the majority's opinion that this is an inherent part of the use of force and therefore falls within the limits of the AUMF, as authorized by Congress.

The majority adopted the test as laid down in *Mathews v Eldridge*[93] as the balancing exercise to be performed on the competing interests of the individual and the government, namely consideration of "[f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the...burdens that the additional or substitute procedural requirement would entail." In performing this balancing act the majority necessarily considered the concerns of the government regarding the impact of additional process on the realities of combat and the practical difficulties of involving serving officers in litigation and felt them to have been properly taken into account in the due process analysis. Arguments that additional process will destroy the intelligence gathering function of detention were clearly dealt with by the majority on the basis that detention for such a purpose has not been authorised. However, intelligence gathering is likely to continue as part of such detention due to the importance of intelligence as part of the war on terror as well as due to the ease with which this purpose can be disguised as detention in order to prevent a combatant returning to hostilities.

With regard to the due process to which a citizen detainee is entitled it was held that such a detainee must receive notice of the factual basis for his classification as an enemy combatant. In addition, he must be given a fair opportunity to rebut the government's factual assertions before a neutral decision-maker. Recognition was given to the fact that the circumstances may be such to require enemy combatant proceedings to be tailored in order to alleviate the burden on the executive in times of ongoing combat. Indeed, it was suggested that hearsay may need to be accepted from the government as the most reliable available evidence, or that it may be possible that the standards articulated could be met by way of a properly constituted and authorised military tribunal. In addition, a presumption in favour of the government's evidence was suggested provided the presumption remained rebuttable and a fair opportunity

[93] 424 US 319, 335 (1976).

for rebuttal were provided. These suggestions were said to provide an innocent individual caught up in hostilities and believed to be an enemy combatant the chance to put forward evidence of his innocence and prove military error. These potential procedural compromises can be said to go some way to drawing the balance set out in *Mathews v Eldridge.* However, this degree of compromise all seems to rest on the side of the individual, resulting in a situation in which the alleged enemy combatant must prove his innocence in the face of documentary hearsay such as the Mobbs declaration whilst also deprived of the due process requirements of judge and jury. Yet in spite of this these proposals would of course represent an improvement to the situation in which Hamdi and other enemy combatants have been kept in recent years. This position reaffirms the important role of the courts in reviewing individual cases and upholding the separation of powers doctrine, contrary to the assertions of the government that the limited institutional capabilities of the courts should have the effect that review should take place under a very deferential standard. Indeed, in the face of its continued applicability the writ of habeas corpus allows the judicial branch to carry out such review and ensure this continued balance.

In its opinion the majority have attempted to strike a balance between interference with the individual's right to liberty without due process of law with the interest of the government in ongoing military hostilities and the safeguarding of the nation. However, the purpose of a petition for habeas corpus is to allow a detained individual to challenge the legality of his detention in order to secure his release should his detention be found to be in violation of the constitution or otherwise illegal. In this case, Hamdi's detention has been found to be entirely lacking in the requirements of due process and yet the court has remanded the case for further proceedings rather than order his release. This belated attempt at due process is not the purpose of the writ of habeas corpus and it denies Hamdi the benefit of the remedy he sought. However, the fact remains that this manipulation of the writ provides Hamdi with the best opportunity thus far of adducing evidence in an attempt to prove his innocence and gain release.

Following an agreement between US and Saudi officials, which precluded any hearing, Hamdi was released in October 2004 .

Rumsfeld v Padilla

No. 03-1027. Argued April 28, 2004--Decided June 28, 2004.

Further to previous discussion of this case, some amount of procedural background is required with regard to the Supreme Court ruling in this case. Jose Padilla was arrested in Chicago on May 8th 2002, pursuant to a material witness warrant issued by the District Court for the Southern District of New York. Following a month of detention in New York City, Padilla was transferred from civilian to military custody on the basis of a presidential order to Secretary of Defense Rumsfeld, which identified him as an "enemy combatant." On 9th June 2002, without the knowledge of his lawyer, Donna Newman, Padilla was transferred to a Navy Brig in Charleston South Carolina, where Commander Melanie Marr became his immediate custodian. On June 11th 2002, Newman filed a habeas petition, naming President Bush, Secretary Rumsfeld, and Melanie A. Marr, Commander of the Consolidated Naval Brig as respondents in the Southern District of New York, challenging the legality of his detention.

A majority of the Supreme Court reversed the decision of the 2nd Circuit Court of Appeals and remanded the case for further proceedings. It was held that the Southern District of New York, where Padilla's habeas corpus petition had been filed by his next friend, lacked jurisdiction over the matter. As a result of this the court did not rule on whether the President had the authority to detain Padilla as a US citizen within the United States.

