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CONSTITUTIONAL OPTIMIZATION ACROSS EXECUTIVE TERRORIST TREATMENT STRATEGIES

BEN MIDDLETON

PhD 2012

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TABLE OF CONTENTS

Contents		iii
Abstract		vi
Table of Cases		vii
Table of Statutes		xii
Table of Abbreviations		xv
Note		xvi
Chapter One:	**Introduction**	**1**
	Introducing the research hypothesis	3
	Originality of the study	4
	Establishing the parameters of the study	6
	Defining ‘terrorist suspect’	6
	Distinguishing between resident and non-resident terrorist suspects	13
	Assuming prosecution is not viable	14
	Assuming release is not viable	21
	A note on jurisdictional terminology	23
	A methodological note	24
	Research Methodology	25
	Comparative vs. non-comparative	25
	Jurisdictional Parameters	32
	Doctrinal vs. socio-legal	38
	Doctrinal research	39
	Socio-legal research	41
	Source material	45
	Conclusion	50
	Chapter Synopsis	51
Chapter Two:	**A search for ‘constitutional optimization’**	**53**
	Section 1: Theoretical Underpinning	
	Defining ‘constitution’	54
	The Rule of Law	56
	Parliamentary Sovereignty	65
	Separation of Powers	74
	Legislature and executive	76
	Executive and judiciary	87
	Judiciary and Legislature	91
	Proportionality in the protection of human rights	94
	Section 2: Application of the theory	
	Applying the benchmarks to the USA	**100**
	Contextualising the theory: Constitutional responses to a terrorism ‘emergency’	105
	Judicial Deference in the domestic courts	110
	Conclusion: four benchmarks for ‘constitutional optimization’	**115**

Chapter Three:	**Detaining Terrorist Suspects**	**117**
	Definitional Considerations	118
	Habeas Corpus	119
	Detention during the Northern Ireland Troubles	**120**
	Preventive Detention (Internment)	121
	Pre-charge Detention	126
	Application of the benchmarks	131
	Detention measures before 9/11	**135**
	Application of the benchmarks	142
	Detention responses to 9/11	**143**
	United States	143
	England and Wales	152
	Application of the benchmarks	154
	Beyond 9/11: four judicial challenges	**159**
	Application of the benchmarks	169
	Beyond the 2004 judgments	**172**
	Oversight of pre-charge detention	172
	Alternatives for legislative oversight?	179
	United States: Guantánamo and beyond	186
	Conclusions	**205**
Chapter Four:	**Controlling Terrorist Suspects**	**208**
	Introduction of the control order regime	**209**
	Application of the benchmarks	212
	Control Orders reach the House of Lords	**216**
	Application of the benchmarks	219
	Aftermath of the Control Order trilogy	**225**
	Application of the benchmarks	236
	TPIMs	**237**
	Learning the lessons of the control order litigation	239
	Creating TPIMs	241
	Condition A	243
	Condition B	244
	Condition C	245
	Condition D	245
	Condition E	248
	Application of the benchmarks	248
	Proportionality of the measures	251
	Conclusions	**257**
Chapter Five:	**Removing Terrorist Suspects**	**261**
	Removal from England and Wales	262
	The prohibition of torture	267
	The *Chahal* benahmarks and beyond	270
	Application of the benchmarks	278
	Removal from the USA	**279**
	Lessons from America: deportation of terrorist suspects	282
	Removal of 'high value' suspects	287
	Application of the benchmarks	289
	Addressing criticisms of assurances	**291**

Criticism 1 292
Criticism 2 302
Enforcement 304
A doctrine of 'compliance' 307
Applying the benchmarks 312
Criticism 3 316
Criticism 4 319
Criticism 5 321
Criticism 6 324
A mandatory independent monitoring mechanism 325
Conclusions 333

Chapter Six: Conclusions and Recommendations 338
Recommendation 1: Legislative codification 339
Recommendation 2: Enhancing legislative oversight mechanisms 343
Emergency procedure 343
Non-emergency procedure 349
Recommendation 3: Promoting judicial muscularity 357

Concluding remarks 361

Bibliography 363
Parliamentary Reports 386
Hansard References 390

ABSTRACT

This thesis explores the strategies of detention, control and removal that are pursued by the state when the prosecution, surveillance or release of a terrorist suspect are not viable options. The inquiry examines executive practices that have emerged in the legal system of England and Wales, and draws on the experiences of the United States of America in order to identify issues of relevance and concern. Analysis is conducted of the interwoven nexus of constitutional mechanisms that supervise and limit executive action.

In accordance with principles of constitutionalism, four constitutional benchmarks are examined. It is suggested that counter-terrorism laws must be sufficiently certain in their scope and application; there should be the provision of both effective legislative and judicial oversight mechanisms; and the human rights doctrine of proportionality is required in order to ensure that the appropriate balance is struck in the dynamic between personal liberty and national security. These benchmarks are applied across the strategies of terrorist detention, control and removal.

The investigation makes three overarching and original recommendations. Legislative codification is suggested across a number of areas. It is argued that enhanced legislative oversight mechanisms, in both emergency and non-emergency contexts, should be sought. In addition, ways to enhance the utility of the judicial oversight mechanism should be contemplated. A confluence of these mechanisms is required in order to achieve ‘constitutional optimization’. Adherence to these principles will ensure that a terrorism emergency is subject to strict temporal limits and that exceptional terrorism-related powers do not perpetuate.

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U v SSHD SC/32/2005
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TABLE OF ABBREVIATIONS

AEDPA	Anti-Terrorism and Effective Death Penalty Act 1996
ATCSA	Anti-Terrorism, Crime and Security Act 2001
AUMF	Authorization for the Use of Military Force
BIA	Board of Immigration Appeals
CAT	United Nations Convention Against Torture and other Cruel, Inhuman or Degrading Treatment
CCA	Civil Contingencies Act 2004
CPR	Civil Procedure Rules
CSRT	Combatant Status Review Tribunal
CTA	Counter-Terrorism Act 2008
DTA	Detainee Treatment Act 2005
DWA	Deportation With Assurances
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EPA	Northern Ireland (Emergency Provisions) Act 1996
FARRA	Foreign Affairs Reform and Restructuring Act
HRA	Human Rights Act 1998
INS	Immigration and Naturalization Service
JCHR	Joint Committee on Human Rights
MCA	Military Commissions Act
MOU	Memorandum of Understanding
NGO	Non-Government Organization
OPCAT	Optional Protocol to the Convention Against Torture
PTA	Prevention of Terrorism Act 2005
SCOTUS	Supreme Court of the United States
SIAC	Special Immigration Appeals Commission
SSHD	Secretary of State for the Home Department
TACT	Terrorism Act 2000
TPIM	Terrorism Prevention and Investigation Measures
ETPIM	Enhanced Terrorism Prevention and Investigation Measures
TRO	Travel Restriction Order
UCMJ	Uniform Code of Military Justice
UKSC	United Kingdom Supreme Court

Note

The law is as stated on the 30th August 2012.

Chapter 1

Introduction

> 'We will have handed the terrorists the victory that they seek if, in combating their threats and violence, we descend to their level and undermine the essential freedoms and rule of law that are the bedrock of our democracy' (Jack Straw MP).[1]

> 'The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these' (Lord Hoffmann).[2]

The professed priority of the government is to detain, prosecute and convict those suspected of committing or instigating acts of terrorism.[3] Despite this pronounced desire, a residual core of high-risk individuals on home soil cannot be prosecuted.[4] The government is burdened with a 'Sophie's Choice' in these situations: to release a suspect, with or without the support of appropriate surveillance mechanisms, or to deploy executive measures that fall within three broad categories. Detention may be used either before charge or as a preventive mechanism amounting to internment.[5] As will be seen in chapter 3, this may not be an option for a variety of reasons.[6] The government may therefore seek to implement a

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[1] HC Deb 14 December 1999 vol 341 col 152 (Jack Straw, Second Reading of the Terrorism Bill 2000).
[2] *A & Others v SSHD* (2004) UKHL 56, [97] (Lord Hoffmann) (the 'Belmarsh' case).
[3] Home Office, *Pursue, Prevent, Protect, Prepare: The United Kingdom's Strategy for Countering International Terrorism* (Cmd 7547, 2009) 70 (CONTEST).
[4] See below p14-17.
[5] As to the nature of pre-charge detention, see below ch 3 p 118-119, 126-128 and in particular 172-186. As to internment, see ch 3 p 121-123. For post 9/11 internment, see ch 3 p 152-156.
[6] The pre-charge detention regime is subject to strict limits and requires evidence of an ongoing investigation: see ch 3 p172. In the absence of available removal strategies (see below ch 5), detention without charge is not currently permissible in England and Wales: see ch 3 p 160-163.

variety of control measures, including restricting a suspect's movement, often by means of a daily curfew and monitored by an electronic tag.[7] Finally, removal strategies (most usually by means of deportation)[8] may be commenced where the suspect is a foreign national.