The federal habeas statute provides that the proper respondent in such an action is "the person" having custody over the petitioner,[94] which is further defined as "the person" able to produce the detainee's body before the habeas court.[95] Due to the applicability of the immediate custodian rule in this case, it was held by the majority that the proper respondent was Commander Marr and that this was the case even though Padilla's detention arose from a military order rather than a criminal conviction. It was asserted on behalf of Padilla and accepted by the Court of Appeals

[94] Section 2242-2243.
[95] *Wales v Whitney* 114 US 564, 574.

that the immediate custodian rule has been relaxed in cases in which detention stems from something other than a federal criminal violation, in which case the proper respondent is the person exercising the "legal reality of control" over the petitioner. This contention was rejected by the majority. However, the case of *Ex parte Endo*[96] can be said to support this argument. In *Ex parte Endo* a Japanese-American citizen interned in California sought relief by filing a habeas corpus petition in the Northern District of California, naming her immediate custodian as respondent. Following the filing of the petition she was moved by the government to Utah with the result that her immediate custodian was no longer within the jurisdiction of the District Court. It was held by the Supreme Court, however that the Northern District of California acquired jurisdiction and that the removal of the petitioner did not cause the court to lose jurisdiction where the custodian remains within the district. It was held that the assistant director of the War Relocation Authority, who resided in the Northern District, would be an "appropriate respondent." This was distinguished however, on the basis that where the government removes a petitioner after she has properly filed a petition naming her immediate custodian, the District Court retains jurisdiction with regard to any respondent within its jurisdiction who has legal authority to bring about the detainee's release. In contrast, Padilla was moved to South Carolina before the petition was filed on his behalf and on this basis the Southern District of New York never acquired jurisdiction over his petition.

Had Ms Newman been kept fully informed with regard to the whereabouts of Padilla and the proceedings against him she would likely have filed the petition in New York prior to his transfer with the effect that Padilla's immediate custodian would have been present in New York at that time and would surely have been deemed to be Secretary Rumsfeld. Whether it can be asserted that the government deliberately misled Ms Newman or manipulated the situation in order to attempt to prevent a successful habeas petition cannot be said for certain, on the basis that there is no evidence that the government refused to provide information regarding Padilla's location or his immediate custodian. However as a lawyer appointed by the Southern District of New York, Ms Newman's ability to advise her client was curtailed by the government to the extent that further advice was not permitted until February 11th

[96] 323 US 283 (1944).

2004 and from that point has been at the discretion of the government. Moreover, it seems likely that any able lawyer appointed to represent an individual in such a precarious situation would, if unable to obtain adequate, if any, information regarding her client, would immediately file for habeas corpus in his last known location.

With regard to jurisdiction, the Habeas statute provides that District courts are limited to granting habeas relief "within their respective jurisdictions."[97] This has been interpreted as requiring that the court issuing the writ have jurisdiction over the custodian. In this regard, the traditional rule has always been that habeas petitions may be issued only in the district of confinement. Those in dissent asserted that the rule governing habeas jurisdiction is a flexible one and the important and unique nature of Padilla's detention should therefore result in the case being treated as an exception to the immediate custodian/respective jurisdiction rule. The creation of exceptions would potentially result in uncertainty in the District courts in determining whether to apply the traditional rule or attempt to find unusual circumstances which justify a departure from the norm. However, there is a degree of flexibility with regard to habeas jurisdiction, albeit there is no case in which a habeas petitioner has been permitted to challenge his present physical custody within the United States by naming as respondent someone other than the immediate custodian and filing the petition somewhere other than the district of confinement. It seems that any risk of uncertainty in the lower courts could have been dealt with by confining the ruling to the narrow and unusual facts of the case. Indeed, the court made clear from the outset in *Hamdi* that the ruling was limited to the narrow circumstances of US citizens captured on the battlefield and detained as enemy combatants. Surely a similar sort of proviso could also have been given in *Padilla* so as to ensure no wider detriment to the general habeas rule. Given the importance of the issues at stake in this case and the circumstances and length of Padilla's detention it seems as though jurisdiction could have been established for the Supreme Court to decide this issue in order to provide due process for Padilla and clarification of the position and rights of those detained in this way as well as wider certainty with regard to authorisation for such detention.

[97] 28 USC 2241(a).

Those in dissent, having found Secretary Rumsfeld to be the proper respondent, asserted that the petition was properly filed in New York on the basis of the decision in *Braden v 30th Judicial Circuit Court of Ky.*[98] In this case it was stated: "So long as the custodian can be reached by service of process, the court can issue a writ "within its jurisdiction" requiring that the prisoner be brought before the court for a hearing on his claim . . . even if the prisoner himself is confined outside the court's territorial jurisdiction."[99] This was distinguished by the majority however, on the basis that in a challenge to present physical detention such as this the immediate custodian rule is applicable and whilst the writ can be issued if the prisoner is outside the jurisdiction of the court, the case made no reference to a custodian served outside the jurisdiction of the court.

Due to the jurisdictional outcome of this case, the merits of the case, namely whether the president has authority to detain Padilla militarily was left unanswered. However, a ruling on the merits of this case should follow a proper filing in the proper jurisdiction. On the basis of the four dissenters in the present case[100] as well as Justice Scalia's dissent in *Hamdi* there is a minimum body which seems inclined to decide the matter in favour of Padilla and order his immediate release. Of course, the majority in *Hamdi* may also add concurrence to this, though whether they would use a habeas petition to order due process rather than immediate release, as in *Hamdi*, remains to be seen. Hamdi sets out the basic framework for due process to be afforded to a detainee, though questions remain with regard to the implementation and use of these in practice. Padilla's case of course lacks the battlefield context of Hamdi's, and Padilla's detention has been affirmed as being for the purpose of intelligence gathering, which was condemned as being unauthorised in *Hamdi*: "Our interest really in his case is not law enforcement, it is not punishment because he was a terrorist or working with the terrorists. Our interest at the moment is to try and find out everything he knows so that hopefully we can stop other terrorist acts."[101] On this basis, it may well be the case that Padilla's immediate release is ordered, or at least

[98] 410 US 484 (1973).
[99] *Ibid.*, p. 495.
[100] Justices Stevens, Souter, Ginsburg and Breyer.
[101] 233 F. Supp. 2d 564, 573-574 (SDNY 2002) (quoting News Briefing, Dept. of Defense (June 12, 2002), 2002 WL 22026773).

that a detainee such as himself would find himself afforded increased due process guarantees in comparison to the basic rights afforded Hamdi.

Padilla's case is currently being heard before the 4th Circuit Court of Appeals.

Rasul v Bush, Al Odah v United States

No. 03-334. Argued April 20, 2004--Decided June 28, 2004.

In finding that the federal courts have jurisdiction to determine the legality of the Executive's detention of individuals held at Guantanamo Bay, Cuba, a majority of the Supreme Court reversed the judgment of the Court of Appeals for the District of Colombia and remanded the case for the District Court to consider the merits of the petitioner's claims in the first instance.

Whilst a great deal of argument in the lower courts had centred on the case of *Johnson v Eisentrager*[102] the matter was decided by the Supreme Court on the basis of the general Habeas statute. The majority of the court found that the petitioners in the instant case differed from those in *Eisentrager* on the basis of the six facts which were listed as critical by the earlier court. These were that the detainees were (a) enemy aliens who (b) had never been or resided in the United States; (c) were captured outside the territory of the United States and there held in military custody as prisoners of war. Further, they were (d) tried and convicted by a Military Commission sitting outside the United States (e) for offences against laws of war committed outside the United States and (f) imprisoned at all times outside the United States."[103]

However, in the instant case, the majority of the court found that the petitioners differed from the former detainees in important respects, namely they are not nationals of countries at war with the United States, and they deny that they have engaged in acts of aggression against the United States; they are not convicted

[102] 339 US 763 (1950).
[103] *Ibid.*, p. 777.

criminals and rather have never been afforded access to any tribunal; since their detention they have been imprisoned in Gunatanamo Bay, a territory over which the United States exercises exclusive jurisdiction and control.

Rather than focus on the requirements of *Eisentrager* and the concept of constitutional entitlement to habeas relief, the instant case instead established a statutory entitlement to the writ. The majority relied on the case of *Braden v. 30th Judicial Circuit Court of Ky*[104] for the point that the prisoner's presence within the territorial jurisdiction of the district court is not "an invariable prerequisite" to the exercise of district court jurisdiction under the federal habeas statute. Rather, because "the writ of habeas corpus does not act upon the prisoner who seeks relief, but upon the person who holds him in what is alleged to be unlawful custody," a district court acts "within [its] respective jurisdiction" within the meaning of section 2241 as long as "the custodian can be reached by service of process."[105]

The respondents argued that congressional legislation is presumed not to have extraterritorial application unless such intent is clearly manifested. This was dismissed by the majority on the basis that the presumption against extraterritoriality has no application to the operation of the habeas statute with respect to persons detained within "the territorial jurisdiction" of the United States.[106] The terms of the lease with Cuba for Guantanamo Bay provide the United States with complete jurisdiction and control over and within the area and as such it was therefore part of the territorial jurisdiction of the United States even though ultimate sovereignty rests with Cuba. The unique status of the area limits the reach of the habeas statute to only those places within the territorial jurisdiction of the US. However, there is some discrepancy between the court's statement regarding statutory habeas relief as being applied domestically to the petitioners' custodians: " No party questions the District Court's jurisdiction over petitioners' custodians. Section 2241, by its terms, requires nothing more. We therefore hold that §2241 confers on the District Court jurisdiction to hear petitioners' habeas corpus challenges to the legality of their detention at the Guantanamo Bay Naval Base" and the determinative status of Guantanamo Bay as

[104] 410 US 484 (1973).
[105] *Ibid.*, pp. 494-495.
[106] *Foley Bros., Inc. v. Filardo*, 336 US 281, 285 (1949).

uniquely within United States territory. Indeed, if the right to habeas relief is premised upon the jurisdiction of the District courts over the petitioners' custodians that would have the effect of stretching this entitlement to this remedy further afield than the territorial jurisdiction of the United States.