This investigation conducts an analysis of these legal strategies that are deployed against terrorist suspects on home soil, which have attracted criticisms focusing on the lack of compatibility with fundamental constitutional principles. It has been argued that many provisions are anathema to the 'rule of law':[9] terrorism-related powers have been castigated as arbitrary and uncertain in their scope and application.[10] Oversight of executive power has not always been effective[11] and knee-

[7] For a discussion of these control orders (and the post-2011 regime), see below ch 4.
[8] See below ch 5.
[9] See, for example, *A and Others v SSHD* (2004) UKHL 56 [74] (Lord Nicholls): 'Indefinite imprisonment without charge or trial is anathema in any country which observes the rule of law'; see generally Lord Phillips, 'Impact of Terrorism on the Rule of Law' [2007] Speech to American Bar Association Conference, <http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/lcj_american_bar_assoc_031007.pdf> accessed 2 January 2012; the discussion of Aileen Kavanagh, 'Constitutionalism, counterterrorism and the courts: changes in the British Constitutional landscape' [2011] IJCL 9(1) 172, 173; Michael Fordham, 'The Rule of Law and Civil Restraint: Cheating the Criminal Law' [2011] JR 336; KD Ewing, *Bonfire of the Liberties: New Labour, Human Rights, and the Rule of Law* (OUP, 2010); Owen Fiss, 'The War Against Terrorism And The Rule Of Law' [2006] OJLS 235; Seung-Whan Choi, 'Fighting Terrorism through the Rule of Law?' [2010] Journal of Conflict Resolution 54, 940; James A Goldston, 'The Rule of Law Movement in an Age of Terror' [2007] Harvard Human Rights Journal 15. Exposition of the concept is provided below, ch 2 p 54-62.
[10] See generally ch 2 p 57-59 below. The right to be free from arbitrary detention is protected by Article 5(1) ECHR (see *Aksoy v Turkey* ECtHR 1996-VI, § 76). See particularly the exposition of arbitrariness in *A and Others v United Kingdom,* App 3455/05 (ECtHR, 19 February 2009) [162-164]. From the perspective of control orders, see e.g. Henry Porter, 'The freedom bill will mean nothing if we keep repressive measures like control orders' *Guardian* (London, 7 November 2010) <http://www.guardian.co.uk/commentisfree/2010/nov/07/freedom-bill-repressive-control-orders> accessed 10 November 2011. More broadly, in the context of stop and search powers, see *Gillan and Quinton v United Kingdom App no 4158/05 (ECtHR, 12 January 2010)* [79]. From the perspective of certainty, see e.g. Matthew Waxman, 'Detention As Targeting: Standards of Certainty And Detention of Suspected Terrorists' [2008] Columbia Law Review 1365.
[11] Fiona De Londras and Fergal F Davis, 'Controlling the executive in times of terrorism: competing perspectives on effective oversight mechanisms' [2010] OJLS 19. In relation to detention provisions, see below ch 3 p 126-127, 134, 142, 148, 151, 155, 173-177,179-181; in relation to control orders, see ch 4 p 212-215, 225-226, 236-237, 250; from the perspective of removal strategies, see ch 5 p 289, 312-313, 333-336.

jerk responses to the terrorism threat have abounded.[12] Powers have been sought and conferred that arguably offend against the human rights doctrine of proportionality; numerous counter-terrorism provisions have been criticized as failing to strike an appropriate 'balance' in the mutable dynamic between personal liberty and national security.[13] It is this general sentiment that is captured by Lord Hoffmann's famous words; and it is a desire to address this paradox that has led to the present thesis.

Introducing the research hypothesis: the need for 'constitutional optimization'

The underlying research hypothesis of this investigation is that through a range of doctrines around 'constitutional optimization', these myriad concerns can be addressed more satisfactorily in cases where the executive strategies of detention, control or removal are deployed. The aim is therefore to suggest recommendations for change to the legal framework of England and Wales in order to facilitate constitutional optimization: an attempt to find 'better law' across these treatment strategies.

[12] In relation to Northern Ireland-related terrorism, see the analysis around the introduction of the Prevention of Terrorism Act 1974 following the Birmingham Bombs: ch 3 p 126-127. In relation to the response to 9/11 in England and Wales and in the USA, see respectively ch 3 p 143-152 and p 152-154. For a discussion of the response to the 7/7 attacks on the London transportation network, see ch 4 p 213.

[13] The human rights doctrine of 'proportionality' forms an important limb to the thesis and is considered below: ch 2 p 94-100. From the perspective of detention mechanisms, perhaps the most famous and relevant jurisprudence came with the House of Lords' judgment in the 'Belmarsh' case, which reaffirmed the decision of the lower courts (*A & Others v SSHD*, SIAC No SC/157/2002) that the powers of indefinite detention without charge were disproportionate since they discriminated between UK and foreign national terrorist suspects*: A and Others v SSHD* [2004] UKHL 56, [42-43] (Lord Bingham). As to the rulings that have declared control orders to be disproportionate, see e.g. below ch 4 p 233. For a discussion regarding the rhetoric of 'balance', see ch 2 p 94.

The term 'constitutionalism' is used synonymously with the 'rule of law' and vice versa[14] and refers to:

> 'the … view that governments should operate according to the rule of law, particularly norms of legality and legal certainty, be obligated to treat those under their power as subjects of rights, and put in place checks on assertions of public authority'.[15]

The function of chapter 2 is to further define 'constitutional optimization'. Four benchmarks are extrapolated from the analysis. These benchmarks comprise: the requirement for laws to be sufficiently *certain*; the need for the provision of an *effective legislative oversight* mechanism; the requirement for *effective judicial oversight*; and the obligation that counter-terrorism measures should be *proportionate* to their desired aim. It follows that the quadripartite aim of the thesis is to make recommendations for change to the executive treatment strategies of detention, control and removal in these areas.

Originality of the study

There is a considerable amount of scholarship on various aspects of the UK's counter-terrorism regime, but the originality of the thesis arises in two principal ways. First, the particular focus of this investigation has not been

[14] The detail of these doctrines is well established and not routinely included in scholarship in the area. See Clive Walker, *Terrorism and the Law* (OUP, 2011); Clive Walker, *Blackstone's Guide to The Anti-Terrorism Legislation* (2nd ed, OUP 2009); Aileen Kavanagh, *Constitutional Review under the UK Human Rights Act* (Cambridge University Press 2009); Fiona de Londas and Fergal Davis, 'Controlling the executive in times of terrorism: competing perspectives on effective oversight mechanisms' (2010) 30(1) Oxford Journal of Legal Studies 19; Oren Gross, 'Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?' (2003) 112 Yale Law Journal 1011; Mark Tushnet, 'Controlling Executive Power in the War on terrorism' (2005) 118 Harv Law Review 2673. For discussion as to the rule of law specifically, see Tom Bingham, *The Rule of Law* (Penguin 2010); Colin Turpin and Adam Tomkins, *British Government and the Constitution* (6th edn, Cambridge University Press 2007) ch 2; AW Bradley and KD Ewing, *Constitutional and Administrative Law* (15th edn, Pearson 2011) ch 6; Joseph Raz, 'The Rule of Law and its virtue' (1997) 93 Law Quarterly Review 195.

[15] Kim Lane Scheppele, 'Global security law and the challenge to constitutionalism after 9/11' (2011) 4 Public Law 353, 356.

previously examined.[16] There is much research that considers general executive oversight mechanisms, but these studies have not analyzed the problems inherent in the provision of scrutiny of the executive strategies of detention, control and removal.[17] The unique focus leads to a number of original recommendations based on the doctrines of 'constitutional optimization'.

Second, the thesis is original due to the dynamism of counter-terrorism law generally. In the course of the analysis, recommendations are made for specific amendments to the counter-terrorism legal framework of England and Wales in the areas of detention, control regimes and removal strategies. All three of these areas are undergoing, or have undergone, considerable reform, and there is very little scholarship available regarding the most recent developments. This investigation conducts the first substantive academic analysis of the Terrorism Prevention and Investigation Measures (TPIM) regime that has recently come into force.[18] Additionally, the recommendations reached in the context of a Deportation With Assurances (DWA) regime are original and have been accepted for publication.[19]

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[16] See Walker, above (n14). Walker's studies are generally accepted as leading the field in the UK, though their focus is less on the specific executive measures considered here and more on the general corpus of counter-terrorism law that has evolved in recent years.
[17] See, for example, Aileen Kavanagh, *Constitutional Review under the UK Human Rights Act* (Cambridge University Press 2009); Fiona de Londas and Fergal Davis, 'Controlling the executive in times of terrorism: competing perspectives on effective oversight mechanisms' (2010) 30(1) Oxford Journal of Legal Studies 19; Gross (n 14); Tushnet (n 14); Adrian Vermeule, 'Holmes on Emergencies' (2009) 61 Stanford Law Review 163; Eric Posner and Adrian Vermeule, *Terror in the Balance: Security, Liberty and the Courts* (Oxford University Press 2007); Adam Tomkins, 'National security and the role of the court: a changed landscape' (2010) 126 Law Quarterly Review 543.
[18] Several of these suggestions have already been published: see Ben Middleton, 'Rebalancing, Reviewing or Rebranding the Treatment of Terrorist Suspects: the Counter-Terrorism Review 2011' Journal of Criminal Law (2011) Vol 75(3) 225. The contemporary analysis of TPIMs will contribute the lead article to the December 2012 edition of the Journal of Criminal Law.
[19] Under contract with the Connecticut Public Interest Law Journal- expected Fall 2012 (Vol 10); 70 pages.