It is hard to reconcile the reliance on *Braden* in the instant case, with the refusal of the majority to follow it in *Padilla.* Indeed, despite the fact that ultimately both were cases in which the detainees concerned were attempting to issue a habeas writ against a custodian outside the jurisdiction of the serving court, the result is a ruling in *Rasul, Al Odah* which makes it much easier for alien prisoners detained as part of conflict to file a habeas petition than for domestic detainees to do so. Indeed the lack of a judicial district in which to file a petition which could, and in the view of some should, have prevented use of the remedy for the Guantanamo detainees, as occurred in Padilla's case following filing in the incorrect district, has been manipulated to allow detainees such as those in Guantanamo Bay to file in any of the federal judicial districts as opposed to a domestic detainee who is restricted to filing in his district of confinement. This discrepancy is curious given the importance and seriousness of the issue at hand in Padilla's case. It seemingly would have been possible for an interpretation to have been given to the situation which could have overcome the procedural problems which dominated the case and which have thus far prevented Padilla from gaining any form of adequate due process.

Chapter 8

Conclusion

Conclusion

The terrorist threat posed and the need to counter it has produced a pattern of action and reaction in both the United Kingdom and the United States. In seeking to protect the democratic way of life, both countries have sought to use the law as a means of protection against terrorism as well as to ensure the continued existence of fundamental rights and freedoms. It has been seen however, that a certain amount of restriction has occurred with regard to these democratic values.

The circumstances in which emergency legislation is generally enacted can often be exploited in an attempt to enact powers unrelated to the emergency at hand. The provisions related to surveillance and data collection enacted in both jurisdictions can be said to be examples of this occurring. The essence of section 213 of the USA PATRIOT Act[1] is clearly of practical use to the interests of law enforcement. However, delayed notice of a search was already available to law enforcement in certain circumstances and so the enactment of section 213 in expanding this exception seems to be an example of the state taking advantage of the legislative opportunity that arose following 9/11 to extend the criminal law under the guise of countering terrorism. The same can be said for the provisions contained in Part XI and Part III of the ATCSA.[2] The provisions in both countries represent a serious inroad into the right to privacy without sufficient justification on the basis of operational necessity in countering terrorism. Indeed it is hard to see that the ability of each country to defend itself would be hindered to any great extent without these provisions. However, as it currently stands both countries have essentially created a suspect community whereby the security of the nation is said to be dependent upon on a reduction in the individual privacy of virtually everybody.

With regard to the protection of the right to freedom of expression the formulation of the four elements of the test laid down in *O'Brien v US*[3] produces a test similar to that

[1] Section 213 provides that notification of a search may be delayed "if the court finds reasonable cause to believe that providing immediate notification of the execution of the warrant may have an adverse result." 18 USC 3103a(b)(1) as amended by section 213.
[2] Part III is concerned with the disclosure of information by public authorities. Part XI governs the retention of communications data.
[3] 391 US 367, 376-377 (1968).

utilised by the European Court of Human Rights. However, whilst the elements of the *O'Brien* test essentially equate to the individual components considered in a challenge under the ECHR, an assessment as to the overall necessity of the measure is omitted in the US test. Indeed instead of requiring a showing that the measure is required on the basis of compelling necessity or is necessary on the basis of a "pressing social need", as in the jurisprudence of the European Court of Human Rights, the test in *O'Brien* requires only an important governmental interest unrelated to the suppression of free expression. As a result the test in *O'Brien* is very difficult for the individual to overcome. Restriction on freedom of expression for reasons of practical necessity such as the prohibition on material support in the US can invariably be justified as opposed to measures which seek to punish political dissent, advocacy and the holding of certain beliefs such as the measures relating to the exclusion and deportation of aliens on ideological grounds.

The most contentious of the provisions enacted in both jurisdictions are those relating to the detention of suspected terrorists. Section 412 of the USA PATRIOT Act combines potentially indefinite detention with negligible due process protections and no independent oversight. The fact that it has not been used thus far in no way justifies its continued existence. Rather it should have been repealed in the recent renewal of the Act so as to prevent its use in the future by either this administration or the next. Due process protections have not only been sacrificed legislatively since the events of September 11th. In addition, executive detention as part of the war on terror has shown the commitment to due process of the United States to be lacking. The choice of Guantanamo Bay as the place of detention, thereby placing the detainees beyond the reach of US courts was no accident and this attempt to negate the protections of due process to which the detainees are entitled has been condemned by the Supreme Court.[4] The actions of the US administration in this regard provide a clear example of the disregard which is often given to fundamental standards in times of crisis. When compared to the executive detention in the United States and the dearth of independent oversight involved with regard to enemy combatants and the detention of suspected terrorists, there may be a temptation to declare the comparable detention provisions of the ATCSA to be preferable. On a superficial basis this may

[4] *Rasul v Bush, Al Odah v United States* No. 03-334. Decided June 28th 2004.

be so given the opportunity of challenge to, and review by, the SIAC. However, aside from the limitations inherent in the use of the SIAC for this role as well as with regard to the use of special advocates, the provisions in Part IV ATCSA failed to conform to the standards of the ECHR by way of their disproportionate scope and discriminatory approach.[5] There is no merit in declaring one country's disregard for the fundamental rights of the individual to be preferable to that of another.

The protracted terrorist struggle in the UK prompted the enactment of a great deal of specialist legislation, which has been criticised over the years for its negative effect on the rights of the individual and democratic values. Despite having been enacted in response to a perceived emergency, this legislation became embedded into British law and society as part of a wider anti-terrorism system. This entrenchment occurred by way of a circular form of justification for the need for such legislation. Indeed any period notable for a dearth of attacks could be said to be the result of the legislative measures in place, whilst the continued existence of the legislation, or the enactment of further legislation, was said to be necessary following a terrorist incident.

A notable effect of the existence of a protracted emergency regime is the consequent impact upon ordinary standards. This normalisation of repressive provisions can be highlighted no more clearly than by consideration of the existence of the word "temporary" in the title of the preceding PTA which was to last for over twenty five years. However, even if the Act had been true to its name and had lasted only as long as deemed strictly necessary, a sinister aftertaste would have remained by way of the contamination of the ordinary law. This permeation of the ordinary law is one of the most worrying consequences of such an emergency regime in its distortion of some of the most fundamental mainstays of British law. This can be exemplified by the extension of the period of detention possible under PACE to 96 hours in light of the extended period available under the PTA. Had the PTA been repealed, the standard in PACE would still have been compromised and would have remained on the statute

[5] *A v Secretary of State for the Home Department* [2005] 2 AC 68.

books in its extended form.[6] Of great concern is the fact that it is this amended ordinary law which then becomes the benchmark for emergency legislation.

A second consequence of anti-terrorism legislation is the tendency to renew and re-enact such legislation once it has been enacted. The problem with an area as emotive as terrorism is the desire not to be seen to be anything other than totally committed to combating terrorism. The act of repealing a piece of legislation may been seen as symbolic of the fact that it is ineffective against the threat and that the terrorists have "won". This is no doubt compounded by the fear of adverse reaction should a terrorist atrocity occur when the full armoury of anti-terrorist law is not in place. The continued existence of such powers provides a platform on which yet more provisions are enacted.

It is this foundation which formed the basis of the hypothesis that any restriction on the rights and liberties of the individual and the values of democracy in the recently enacted anti-terrorism legislation would be greater in the United Kingdom than in the United States. So far as a direct comparison is possible, examination of those rights traditionally affected by measures in this area of the law has not shown this to be the case. Indeed the nature of the provisions enacted in the US legislation, in particular those in the USA PATRIOT Act, is such that it cannot be said that the restriction on the rights considered is any less in the United States. Instead, with regard to the provisions concerning detention of suspected terrorists and enemy combatants and the subsequent curtailment of due process protections, the restriction on these rights is greater in the US than in the UK. The previous experience of the United States with regard to domestic terrorist violence was one of an ever-present yet essentially minimal threat. At no point was the threat deemed serious enough to require a response such as that in the UK or indeed in the US in recent years. The same can be said of the more prolific attacks against Americans abroad. This was reflected in the measures taken by the state in response to the terrorist threat, with the effect that it was not the case that a trade-off between liberty and security was necessitated. As a result the rights of the individual were not restricted and democratic values remained

[6] Such an effect is troubling in light of the recent proposal to increase maximum period of pre-charge detention of suspected terrorists to three months. See draft Terrorism Bill available at www.homeoffice.gov.uk/docs4/home_sec_letter.html

untouched.[7] It was the large scale terrorist attacks within the borders of the US in 1995 and 2001 which were deemed to threaten the security of the nation to such an extent as to justify the enactment of the specialist legislation currently in force placing the response of the US in a very similar position to that of the UK. In this way, what appears to be significant with regard to the enactment of anti-terrorism legislation in the United States, is the experience of a sufficiently serious threat in the domestic context. This is similar to the United Kingdom's experience with, and response to, terrorism emanating from Northern Irish affairs, both in the province and on the mainland. The enactment of legislation in response to terrorist attacks in the US had an effect on individual rights and democratic values in a similar manner to the impact experienced in the United Kingdom following the enactment of anti-terrorism legislation. However, the effect of anti-terrorism legislation goes further than the immediate scope of the provisions however, to the permeation of the law and fundamental standards beyond the terrorist issue. It is in this area that an effect can be seen as a result of the longevity of the legislation in the UK. Indeed, the continuous threat of terrorism and this gradual erosion of fundamental standards has resulted in the acceptance of inroads into individual rights and democratic values, as can be seen from, for example, the abridgement of the right to silence. It is in this way that the experience of the United Kingdom with regard to terrorism and legislative provisions in response differs from that of the United States. Whilst the maturity of the UK system, and its containment of a long-standing threat, may have prompted its consideration as somewhat of a blueprint to the United States, or indeed other countries legislating in this area for the first time, the erosion of values removed from the terrorist arena serves as a warning for the future.