Establishing the parameters of the inquiry

I. Defining 'terrorist suspect'

Since this thesis examines the legal strategies deployed against terrorist suspects, some definitional parameters are necessary. In the context of legal scholarship, 'terrorist' may be used interchangeably with 'terrorist suspect': the difficulties that States often face bringing terrorist prosecutions means that there many individuals who cannot be prosecuted but who are suspected of (often significant) involvement in terrorism-related activity.[20] It is important to note that the present investigation is concerned with those individuals who cannot currently be prosecuted for terrorism-related offences (although this does not preclude the possibility that a terrorism-related sentence has been previously served, since upon release, convicted terrorists may reoffend or attempt to reengage with old networks).[21] To the extent that 'terrorist' is used throughout this thesis, therefore, it is used to connote 'terrorist suspect' and no pejorative meaning should be attached to this simplification, which is adopted for the sake of convenience.

This inquiry focuses upon the legal framework currently in place to deal with the individuals outlined above in England and Wales. There are copious academic musings as to what constitutes terrorism,[22] and the

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[20] HM Government, *Review of Counter-Terrorism and Security Powers: Review Findings and Recommendations* (Cmd 8004, 2011) (Counter- Terrorism Review) 37. See below p 15-17.

[21] Indeed this issue has recently been brought to the fore by the release of individuals convicted of the Airlines Liquids bomb plot: see e.g. Tom Whitehead, 'Convicted terrorists released this week ahead of Olympics' *Telegraph* (London 19 March 2012) <http://www.telegraph.co.uk/news/uknews/law-and-order/9151729/Convicted-terrorists-released-this-week-ahead-of-Olympics.html> .

[22] See e.g. Boaz Ganor, 'Defining Terrorism: Is One Man's Terrorist Another Man's Freedom Fighter?' (2002) Policy, Practice and Research Vol 3(4) 287; Michael Sharf, 'Defining Terrorism as the Peace Time equivalent of War Crimes: A Case of too much convergence between International Humanitarian Law and Internatinoal Criminal Law?' (2001) ILSA Journal of Internationa and Comparative Law 391; Bruce Hoffman, 'Defining Terrorism' (1986) Social Science Record vol 24, 6; HHA Cooper, 'Terrorism- The problem

logical definitional foundation is afforded by s. 1 of the Terrorism Act 2000 (TACT):

> ‘s.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 an international governmental organisation 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, racial, 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
> (e) is designed seriously to interfere with or seriously to disrupt an electronic system.
> (3) The use or threat of action falling within subsection (2) which involves the use of firearms or explosives is terrorism whether or not subsection (1)(b) is satisfied.
> (4) In this section—
> (a) “action” includes action outside the United Kingdom,
> (b) a reference to any person or to property is a reference to any person, or to property, wherever situated,
> (c) a reference to the public includes a reference to the public of a country other than the United Kingdom, and
> (d) “the government” means the government of the United Kingdom, of a Part of the United Kingdom or of a country other than the United Kingdom.
> (5) In this Act a reference to action taken for the purposes of terrorism includes a reference to action taken for the benefit of a proscribed organisation.’[23]

An initial observation must be made that the definition is intentionally broad.[24] This could lead to legitimate discussion as to whether the definition itself is problematic: it is arguable that its breadth offends against the doctrine of legal certainty as is required for the rule of law.[25] There

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of the problem of definition’ (1978) Chitty’s Law Journal 105; Elisabeth Symeonidou-Kastanidou, ‘Defining Terrorism’ (2004) 12 European Journal of Crime, Criminal Law and Criminal Justice 14; Geoffrey Levitt, ‘Is ‘’Terrorism’’ worth defining?’ (1986) 13 Ohio New University Law Review 97; Bruce Hoffman, *Inside Terrorism* (Columbia University Press 2006) Ch 1; Ben Golder and George Williams, ‘What is ‘’Terrorism’’? Problems of Legal Definition’ (2005) University of New South Wales Law Journal vol 25, 270.

[23] s. 1 Terrorism Act 2000, as amended.

[24] Walker, *Blackstone’s Guide* (n 14) 12; A Blick, T Choudhury and S Weir, *The Rules of the Game: Terrorism, Community and Human Rights* (Joseph Rowntree Reform Trust 2006).

[25] Below, chapter 2 p 61-62.

have been concerns expressed, for example, that the legal definition would be capable of targeting legitimate political protest such as a nurses' strike.[26] Similarly, it has been expressed that the inclusion of the word 'influence'[27] is too broad and that 'religious' connotations are superfluous.[28] The term 'violence' has been described as 'unrefined and malleable'.[29]

Despite these concerns, the Independent Reviewer of Terrorism Legislation, in a detailed report, has indicated that the definition remains broadly fit for purpose, not least because terrorism investigations require earlier intervention than conventional criminal investigations.[30] There is a safeguard built in to TACT 2000 that prosecution under the Act requires the consent of the Director of Public Prosecutions, and the improper use of terrorism-related powers in this way would be unlikely.[31]

Internationally, there remains no consistently accepted definition of terrorism.[32] The United States' definition, for example, is similarly framed by the USA PATRIOT Act of 2001[33] and the working definition promulgated by the Department of Defense, which defines terrorism as:

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[26] See Ben Golder and George Williams, 'What is "Terrorism"? The problems of Legal Definition' (2004) 27(2) University of New South Wales Law Journal 270. The particular issue of legitimate industrial action was raised (and rebuffed) during passage of the 2000 Act: HL Deb 4 July 2000, col 1449. Note Walker's observations that there is 'some room for doubt' on this score, and the author's belief that such industrial action would amount to an omission rather than an act, which is not encapsulated by the definition (Walker, *Blackstone's Guide* (n 14) 10).

[27] s.1(1)(b) TACT 2000.

[28] s. 1(1)(c) TACT 2000. See Walker, *Blackstone's Guide* (n 14) 10.

[29] s. 2(a) TACT 2000: Ibid 11.

[30] Lord Carlile, The Definition of Terrorism (Cmd 7052, 2007) 48. Note that the government did not adhere to all of Lord Carlile's recommendations.

[31] See the opinion of Lord Carlile: 'in our perhaps idiosyncratic Parliamentary system with its unwritten constitution, the exercise of the discretion to or not to prosecute or to use special legislative powers should be regarded as constitutionally important' (ibid 36).

[32] 'After thirty years of hard labor there is still no generally agreed definition of terrorism' Walter Laqueur, *No End To War: Terrorism in the Twenty-First Century* (Continuum, 2003) 232.

[33] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, 18 USC § 2331.

> 'the unlawful use of violence or threat of violence to instill fear and coerce governments or societies. Terrorism is often motivated by religious, political, or other ideological beliefs and committed in the pursuit of goals that are usually political.'[34]

European consensus on a definition is similarly elusive;[35] academics have questioned whether there is a need for a definition at all[36] and cautioned against the near impossible task of attempting to provide a unified definition.[37] Over-inclusive attempts to reach international consensus risk capturing criminal activity that should not deserve a 'terrorism' label.[38] Walker has suggested that a more satisfactory UK definition could be reached by framing a definition in reference to established 'scheduled offences', as aspects of the EU definitions appear to do, in order to comply with the fundamental requirements of legal certainty.[39] This was rejected by the government.[40]

It is often aphoristically stated that 'one man's terrorist is another man's freedom fighter', but this adage is unhelpful to the present investigation since it is not representative of the legal position. In the UK, the definition of 'terrorist' is even more broadly cast than the definition of 'terrorism'

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[34] US Department of Defense, *Antiterrorism* (Joint Publication 3-07.2, 24 November 2010) https://rdl.train.army.mil/soldierPortal/atia/adlsc/view/public/25681-1/JP/3-07.2/JP3_07X2.PDF vii, accessed 11 June 2011.

[35] The EU definition is still contingent upon the domestic law of members states, but classifies specific offences that 'may seriously damage a country or an international organisation where committed with the aim of: seriously intimidating a population; or unduly compelling a Government or international organisation to perform or abstain from performing any act; or seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation' Art I, European Council Framework Decision of 13 June 2002 on combating terrorism (2002 /475/JHA).

[36] G Levitt, 'Is Terrorism Worth Defining?' [1986] Ohio Northern University Law Review 97.

[37] D Tucker, *Skirmishes at the Edge of Empire* (Praeger 1997) 51.

[38] 'it would include the activities of a lone, violent and eccentric campaigner against the use of electricity; or against laws prohibiting smoking in public places; or Thomas Hamilton the loner Dunblane child murderer. Terrible crimes though he committed, terrorism is not a suitable label' Lord Carlile, The Definition of Terrorism (n 30) 7.

[39] Walker, *Blackstone's Guide* (n 14) 12.

[40] HL Deb Vol 611, col 1484.

itself, and the two have an umbilical link. Thus a 'terrorist' is defined in s. 40 TACT 2000 as someone who is or has been concerned in the commission, preparation or instigation of acts of terrorism,[41] or who has committed a specific terrorism-related offence contained in TACT.[42] The definition applies retrospectively.[43]

Once again, the breadth of this definition is startling; a terrorist may be an individual who is simply *preparing* to commit an act that falls foul of the inherently broad s. 1 definition. Whilst these definitional issues could, of themselves, form the basis of an entire thesis, such concerns are beyond the purview of this discussion.[44] Significant changes here seem unlikely in the near future; narrowing the focus of the definition could have a significant and deleterious impact on the effectiveness of terrorism-related investigations and prosecutions[45] and the breadth of the definition appears to have been accepted by the European Court of Human Rights (ECtHR).[46] It is equally difficult to imagine a situation in which the definition is significantly broadened. Modest amendments have been made to the

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[41] s. 40(1)(b) TACT 2000.

[42] s. 40(1)(a) TACT 2000. This section *inter alia* includes the membership or provision of support to a proscribed organization, possession of terrorism-related articles or documents, terrorism fund raising or money laundering, or weapons training.

[43] s. 40(2) TACT 2000.

[44] For judicial evaluation of the s. 1 definition, see *SSHD v DD (Afghanistan)* [2010] EWCA Civ 1407. For lengthy analysis of the definition itself, see e.g. European Research Project, 'Defining Terrorism', Transnational Terrorism, Security and the Rule of Law (2008) <http://www.transnationalterrorism.eu>. <http://www.transnationalterrorism.eu/tekst/publications/WP3%20Del%204.pdf> accessed 28 November 2011. Despite attempts at definitions provided by the United Nations Security Council (Resolution 1566 defined terrorism as 'criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act'), no uniform definition has been adopted.

[45] Lord Carlile, The Definition of Terrorism (n 30) 23.

[46] See, for example, *A v UK* App no 3455/05 (ECtHR, 20 February 2009). In particular, the definition was cited (together with the background to the passage of TACT 2000) in *Gillan and Quinton v United Kingdom App no 4158/05* (ECtHR, 12 January 2010) [27-29]. As to the classification of 'terrorism' generally, and in the context of proscription and detention mechanisms, the ECtHR held that a previous definition of terrorism is capable of being classified as an 'offence' for the purposes of Article 5 ECHR: *Brogan v United Kingdom, App no 11266/84* (ECtHR, 29 November 1988) [51].

definition since 2000 with relatively little in the way of political opposition,[47] and concerns surrounding the feasibility of terrorism-related prosecutions have focused on alternative issues.[48]

For the purposes of this investigation, therefore, the statutory definition of terrorism and terrorist in England and Wales provides a useful lodestar. Classification of terrorism under s. 1 TACT is used as a trigger for a variety of additional terrorism-related offences, including fundraising, proscription, and possession of terrorism-related materials.[49] The definition prompts a variety of additional powers, including stop and search, arrest, port and border controls, the use of cordons and post-charge questioning.[50] The current discussion is not concerned with these powers or offences. Instead, the focus is on the principal executive measures that are deployed against those individuals who are suspected of involvement in terrorism related activity. The s. 1 definition applies to both detention and control order regimes. Arguably, it is of less significance to the removal paradigm, since deportation can be triggered where an individual's presence is simply not 'conducive to the public good' and categorization as a terrorist is not strictly necessary.[51]

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[47] Some of these amendments were proposed by Lord Carlile (n 30). The s.1 TACT 2000 definition was augmented by s. 34 Terrorism Act 2006 and s. 75(2)(a) Counter-Terrorism Act 2008 (which respectively inserted the words 'racial cause' and 'international governmental organisation' into the definition). These insertions passed without significant consternation in Parliament: see HC Deb 3 November 2005, Col 438 Cols 985-1073; HL Deb 13 December 2005 Col 676 Cols 1118-1246.

[48] Common issues relate to the removal of the ban on the use of intercept evidence in court (below p 18), the increased use of the threshold test (below p 17) and the use of secret evidence in court (see particularly Joint Committee on Human Rights, *Written Evidence: The Justice and Security Green Paper*, evidence submitted by David Anderson QC, Independent Reviewer of Terrorism Legislation, <http://www.parliament.uk/documents/joint-committees/human-rights/Justice_and_Security_Written_Evidence_v6.pdf> 138-155).

[49] Respectively ss.15-18 TACT 2000, ss.3-10 TACT 2000, and ss.57-58 TACT 2000. For detailed analysis of these provisions, see Walker, *Blackstone's Guide* (n 14) Ch 2-3.

[50] Respectively s. 41 TACT 2000, ss. 44-45 TACT 2000, ss.33-36 TACT 2000, s 22 Counter-Terrorism Act 2008.

[51] Although note that removal proceedings are routinely triggered when a foreign national is released after serving a sentence of imprisonment, whether terrorism-related or

Notwithstanding the use of the s. 1 definition in this investigation, care must be taken not to be either over or under-inclusive. Political activists, including (for example) animal rights protestors may in theory be capable of satisfying this s. 1 definition, but are not the intended target of the present study. In practice, reliance on sensible discretion by the police, Crown Prosecution Service and Director of Public Prosecutions should mean that terrorism prosecutions would not be brought in such instances.[52] While the same may not be said of the use of stop and search powers, restrictions on protest,[53] and general powers of arrest,[54] these anomalies can be discounted from the present thesis since they are not relevant to the aforementioned executive strategies of terrorist detention, control or removal.

It is established below that the investigation will draw on the experiences and practices of the US to identify issues of relevance or concern; it should therefore be noted that there are sufficient similarities between the two definitions so as to render any observations apposite.[55] The definition of terrorism in the US, as applied to those terrorist suspects who have

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otherwise: see below ch 5 p 262-265. It is clear that a designation as a terrorist suspect will almost inevitably lead to the conclusion that their presence in the UK is not 'conducive to the public good'.

[52] It is crucial to note that this distinction is valid in the present context since this investigation is not concerned with general powers of stop and search and arrest. See the opinion of Lord Carlile that in practice, discretion is important (Lord Carlile, *The Definition of Terrorism* (n 30) [60-64]) and Walker's note that '[the breadth of the definition] is often moderated by police and prosecutorial restraint' (Walker, *Blackstone's Guide* (n 14) 12).

[53] Christopher Newman, 'A Chilling Consensus: Political Protest in the 'War on Terror' in Moran and Phythian (eds), *"Intelligence, Security and Policing Post 9/11* (Palgrave, 2008).

[54] With regard to the misuse of stop and search powers in political demonstrations, see for example *Gillan and Quinton v UK* App no 4158/05 (ECtHR, 12 January 2010).

[55] See the dicta of Mitting J, 'We have not been referred to and are not aware of any widely accepted international definition of terrorism which differs in any essential respect from [the s. 1 definition] … but we doubt that any international organisation or reputable commentator would disagree with a definition of terrorism which had at its heart the use or threat of serious or life threatening violence against the person and/or serious violence against property, including economic infrastructure, with the aim of intimidating a population or influencing a government, except when carried out as lawful act of war' *SS v SSHD* (SC/56/2009, 30 July 2010) [16]. Both the UK and US working definitions make reference to three core elements: threat or use of violence, publicity, with a particular (often political) goal (*Defining Terrorism* (n 22) 18).

been detained on the US mainland or at Guantánamo Bay, could equally satisfy the UK meaning if the individuals were detained in England and Wales, in light of the breadth of the respective definitions.[56] This thesis, therefore, does not attempt to conduct a detailed definitional analysis of 'terrorism' beyond s. 1 TACT 2000. In light of this exercise, a terrorist suspect may simply be considered to be an individual who is suspected to have been involved in terrorism-related activity.[57]

II. Distinguishing between resident and non-resident terrorist suspects

The legal regime in the UK has extra-territorial application: it confers liability on individuals committing, preparing or instigating acts of terrorism wherever they are in the world.[58] It should, however, be noted that the legal provisions that may be deployed against a terrorist suspect may vary depending on whether the individual is a national, non-national, on their home soil or abroad.[59] It is axiomatic that a high number of terrorist suspects may be captured abroad in places such as Afghanistan, Pakistan and Iraq, and it may similarly be possible that some of these suspects may

[56] Although the exact nature of the US definition is difficult accurately assess, since it relies on executive determination and policy, it is instructive to examine the nature of the many individuals who have subsequently been released. Rasul, Iqbal and Hicks, for example, were detained as enemy combatants (the definition of which is inextricably linked to the US working definition of terrorism above) since they were suspected of fighting with Taliban forces against the Coalition following the invasion of Afghanistan (*Rasul v. Bush*, 542 US 466 (2004)). In England and Wales, such behaviour has routinely been held to satisfy the s. 1 TACT 2000 definition: see the successful prosecutions of Mohamed Abushamma and Rajib Karim: Telegraph, 'British student admits trying to join mujahideen terrorists' (London, 28 November 2008); BBC News, 'Terror plot BA man Rajib Karim gets 30 years' (London, 18 March 2011). <http://www.bbc.co.uk/news/uk-12788224>. As to whether a supervisory court would uphold such designation, of course, this is inevitably contingent upon closed evidence.

[57] Consideration of the factual adjudication of such issues in court is beyond the ambit of this thesis.

[58] s. 1(4)(a)-(d) Terrorism Act 2000.

[59] In England and Wales, for example, indefinite detention powers were deployed only against 'foreign' terrorist suspects following 9/11; indeed, this distinction between indigenous and foreign suspects eventually lead to the demise of the regime (see below ch 3 p 159-163). Deportation of terrorist suspects is only possible where an individual is a foreign national (see below ch 5 p 261). Different powers of detention and availability of judicial review apply in the context of American detainees at Guantanamo Bay: see below ch 4 p 186-204.

be removed to their home soil.[60] This investigation is concerned primarily with those suspects who are situated in England and Wales or Northern Ireland, regardless of whether they are UK nationals. Where synergies and disparities in the legal practice of the USA are examined, the investigation considers those on the US' mainland or within the jurisdiction of Guantánamo Bay but not those based elsewhere overseas.[61] It follows that discussions of practices of detention, prosecution, or even extra-judicial assassinations of terrorist suspects abroad[62] are beyond the scope of this inquiry.