In comparison to the minimal interference with democratic values in the United States in dealing with the previous terrorist threat, there existed somewhat of a dichotomy between the situation in Great Britain and that in Northern Ireland. The dominant terrorist threat in the UK was that related to Irish Nationalism resulting in the enactment of emergency measures in both areas. The nature of the measures was such that an impact was felt upon traditional rights and freedoms, often without the

[7] The only exception was with regard to the guarantees of the First Amendment under the Anti-Terrorism Act of 1987. However, due to the nature of the jurisprudence in this area the provisions of the Act were not in violation of the Constitution.

justification of efficaciousness. With regard to Great Britain and the situation under the various Prevention of Terrorism Acts the effect of the provisions was notable, with the decision to enact such measures, acceptance of such by the public and the longevity of the "temporary", emergency regime being demonstrative of the impairment done to democratic values by terrorism. However, throughout the period in which the PTA dominated the legislative response to terrorism emanating from Northern Ireland, the mechanisms of the state continued to function normally and the foundations of civil society remained intact with the result that democracy remained viable. However, in the case of Northern Ireland the impact on democracy of some of the provisions under the Emergency Provisions Acts went further than interference with the rights of the individual and weakened the democratic integrity of the province. This was particularly so with regard to the use of internment, which succeeded in further alienating an already marginalized community whilst the introduction of trial without jury removed a fundamental aspect of the administration of justice. Measures such as these undermined public confidence in the actions of the government and often succeeded in tipping public support in favour of terrorist organisations.[8] Of course it cannot be said that during this time Northern Ireland was wholly undemocratic. This was not the case. However, the measures enacted in an attempt to counter the threat did have a detrimental effect on the democratic foundation of the province. Long-lasting though this was, progress has been made in bringing peace to the area through adherence to the intrinsic principles of democracy.

Several lessons can be learned from the United Kingdom's experience with the Irish Nationalist terrorist struggle and the specialist legislative response. The permanent fixture of emergency legislation in the legal system leads to the gradual acceptance of special emergency measures into the law as well as every day life, as previously discussed. Moreover, somewhat of a pattern ensues. It has been the experience of the UK as well as other countries, that legislation does not and cannot prevent every terrorist attack. This is borne out by the bombings in London on 7th July 2005 and the attempted bombings there a fortnight later on 21st July, despite the existence of the permanent Terrorism Act 2000 and the more recent Anti-Terrorism, Crime and

[8] CAIN Web Service available at: http://cain.ulst.ac.uk/events/intern/sum.htm

Security Act 2001. However, each new attack inspires calls to legislate further, as can be seen from the reaction to the London bombings, which will be discussed shortly.

A serious lesson in the UK's anti-terrorist history is the fact that measures taken in an attempt to curb terrorist activities can have a converse effect, as occurred with the use of internment in Northern Ireland in the 1970s. A rise in violence and a likely increase in IRA recruitment levels as well as the disaffection of a large proportion of the Catholic population followed the introduction of internment, rendering it a failure in anti-terrorist terms as well as with regard to attempting to maintain the social cohesion of the troubled province. Ultimately progress has been made with regard to the Northern Irish terrorist problem not through legislative or executive security measures but by way of political discourse, commitment to equality and increased respect for fundamental rights, as well as perhaps a realisation on the part of the organisations concerned that their ultimate objectives could not be achieved through violent means. This can be seen from the decrease in violence following the signing of the Good Friday Agreement in 1998 and the preceding ceasefires. The utility of dialogue in achieving a desirable end to the troubles in the province has been recognised by one of the main organisations in the history of the terrorist problem in Northern Ireland, with the IRA ceasefire announcement of July 2005 stating the organisation's intent to achieve its objectives using "purely political and democratic programmes through exclusively peaceful means."[9]

It is this potential for progress through negotiation and discourse which sets the United Kingdom's experience with Irish Nationalist violence apart from the threat posed by Islamic extremism and Al Qaeda. Terrorism is to be condemned in any guise and on any scale. However progress was and is possible with regard to attempting to bring an end to the terrorist violence associated with Northern Ireland due to the political and, in some eyes, reasonable demands of organisations such as the IRA and its loyalist counterparts. This differs markedly from the aims of Islamic extremist organisations such as Al Qaeda which seek to drive Americans and American influence out of all Muslim nations, in particular Saudi Arabia, destroy

[9] See http://news.bbc.co.uk/1/hi/northern_ireland/4724599.stm for full statement. 28th July 2005. On 26th September John de Chastelain made the announcement that the IRA had decommissioned its arms. See http://news.bbc.co.uk/go/em/fr/-/1/hi/northern_ireland/4283444.stm