III. Assuming prosecution is not a viable option

The professed priority for the UK government is to prosecute suspected terrorists whenever possible.[63] Prosecution is not always possible for a number of interrelated reasons. There may not be sufficient evidence regarding alleged involvement in terrorism-related activity to charge an individual with an individual crime; this issue may be exacerbated by the need for law enforcement agencies to intervene at an early stage in a terrorism investigation in order to protect the public.[64] Some, or all, of the

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[60] Above, n. 56.

[61] It is legitimate to consider Guantánamo detainees in this context following the decision in *Boumediene v Bush* 549 US (2007) Nos 06-1195 and 05-1196 2 April 2007, 35: SCOTUS declared that the protection under the US constitution extended to Guantánamo Bay notwithstanding contested issues of sovereignty. See below ch 3 p 193-197.

[62] See, for example, the reports of targeted drone strikes: Ian Cobain, 'Two British terror suspects killed in US drone strikes in Pakistan' *Guardian* (London, 18 November 2011); Mark Hosenball and Chris Allbritton, 'Exclusive: Senior al Qaeda figure killed in drone strike' *Reuters* (London, 19 January 2012) <http://www.reuters.com/article/2012/01/19/us-usa-pakistan-drones-idUSTRE80I2G120120119>. Scott Shane and Tom Shanker, 'Strike Reflects U.S. Shift to Drones in Terror Fight' *New York Times* (New York, 1 October 2011) <http://www.nytimes.com/2011/10/02/world/awlaki-strike-shows-us-shift-to-drones-in-terror-fight.html?pagewanted=all>; BBC News, 'Obama defends US drone strikes in Pakistan' (London, 31 Janurary 2012) <http://www.bbc.co.uk/news/world-us-canada-16804247> .

[63] White House, *National Strategy for Counterterrorism* (June 2011) <http://www.whitehouse.gov/sites/default/files/counterterrorism_strategy.pdf> 6, accessed 30 June 2011; CONTEST (n 3) 70.

[64] CTR (above n 20) 37.

material gathered as a result of an investigation may be inadmissible as evidence in legal proceedings.[65] Prosecution may divulge sensitive intelligence gathering techniques or threaten national security, perhaps by harming international relations with other intelligence agencies or governments.[66]

Given the nature of much of the decision-making, it is difficult to assess the extent to which prosecution is actually the preferred priority of the Government. There is always likely to be a tension between the pursuit of a prosecution, which may involve divulging sensitive intelligence and evidence in open court, and simply relying on methods of executive control that do not require such full disclosure.[67] It is possible that executive measures have been sought in preference to prosecution, rather than the other way round, and consideration of this issue would require access to classified information in order to independently verify.[68] Successive reports of the Independent Reviewer of Terrorism legislation, however, have acknowledged the fact that prosecution is preferred but not always possible.[69] The Independent Reviewer has recently stated, for example:

> 'there is a troubling feel to the imposition of control orders on persons acquitted of terrorist offences … [t]he practice is troubling … because it reveals an unpalatable truth: that while it should always be the first and preferable option for dealing with suspected terrorists, the

[65] Ibid.
[66] Ibid.
[67] The extent to which this is the case, for example, has formed the basis for changes to the control order regime in England and Wales; the new regime purports to create a more 'structured' link between imposition of control measures and the pursuit of a prosecution (Counter-Terrorism Review (n 20) 37).
[68] It should be noted that in light of the new regime of TPIMs, it will be difficult to establish or continue such practice, since each measure is temporary and cannot last more than 2 years; this should place a considerable impetus on the government to seek and secure prosecutions.
[69] David Anderson QC, 'Control Orders in 2011: Final Report of the Independent Reviewer on the Prevention of Terrorism Act 2005' (March 2012) (David Anderson Report) 3.21.

criminal justice system is not always enough to keep the public safe'.[70]

Additionally, there have been a number of attempts to facilitate the prosecution of terrorist suspects. The Independent Reviewer keeps under review the likelihood of successful prosecution as part of his remit; annual reviews refer to successful terrorism prosecutions and appeals,[71] and the Crown Prosecution Service maintains a dedicated list of successful terrorism-related prosecutions.[72] Perhaps more significantly, the counter-terrorism arsenal has been substantially augmented with broad offences, all of which are contingent on the inherently broad definition of terrorism. Key offences that are routinely deployed comprise, *inter alia*, the offence of preparation of terrorism under s. 5 of the Terrorism Act 2006, which confers criminality at a much earlier stage than the criminal law would otherwise provide.[73] Other relevant offences include the possession of articles for terrorist purposes, the possession of information likely to be useful to terrorists,[74] dissemination of terrorist publications[75] or established

[70] Lord Carlile, Fourth Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005 (3 February 2009); Fifth Report of Independent Reviewer Pursuant to s. 14(3) of the Prevention of Terrorism Act 2005 (1 February 2010); Lord Carlile, Sixth Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005 (3 February 2011); Final Report (n 69). See in particular, the comments of David Anderson that 'not a single former controlled person has been successfully prosecuted for a terrorist offence. Having spoken to those involved, I do not believe that this reflects any lack of enthusiasm for this course on the part of those who enforce and monitor control orders, or on the part of the police (and, where appropriate, the CPS) who were obliged to keep the possibility of prosecution under review throughout the period during which the control order had effect. Rather, it is a consequence of the facts' (ibid 3.51).

[71] *Independent Reviewer of Terrorism Legislation,* Reviewer's role: Statutory functions <http://terrorismlegislationreviewer.independent.gov.uk/role-of-the-reviewer/>.

[72] *The Counter-Terrorism Division of the Crown Prosecution Service (CPS), Successful prosecutions since the end of 2006* <http://www.cps.gov.uk/publications/prosecution/ctd.html#a02>.

[73] See *R v Roddis* [2009] EWCA Crim 585 and *R v Iqbal* [2010] EWCA Crim 3215. See also, for example, the conviction on February 28 2011 of Rajib Karim, who was sentenced to 30 years imprisonment on four counts on the 18th March 2011 (Duncan Gardham, 'British Airways bomber jailed for 30 years' *Telegraph* (London, 18th March 2011) <http://www.telegraph.co.uk/news/uknews/terrorism-in-the-uk/8391162/British-Airways-bomber-jailed-for-30-years.html> accessed 22 March 2011).

[74] s. 57(1) TACT provides that 'A person commits an offence if he possesses an article in circumstances which give rise to a reasonable suspicion that his possession is for a

criminal law offences under the Explosive Substances Act 1883.[76] The sensible use of prosecutorial discretion remains an important, if limited, safeguard.[77]

This thesis does not offer ways in which further prosecutions can be facilitated; the focus of the discussion is on the executive measures deployed by the state w*here the prosecution or release of a suspect are not viable options*. Nonetheless, there have been a variety of suggestions that are considered here in order to contextualize the analysis. Many suggestions have been offered by way of reducing reliance on executive measures and increasing the numbers of suspects who can be prosecuted. These include the use of the 'threshold test' by prosecutors; removing the bar on the use of intercept evidence in court; and the activation of pre-existing powers of post-charge questioning.

i. The 'Threshold test'

The Crown Prosecution Service uses the standard 'full test' to charge an individual with a specified offence, which requires that there is a 'realistic prospect of conviction'. In terrorism cases, this is a high bar to meet given the prevailing need to intervene early in an investigation in order to protect

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purpose connected with the commission, preparation or instigation of an act of terrorism'. s. 58(1) provides that 'A person commits an offence if (a) he collects or makes a record of information of a kind likely to be useful to a person committing or preparing an act of terrorism, or (b) he possesses a document or record containing information of that kind.' The former offence was prosecuted in the 2010 case of Krenar Lusha; the latter was prosecuted in the cases of Ishaq Kanmi, Ilyas Iqbal, Terrence Gavan, Justin Cartwright, Ian and Nick Davison, Trevor Hannington, and against several of the defendants in the Airline Bomb plot. See generally the case of *R v G; R v J* [2009] UKHL 13.

[75] s. 2 of the Terrorism Act 2006 creates an offence of disseminating a terrorist publication *inter alia* where an intended effect is the direct or indirect encouragement or inducement to commit, instigate or prepare an act of terrorism, or where the individual is reckless as to whether it may so encourage or induce such activities.

[76] s. 4(1) of the Explosive Substances Act 1883 creates an offence of making explosives. The offence was, for example, prosecuted in the 2010 cases of Justin Cartwright, Terrence Gavan and Darren Tinklin, as well as the 2009 case of Neil Lewington.

[77] Lord Carlile, Definition of Terrorism (n 30) 35-36.

the public.[78] The 'threshold test' was inserted in the Code for Crown Prosecutors to introduce a threshold for charging 'which is higher than the threshold for arrest, in the crucial sense that it must be based on evidence which will be admissible at trial and not merely intelligence information,' but lower than the demanding standards of the full test.[79] Specifically, this requires that there is at least reasonable suspicion that an offence has been committed, and that there are reasonable grounds to suspect that the continued investigation would provide further evidence that would substantiate a realistic prospect of conviction.[80] The test has been described as a 'sensible practical response' to the terrorism dilemma;[81] it has been argued that its use weakens any argument for lengthy periods of pre-charge detention.[82] The Government has responded that the test does not apply in all cases and it cannot be relied on where the nature of the evidence and potential charges are unclear.[83] Its use does not obviate the need for alternative strategies.

ii. Removing the bar on the admissibility of intercept material as evidence

Material that is obtained through a UK-based interception of communications is currently inadmissible in court,[84] notwithstanding the fact that evidence obtained from foreign intercepts is admissible, as is evidence obtained from a telephone conversation recorded with the consent of one of the participants, or a conversation recorded by a hidden

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[78] CPS, *The Code for Crown Prosecutors* (February 2010) 7-15 <http://www.cps.gov.uk/publications/docs/code2010english.pdf> accessed 9 January 2011.
[79] JCHR, *Counter-Terrorism Policy and Human Rights: Prosecution and Pre-Charge Detention, Twenty-fourth Report of Session 2005-6* (HL 240 HC 1576, 2006) 35-36.
[80] CPS (n 78) 15-18.
[81] JCHR (n 79).
[82] ibid.
[83] Home Office, *Government reply to the twenty-fourth report from the JCHR, Counter-Terrorism Policy and Human Rights: Prosecution and Pre-Charge Detention* (Cmd 6920, 2006) 9; Counter-Terrorism Review (n 111) 10.
[84] s. 17 Regulation of Investigatory Powers Act 2000.

microphone not attached to the telephone.[85] There is, in principle, a general consensus that the bar should be removed.[86] NGOs have suggested that relaxing the bar would facilitate prosecutions and reduce reliance on alternative measures of terrorist control and detention.[87] Although the Chilcott Review agreed intercept evidence should be admissible,[88] the recommendations of the report were detailed and complex. The Intelligence services raised considerable resistance and continue to do so.[89]

The government's immediate response to the Chilcott Review was that the removal of the bar was unworkable.[90] The Government,[91] the Chilcott Review[92] and the Independent Reviewer of Terrorism Legislation[93] have all concluded that the removal of the bar on the use of intercept would have little, if any, impact on the number of successful terrorism-related prosecutions, *a fortiori* on the need for alternative executive terrorism powers.[94] Following the Counter-Terrorism Review 2011, the Coalition Government restated its objective to find ways in which the bar on the use

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[85] Privy Council Review of Intercept As Evidence, Report to the Prime Minister and the Home Secretary (Cmd 7324, February 2008) para 22 (Chilcott Review).
[86] David Ormerod, 'Telephone Intercepts and their Admissibility' (2004) Jan Criminal Law Review 15.
[87] Liberty, *From Law to War: Liberty's Response to the Coalition Government's Review of Counter-Terrorism and Security Powers 2010* <http://www.liberty-human-rights.org.uk/pdfs/policy10/from-war-to-law-final-pdf-with-bookmarks.pdf> 28, accessed 10 March 2011; Justice, *Response to the Coalition Programme for Government*, May 2010 <http://www.justice.org.uk/data/files/resources/80/JUSTICE-response-to-coalition-programme-for-governemnt.pdf> accessed 10 March 2011.
[88] Chilcott Review (n 85) 51.
[89] Chilcott Review (n 85) 5.
[90] The government concluded that the use of intercept as evidence was 'unworkable'. See Richard Ford, 'Phone-tap evidence ruled out in terrorism trials'. *The Times* (London, 11 December 2009) <http://www.timesonline.co.uk/tol/news/uk/crime/article6951615.ece> accessed 10 March 2011.
[91] Counter-Terrorism Review (n 20) 37-38.
[92] Chilcott Review (n 85) 17.
[93] See the comments of Lord Carlile: 'it is unrealistic in the extreme, and unhelpfully misleading, to suggest that … the admission of intercept evidence would increase measurably the prospects of successful prosecution of individuals currently subject to control orders' Lord Carlile, Sixth Report (n 70) para 6.
[94] Chilcott Review (n 85) 17.

of intercept evidence can be removed.[95] The difficulties are formidable and the JCHR opined that the latest attempt is 'doomed to failure'.[96] Indeed, the latest version of the Counter-Terrorism Strategy states that the Government:

> 'wants to find a practical way to allow the use of intercept as evidence in court. But there are a number of critical issues to address, notably the legal viability of any model and the potential adverse consequences for the continued use of intercept as intelligence… the Government has extended the work of the Privy Council review… [to consider] whether operational requirements for an evidential regime which were identified and agreed by the Privy Council group on 30 January 2008 can be reconciled with any legal framework for intercept as evidence; and if they cannot, what the balance of advantage, costs and risk of introducing a legally viably regime would be.'[97]

In short, removal of the bar on intercept evidence in court will not obviate the need for reliance on alternative executive measures of detention, control and removal. If, however, it is implemented at some point in the future, there may be a limited impact on certain terrorism-related prosecutions.

iii. Powers of post-charge questioning

Partially by means of appeasing those who are fundamentally opposed to extensions in the permissible period of pre-charge detention, the Counter-Terrorism Act 2008 (CTA) introduced powers of post charge questioning for individuals charged with specific terrorism-related offences,[98] together with a range of safeguards that, *inter alia,* require judicial authorization and

[95] HC Deb 26 January 2011, col 14WS.
[96] JCHR, *Counter-Terrorism Policy and Human Rights (Seventeenth Report): Bringing Rights Back in* (HC 111, 2010) para 101.
[97] Alexander Home, *The Use of Intercept Evidence in Terrorism Cases'* (House of Commons Library, SN/HA/5249, 24 November 2011).
[98] s. 27 CTA lists specific offences to which the powers apply; s. 93 expressly includes any offence that has a 'terrorist connection', and so has an umbilical link to the broad s. 1 TACT definition.

provide temporal limitation of the powers.[99] Once post-charge questioning is authorized, adverse inferences can be drawn from a suspect's silence.[100] New Codes of Practice are to be promulgated so as to govern the new procedure, and the regime has yet to be brought into force.[101] The Government has suggested that the introduction of the powers is 'unlikely to make much, if any' difference to the need for extended pre-charge detention,[102] a view that is shared by Lord Carlile.[103] There is little likelihood that post-charge questioning will have a marked impact on the need for alternative executive measures, and there have been some initial concerns raised regarding the general operation of the regime.[104]

IV. Assuming release is not a viable option

A plethora of additional provisions operate in order to disrupt terrorism-related activity. The role of financial measures with regard to terrorist asset freezing and seizure should not be underestimated; a considerable corpus of law has been dedicated to such provisions.[105] The proscription of terrorist groups forms an essential limb to counter-terrorism strategies.[106] Similarly, there are a range of 'prophylactic and pre-emptive' measures that may be employed, including powers of stop and search, increased powers of arrest, and additional policing powers, such as the authorization

[99] s. 22 CTA.
[100] ss. 34(1), 36 and 37 Criminal Justice and Public Order Act 1996.
[101] s. 22(7) and (8) CTA; s. 66 Police and Criminal Evidence Act 1984. The powers commence following an order of the Secretary of State pursuant to s. 100(5) CTA, that has yet to be made. Note that as of May 2012, changes to the Codes of Practice in the Police and Criminal Evidence Act 1984 have been made to pave the way for the introduction of the powers: Hansard, HC Deb 10 May 2012 Col 9WS.
[102] Counter-Terrorism Review (n 20) 10.
[103] Lord Carlile, Sixth Report (n 70) para 6.
[104] Clive Walker, 'Post-charge questioning of suspects' [2008] Criminal Law Review 509.
[105] See Peter Sproat, 'Counter Terrorist Finance Policies in the UK: An Evaluation' in J Moran and M Phythian (eds) *In The Shadow Of 9/11: Intelligence, Security And Policing In The UK's War On Terror* (Macmillan 2008); Peter Sproat, 'Counter-terrorist finance in the UK: a quantitative and qualitative commentary based on open-source materials (2010) 13(4) Journal of Money Laundering Control 315; Walker, *Blackstone's Guide* (2009) (n 6) ch 3.
[106] Walker, *Blackstone's Guide* (2009) (n 14) ch 2.

for the use of cordons.[107] Such powers are of considerable importance to counter-terrorism law generally, but fall outside of the focus of this inquiry.

If an individual is to be released, surveillance of a terrorist suspect is an essential tool that is routinely deployed. Increased surveillance could decrease reliance on other treatment strategies yet has significant limitations.[108] Continuous surveillance may prove prohibitively costly to implement and is demanding with regard to manpower and resources.[109] Subjecting an individual to surveillance may also be considered to be an inadequate way of preventing involvement in terrorism-related activity, given an assessment of the risk that an individual poses.[110] Although the Coalition Government has promised increased surveillance of terrorist suspects,[111] *in toto* surveillance does not provide a satisfactory treatment strategy to deal with the 'very dangerous' individuals that are said to exist. The Special Immigration Appeals Commission (a security-cleared specialist tribunal) has supported this view,[112] as has the new Independent Reviewer of Terrorism Legislation.[113] Absent an increased reliance on

[107] See parts IV and V of the Terrorism Act 2000 (Lord Carlile, Definition of Terrorism (n 52) 27).
[108] See generally JCHR, *Counter-terrorism Policy and Human Rights (Sixteenth Report): Annual Renewal of Control Order Legislation 2010* (HL 64 HC 395, 2010) 33, noting the response of the government.
[109] As to resource implications, see e.g. the conclusions of Lord Carlile, *Sixth Report* (n 70). For an assessment as to the increasing prevalence of internet-based surveillance, see Alisdair A Gillespie, 'Regulation of Internet Surveillance' (2009) 4 European Human Rights Law Review 552. Of course, it could be argued that with hindsight, surveillance would have not been disproportionately expensive in regard to the treatment of Abu Qatada, whose deportation has cost upwards of £1million in legal fees alone, but the implications for resources in this specific case should not be extrapolated to the treatment of terrorist suspects generally. See Editorial, 'Abu Qatada: European judges meet to decide right to appeal' *Telegraph* (London, 9th May 2012) <http://www.telegraph.co.uk/news/uknews/immigration/9253765/Abu-Qatada-European-judges-meet-to-decide-right-to-appeal.html>.
[110] Lord Carlile Sixth Report (n 70) 32-34.
[111] HC Deb 26 January 2011, cols 308-314.
[112] *Abu Qatada v SSHD* (SC/15/2005), 8 May 2008.
[113] Frances Gibb, '"It is important that we don't compromise our liberties": the man charged with policing anti-terror laws favours a "grown-up" approach' Times (London, 8 March 2012) Law 49.

surveillance or prosecution, it is the alternative treatment strategies that form the basis of the central analysis of this thesis.