Israel, and overthrow pro-Western governments around the Middle East. These aims even go so far as to include the establishment of an Islamic nation, by force if necessary, which unites all Muslims under the rule of the first Caliphs, or successors of Mohammed. The difficulty in achieving, or even attempting, a negotiated solution to such demands is clear. Indeed it seems that the template of political progress used with regard to Northern Ireland will be of little use in dealing with militant Islamic extremist organisations, due to the ideological battle democracies face. However, the possibility of dialogue and political progress with the IRA may once have seemed similarly bleak, due to the ruthless tactics and unreasonable demands of the organisation. Progress was a slow process which involved an appreciation that the United Kingdom would not be defeated by violent means. The lesson of attempting to bring peace to Northern Ireland has taught that political progress requires patience as well as the fact that the aims of a terrorist organisation do not remain static. What the future holds in this regard in relation to the current threat remains to be seen. It can be said however, that steps can be taken by democracies in an attempt to contain the current threat. A pressing question for the UK in the aftermath of the London attacks is what prompted the perpetrators, who had been born and raised in Great Britain to take such a path. It is in consideration of such a question that progress may be made. Measures may be taken to undermine the rhetoric which proves successful in influencing individuals to join radical groups in an attempt to limit recruitment. Some of the proposed provisions of the current Bill appear to be aimed at this addressing, *inter alia,* the encouragement and glorification of terrorism as well as the dissemination of terrorist publications.[10] In addition proposals have been made with regard to expanding the grounds on which decisions to deport and exclude can be made to include fostering hatred, advocating violence to further a person's beliefs, or justifying or validating such violence.[11] In taking such steps democratic values and the notion of pluralism are of fundamental importance; repressive or discriminatory tactics by the state will only serve to inflame the situation. It seems currently that prevention, rather than cure, is the most realistic option for democracies against this foe. However, it is hoped that this aim is not pursued at the cost of democratic values and fundamental standards.

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[10] See www.homeoffice.gov.uk/docs4/home_sec_letter.html

[11] See http://news.bbc.co.uk/1/hi/uk_politics/4179044.stm

Rather than simply posing a threat from abroad, Islamic fundamentalism and the cult of the suicide bomber made a dramatic entry onto the British domestic stage on 7th July 2005 with an attack on the London transport network which left 52 people dead and over 700 injured. An additional facet to the feeling of vulnerability experienced by the country was the information that at least three of the four bombers were born and raised in the United Kingdom. As has come to be expected following a terrorist atrocity, as part of the cycle of action and reaction, calls for new legislation were swift in coming. In, addition various changes to executive policy were also proposed. A draft Terrorism Bill was published by the Home Secretary on 15th September 2005.[12] The proposed measures focus on those prepared to engage in extremism and are founded on the basis that the mood of the country is different following the events of 7th July with regard to the enactment of more controversial measures.[13] Some preliminary observations may be made. Firstly, the attacks on London appear to have been used to justify a reduction in the human rights standards to which the United Kingdom seeks to adhere. The proposals were accompanied by the statement that should legal obstacles arise, the government was prepared to legislate to amend the Human Rights Act 1998 if necessary, with regard to the interpretation of the European Convention on Human Rights. This attitude is evident in the proposals for a change in executive policy for example, with regard to the deportation of individuals. Sending an individual to a country where he may face torture or inhuman or degrading treatment is contrary to article 3 of the ECHR[14]. However, the proposed measures seek to allow such action on the basis of "memoranda of understanding" that the countries concerned will comply with international human rights standards.[15] Efforts attempting to improve the human rights records of such countries are to be commended. However these memoranda appear to be aimed at deporting individuals with clear conscience. Moreover, such action leaves the individual removed free to pursue terrorist activities abroad, often in countries known for their strong terrorist

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[12] Available at www.homeoffice.gov.uk/docs4/home_sec_letter.html

[13] The mood of the country is said to be different with regard to both the public as well as members of Parliament. Prime Minister's Press Conference 5th August 2005. Available at: http://www.number10.gov.uk/output/Page8041.asp

[14] *Chahal v UK* (1997) 23 E.H.R.R. 413.

[15] This issue was recently discussed when the Home Secretary appeared before the Home Affairs Committee regarding Counter -Terrorism and Community Relations in the Aftermath of the London Bombings on 13th September 2005. An uncorrected transcript is available at: www.publications.parliament.uk/pa/cm200506/cmselect/cmhaff/uc462-i/uc46201.htm

associations. On the basis of the definition of national security given in *Rehman*[16], such a measure does not promote the security of the country. Under the draft legislation, an extension to the list of proscribed organisations is proposed. One of the named organisations is Hizb-ut-Tahira, a group founded in 1986 which states that it seeks its objectives through non-violent means. The United States continues to monitor the group but has not found a link between it and any known terrorist activities, nor is there evidence of its provision of financial support to terrorist organisations. In this way this provision is reminiscent of those in the USA PATRIOT Act which punish individuals on an ideological basis rather than for any criminal act. In addition, an increase in the length of pre-charge detention to a period of three months has been proposed despite the existing 14 day provision currently in place. This may involve a new pre-trial process which it seems will resemble the continental inquisitorial system despite the adversarial nature of proceedings which UK judges are trained to handle. It seems this process may well resemble that of the SIAC despite the problems inherent with the use of that tribunal for anti-terrorist, criminal purposes. The enactment of the Prevention of Terrorism Act 2005 was fiercely opposed[17] due to the coercive nature of the provisions proposed. The introduction of the current Bill to the House will serve as an indicator as to whether attitudes really have changed to the extent claimed following the 7th July.