V. A note on jurisdictional terminology

This investigation will primarily focus upon the legal framework in place within England and Wales. The laws and practices within the US will be used as an analogue to underpin this analysis. There are a number of reasons for employing this methodology and these will be outlined in detail throughout the remainder of this chapter. Given the constitutional makeup of the UK, many of the counter-terrorism provisions apply equally in Scotland and Northern Ireland (indeed a substantial body of counter-terrorism law in the UK is derived from its extensive experience of fighting Northern Ireland-related terrorism). There are some jurisdictional differences with regard to the appellate court hierarchy of Scotland (for example, the United Kingdom Supreme Court (UKSC) is the final appellate court for civil cases but not criminal cases) and this thesis does not focus on the law of Scotland.[114] For the most part, the investigation will be based on the law of England and Wales, with references made to Northern Ireland and the USA where necessary.[115] Where a particular provision or principle applies to the whole of the UK, the appropriate reference will be made. Decisions reached by the UKSC will be routinely analysed, as will consideration of the relevant European jurisprudence, including decisions of the ECtHR. The Strasbourg case law continues to have an impact on the law of the entire UK given each country's membership of the European Union and accession to the European Convention for the Protection of

[114] While the control order regime under the Prevention of Terrorism Act 2005 applied to Scotland, the Special Immigration Appeals Commission Act 1997 did not. The powers of indefinite detention under the Anti-Terrorism, Crime and Security Act 2001 applied to Scotland, as does the new Terrorism Prevention and Investigation Measures Act 2011.
[115] Each of the statutes cited above applies equally to Northern Ireland.

Human Rights and Fundamental Freedoms (ECHR).[116] It is therefore likely that elements of this thesis will be useful to scholars examining the counter-terrorism legal order of Scotland and Northern Ireland, as well as European jurisdictions further afield.

VI. Counter-Terrorism Research: a methodological note

One of the acknowledged difficulties with conducting research in the field of counter-terrorism law relates to its inherent dynamism. Fundamental changes may arise swiftly as a result of a variety of triggers: terrorist incidents, adverse judicial decisions or sweeping legislative revision. The present investigation is not immune to such dangers. Indeed, as is identified throughout the thesis, there are pending modifications to each of the three terrorist treatment strategies. There is inevitably a desire to await the latest decision of the UKSC or ECtHR, the latest statutory amendment, or the latest Parliamentary vote on the renewal of a pre-existing power. But the nature of counter-terrorism law is such that there has rarely been a period in the last decade in which fundamental changes were not anticipated. There is equally an omnipresent risk of further terrorism attacks that may render some of the legal analysis redundant. A researcher can do little to guard against such perceived risks, which are endemic to all legal research, but are of heightened significance in this paradigm.

These risks do not undermine nor preclude the legitimacy of research in this area. On the contrary: academic synthesis of the relevant principles may contribute to the development of new provisions; this thesis is well placed to inform forthcoming Parliamentary debates on a variety of

[116] European Parliamentary Assembly, Resolution 1031 (1994), *On the honouring of commitments entered into my member states when joining the Council of Europe,* §9.

terrorism-related issues. The fact that counter-terrorism law is in a state of flux reinforces the originality of the analysis, since many of the more recent developments have not been previously subjected to academic scrutiny. In addition, while there may be reform in relation to a specific treatment strategy, the conclusions in relation to constitutional optimization will continue to apply and have salience.

Research Methodology

Before the benchmarks required for constitutional optimization are established, it is necessary to determine the research methodology that will be adopted. There are many accepted methodologies in the broad discipline of law, including, *inter alia,* comparative studies that draw on lessons from alternative legal systems, doctrinal studies, contextual or inter-disciplinary (socio-legal) studies, and jurisprudential studies.

I. Comparative versus non-comparative

There are various approaches to legal research by which it is possible to incorporate legal analysis from other jurisdictions. Perhaps the most firmly established is the traditional 'comparative' study. This orthodoxy suggests that a comparative approach is acceptable only 'if it results in proposals for the reform of domestic law'.[117] In this way, comparative law is valid where 'assimilation or integration' of laws may occur, based on a comparator that espouses similar economic, social and cultural elements, absent which comparisons make little sense and are of questionable validity.[118] It is clear that employing a comparative approach may allow lessons to be

[117] Rodolfo Sacco, 'Legal Formants: A Dynamic Approach to Comparative Law' (1991) 39 American Journal of Comparative Law 1, 1.
[118] O Kahn-Freund, 'On Uses and Misuses of Comparative Law' (1974) 37 Modern Law Review 1, 8.

learned from the relative success or failures of the terrorism treatment strategies deployed across other jurisdictions.[119]

Comparative law is, however, a notoriously difficult discipline to master; its very meaning is contested. Zweigert and Kötz, authors of a seminal text in this area,[120] have described its basis as 'an intellectual activity with law as its object and comparison as its process with an added element of internationalism'.[121] It may be considered to be a legal discipline in its own right that draws comparisons from more than one legal order.[122] Some scholars have suggested that a 'genuine … "scientific" contribution' may be made by simply identifying synergies and disparities between jurisdictions.[123] Others have noted that it is equally possible to 'selectively' identify provisions from a comparator jurisdiction[124] notwithstanding a substantial degree of political differentiation.[125] Comparative law is routinely drawn on by judges in the absence of a clear domestic precedent in order to help arrive at judgments,[126] and this is equally true in terrorism-related cases.[127] Different models of comparative law exist. One author has separated comparative studies into five groups:

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[119] M Salter and J Mason, *Guide to the Conduct of Legal Research,* (Pearson, 2007) 183.
[120] B S Markesinis, 'A Matter of Style' (1994) LQR 110, 607-628 states that 'No book in my opinion has done more to reveal the weaknesses of the old-style works of comparative law that Zweigert & Kötz's *An introduction to Comparative Law.* Crisp, specific, complete and reliable...they have used their rich and focused material to compare and criticize solutions and, what is for me just as important, they have been quick to emphasize similarities of result and even methodology' at p 607.
[121] Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (3rd edn, OUP 1998) 2.
[122] I Stewart, *Critical approaches in Comparative Law* (2002) Oxford U Comparative L Forum 4.
[123] Sacco (n 117) 3.
[124] Ibid.
[125] Kahn-Freund (n 118) 12; Alan Watson, *Legal Transplants and Law Reform* (1976) 92 Law Quarterly Review 79, 79.
[126] Bernhard Crossfeld, *The Strengths and Weaknesses of Comparative Law* (OUP, 1990) 13.
[127] See the seminal cases on either side of the Atlantic: *A and Others v United Kingdom* App No 3455/05 (ECtHR, 19 February 2009); *A and Others v SSHD* [2004] UKHL 56; *Boumediene v Bush* 553 US 723 (2008); *Rasul v Bush* 542 US 466 (2004).

> '(a) a comparison of foreign systems with the domestic system to ascertain similarities and differences; (b) studies which analyse objectively and systematically solutions which various systems offer for a given legal problem; (c) studies which investigate the casual relationship between different systems of law; (d) studies which compare the several stages of various legal systems; (e) and studies which attempt to discover or examine legal evolution generally according to periods and systems'.[128]

Under this analysis, the present thesis could be classified under the headings (a) and (b). In terms of the nature of the comparative investigation, there is a degree of consensus that some time should be devoted to considering the general mechanisms of each comparator's legal system.[129]

While full homogenization between comparators is not necessarily crucial,[130] Zweigert and Kötz have expounded the requirements in order for such an investigation to have validity. The authors establish the principle of 'functionality':[131] the idea that incomparables 'cannot usefully be compared and the only things which are comparable are those which fulfil the same function.'[132] If this method were to be used in the present investigation, it would require a research question to be appropriately couched in functionalist terminology.

Zweigert and Kötz identify two general approaches to comparative law.[133] The first of these methods is the macro-comparison, which compares the 'spirit and style' of legal systems, including the 'thought and procedures

[128] Hug (1922) in Peter De Cruz, *Comparative Law In A Changing World* (Cavendish, 1995) 6.
[129] Zweigert & Kötz (n 121) 33-37; Bernhard Crossfeld (n 126) Ch 2; Sacco (n 117).
[130] Sacco (n 117) 6.
[131] Zweigert & Kötz, (n 121) 32.
[132] ibid.
[133] See the general methodology discussion by Zweigert & Kötz (n 121) Ch 1.

they use'.[134] Instead of focussing on one discrete issue, the comparativist focuses on practices and general legal approaches, before drawing comparisons with a domestic jurisdiction.[135] Micro-comparison, by contrast, is concerned with the rules used to deal with specific legal problems and particular conflicts of interest.[136] As this thesis is concerned with a specific problem within the legal system of England and Wales, this approach appears to be suitable at first glance: it should be possible to examine the legal measures that a different jurisdiction adopts to deal with the threat posed by terrorist suspects on home soil, when prosecution or release are not viable options.