There was once a time when terrorist attacks in the UK killing 54 people would not have triggered a response in the United States. The events of September 11th and their aftermath brought an end to those days. Following the July 7th attacks, the mass transit system of the US was moved from code yellow (elevated) to orange (high), where it remained for 36 days.[18] Armed police and explosive-detecting dogs were deployed on the subway system, with random searches carried out on a numerical basis and plainclothes patrols increased. Civil liberties groups in the US have cried foul with regard to this policy on the basis that unreasonable searches and seizures are

[16] *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153.
[17] During the passage of the Bill through the House of Commons there was a substantial rebellion by Labour backbencher. The House of Lords made a number of amendments to the Bill. These were considered by the Commons on March 10th and the subsequent debates resulted in the longest ever sitting of the Lords, a duration exceeding 30 hours.
[18] S. S. Hsu and D. Eggen (2005) Terrorism Alert Level Lowered For Transit. *The Washington Post*, August 13th p. B01.

prohibited by the Fourth Amendment.[19] However, so long as the searches are not carried out on a racial basis and are purely random it seems that any such challenge is likely to fail. Random searches are an accepted part of travel with regard to flights, with it being the case that the individual has a choice about whether to choose such a form of transport and submit to a random search or to find an alternative means of travel. Flexibility has been shown by the Supreme Court in relation to the development of Fourth Amendment jurisprudence as well consideration to the needs of law enforcement[20] and on this basis it may well result in the opinion that such searches are justified given the nature of the situation.

The events of September 11th changed the legal landscape in the United Kingdom and the United States. In the United States, the USA PATRIOT Act has recently been renewed, extending the sunset periods on many of the provisions to ten years. In the United Kingdom, it was deemed necessary to invoke a derogation from article 5 of the ECHR once again and in recent months further legislation, in the form of the Prevention of Terrorism Act 2005, has been enacted with a raft of further anti-terrorism measures likely shortly. Can it be said that these democracies are winning their battle with terrorism? The United States has not experienced another terrorist attack within its borders since September 11th. The United Kingdom was similarly free from such incidents until July 7th 2005. In addition, in the war on terror, it is estimated that up to 75% of key Al Qaeda operatives have been captured or killed.[21] However, incidents, casualties and membership levels are not the only considerations to be taken into account with regard to the success of a country in countering the terrorist threat. Indeed, the objective for the UK and the US is achieving legal effectiveness in preventing terrorism without destroying the features of democratic society. Damage to democratic values can be evidenced by the decision of the government to enact measures which curtail the rights and liberties of the individual and indeed by the acceptance of the people of the need for such measures. The aftermath of the July 7th bombings is an example in point with regard to these

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[19] The new York Civil Liberties Union filed a lawsuit on behalf of five plaintiffs on 4th August 2005 in an attempt to halt the practice of random bag searches in New York. See NYCLU Sues New York City Over Subway Bag Search Policy available at
http://www.aclu.org/PolicePractices/PolicePractices.cfm?ID=18885&c=119
[20] As seen in chapter 4.
[21] Address of President Bush to the Republican Party Convention, September 2nd 2004. Available at http://news.bbc.co.uk/2/hi/americas/3623344.stm

consequences with further stringent legislation having been proposed. A further example is served by the use of detention without trial by both the UK and US following 9/11. As a result of some of the measures enacted in response to this terrorist threat it can be said that democratic values have suffered a certain amount of curtailment. The cycle of action and reaction continues yet democracy remains viable in both countries.

The duty on governments to respond to terrorism is clear and there is no question of action being taken, even if it results in interference with rights and liberties so long as it is necessary, effective, proportionate and in keeping with fundamental standards. It is in ensuring this that the role of the courts is crucial. In both countries the courts have shown themselves in recent months to be vigilant and active in upholding these standards and the liberty of the individual.[22] This serves as another example of the strength of democracy in the United States and the United Kingdom. However, in this area of the law the scrutiny and protection of the courts must not be taken for granted. As has been seen, in the arena of anti-terrorism law the role of the courts can be subverted leaving the individual in a position of weakness with regard to attempting to challenge the exercise of enacted powers. Moreover, suggestions have recently been made that the judiciary should be required to give more weight to national security concerns with regard to the deportation of suspected terrorists.[23] To attempt to exert a degree of influence over the considerations of the judiciary in this way undermines the purpose of the Human Rights Act 1998 in allowing judges to find against the government when it acts in such a way as to unjustifiably restrict the rights and liberties of the individual.

The threat that democracies face has changed in recent years and will persist. The price of security is changing and freedom will not always emerge unscathed, as has been seen. The balance struck by democratic governments has not and will not always be right, however maintaining the health of democratic society is paramount in defeating the threat posed by terrorism.

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[22] In the UK see *A v Secretary of State for the Home Department* [2005] 2 AC 68. In the US see *Hamdi v Rumsfeld No. 03-6696* and *Rasul et al. v Bush* No. 03-334, No. 03-343, both decided on June 28th 2004.
[23] See Judges Face Human Rights Shake-Up 12 August 2005 at http://news.bbc.co.uk/1/hi/uk_politics/4144186.stm

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