In practice, however, it would be very difficult to conduct a micro-comparison that does not draw on elements of a macro-comparison.[137] In the context of the present investigation, for example, the legal measures to deal with terrorist suspects may be unique to each particular jurisdiction, but their practical operation and operable constitutional oversight mechanisms will also vary considerably. Combining both macro and micro approaches is therefore consistent with a functionalist comparative methodology,[138] and conventional wisdom would suggest that a researcher must construct a methodology which:

> 'first lays out the essentials of the relevant foreign law, country by country, and then uses this material as a basis for critical comparison, ending up with conclusions about the proper policy for the law to adopt, which may involve a reinterpretation of his own system'.[139]

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[134] Zweigert & Kötz (n 121) 4.
[135] Ibid.
[136] Zweigert & Kötz, (n 121) 3.
[137] Ibid 5.
[138] Ibid.
[139] Ibid 6.

This approach may be appropriate in different circumstances, but it is not adopted by the present investigation for a variety of interrelated reasons. The adoption of a 'functionalist' approach across different legal systems, or even a wholly comparative approach, would require an assessment as to the practical impact of the counter-terrorism powers and applicable oversight mechanisms at both micro and macro levels.

At the macro level, there are likely to be significant constitutional disparities between comparator legal systems, not least because the constitution of the UK is uncodified, unlike that of almost every other country.[140] Parliament is sovereign; there is a concomitant commitment to the rule of law; and there is weak separation between the three arms of state: the legislature, executive and judiciary.[141] Due to the doctrine of Parliamentary Sovereignty (itself a common law construct), the judiciary have no power to strike down legislation.[142] The UK constitution remains inherently political,[143] notwithstanding recent statutory codification of constitutional principles.[144] Alternative jurisdictions possess very different constitutions; while these constitutional differences may provide a relevant and interesting counter-point to the present investigation, they also raise some pertinent concerns regarding the legitimacy of any proposed 'better law', since it is almost inevitable that any solution will not be simultaneously applicable to both England and Wales and a comparator jurisdiction.

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[140] See below ch 2 p 54-55. Israel, New Zealand, San Marino and some aspects of the Canadian constitution remain unwritten. Most other jurisdictions have a single, codified document that establishes the rules of the State. This is not the case in the UK: see See generally AV Dicey, *Introduction to the study of the Law of the Constitution* (8th edn, Macmillan 1915) cxxv; Bradley and Ewing, *Constitutional and Administrative Law (*15th ed, Pearson 2011) ch 1-2.

[141] Bradley & Ewing (n 140) ch 4-6; see below ch 2.

[142] ibid.

[143] JAG Griffith 'The Political Constitution' (1979) 42 Modern Law Review 1; Adam Tomkins, 'In defence of the political constitution' (2002) 22(1) Oxford Journal of Legal Studies 157.

[144] See, for example, the Human Rights Act 1998; the House of Lords Act 1999; the Constitutional Reform Act 2005.

Macro-analysis in the present investigation would require examination of the ways in which each jurisdiction imports the notion of fundamental rights into its constitution, since it will be established in chapter 2 that the human rights doctrine of proportionality forms one of the benchmarks required for 'constitutional optimization'.[145] Similarly, different constitutions are likely to afford varying degrees of protection to fundamental doctrines such as the Separation of Powers,[146] which are again essential to the same aim.[147] While these hurdles may not be insurmountable to investigations in other areas, such macro-analysis may risk obscuring any recommendations made by the present thesis.[148]

An attempt at comparative micro-analysis may also run into problems. First, there may be non-legislative or judicial substitutes for detention or removal practices. The counter-terrorism legal regime of England and Wales has become increasingly transparent in recent years,[149] but the same cannot be said of many other legal systems. Even with the availability of official reports and the media, treatment strategies that deal with high-risk individuals on home soil are shrouded in secrecy.[150] These

[145] Below, ch 2 p94-100.
[146] William J Brennan Jr, 'The Constitution of the United States: Contemporary Ratification' (1986) 27 South Texas Law Review 433, 437.
[147] See below ch 2 p 74-94. For example, the role of the judiciary in supervising and limiting executive action may vary widely between jurisdictions, and in some instances the judicial function may be heavily circumscribed in terrorism-related cases.
[148] Such macro-analysis requires a comparativist to take steps to eradicate preconceptions of the domestic legal system (Zweigert and Kötz (n 121) 33-37).
[149] Codification in the Terrorism Act 2000, following lengthy review by Lord Lloyd, ensured transparency that was augmented with structured review by an independent person. Since 2000, the government's counter-terrorism strategy has been substantially amended and is widely available (CONTEST (n 3)); the Security Services' websites provide up-to-date information regarding threat levels (since 2006: <https://www.mi5.gov.uk/output/threat-levels.html>; there are frequent reports to Parliament on the operation of the new provisions (such as those prepared by the Independent Reviewer and by Select Committees, including the Joint Committee on Human Rights).
[150] In the UK, redacted copies of control orders would be published as part of the annual independent review. By contrast, in the United States, there is no such mechanism by which information on these terrorist suspects is released to the public: see generally Jeffrey Addicott, Terrorism Law: The Rule of Law and the War on Terror (Lawyers and Judges, 2nd ed 2004).

executive measures may be based on sensitive operational requirements to which the present investigation is not and cannot be privy. Ensuring that comparative provisions are functionally the same is likely to be a near-impossible task in the absence of high security clearance or through the use of diplomatic channels that are unavailable to the present desk-based study.

At both macro and micro levels, it is problematic to compare the counter-terrorism regimes of civil and common law jurisdictions, even with the adoption of a functionalist approach. France and Spain, for example, use systems of investigatory magistrates, which are endowed with considerable powers; [151] drawing meaningful comparisons between detention or removal regimes is difficult by their nature. Indeed, one comparative study of pre-charge detention conducted by Liberty has been criticized for this very reason.[152] The impact of societal drivers on counter-terrorism legislation will also vary widely between jurisdictions, [153] depending on complex historical and political factors, an analysis of which is beyond the scope of the present investigation.

In light of these methodological and practical challenges, this thesis is not truly 'comparative' in nature. But by conducting an isolated investigation of the counter-terrorism legal provisions in England and Wales, the

[151] In Spain, the Audiencia Nacional (a specialized central court that sits in Madrid) is legally the only competent body to investigate and judge the terrorist offences: see generally José Luis de la Cuesta, Anti-Terrorist Penal Legislation and the Rule of Law: Spanish Experience <http://www.penal.org/IMG/JLDLCTerrorism.pdf>. In France, a centralized court is responsible for investigating and granting detention where necessary: Steven Erlanger, 'Fighting Terrorism, French-Style' *New York Times* (online, 30 March 2012) <http://www.nytimes.com/2012/04/01/sunday-review/the-french-way-of-fighting-homegrown-terrorism.html?ref=world>.

[152] Jago Russel (ed), 'Terrorism Pre-Charge Detention: Comparative Law Study' (November 2007) < http://www.statewatch.org/news/2007/nov/liberty-report-pre-charge-detention-comparative-law-study.pdf>; see the comments by Stella Elias, 'Rethinking 'Preventive Detention' From a Comparative Perspective: Three Frameworks For Detaining Terrorist Suspects' [2009] Columbia Human Rights Law Review 100.

[153] Sacco (n 117) 33.

investigation would risk falling ‘into error’.[154] It follows that this inquiry will conduct a non-comparative study, based on the law of England and Wales, but which is cognizant of differing behaviours and practices of another jurisdiction, in order to identify any issues that may be of relevance or concern.

II. Jurisdictional Parameters

In the absence of a traditional comparative analysis, it is not necessary to provide extensive justification and macro-analysis of comparator legal systems. Nonetheless, it remains instructive to examine the basis for selection of the chosen jurisdictions.

i. England and Wales

As a result of decades of evolution, the UK’s counter-terrorism laws have been described as the most sophisticated in the world,[155] and have effectively acted as a template for the counter-terrorism regime of Australia.[156] The UK has substantial experience of dealing with terrorism in relation to Northern Ireland, and was a principal victim of Al-Qaeda-affiliated terrorism over the last decade, with British citizens killed in the attack on the World Trade Centre on 11th September 2001 and the London Bombing campaign on 7th July 2005. There have been various other

[154] Zweigert and Kötz (n 121) 41.
[155] Home Office, *Counter-Terrorism Powers: Reconciling Security and Liberty in an Open Society: A Discussion Paper* (Cm 6147, 2004) 4; Conor Gearty, ‘Human Rights in an Age of Counter-Terrorism: Injurious, Irrelevant or Indispensable?’ Current Legal Problems [2005] 58, 25.
[156] Andrew Lynch and George Williams, *What Price Security? Taking Stock of Australia's Anti-terror Laws* (University of New South Wales Press 2006); Christopher Michaelson, ‘Derogating from International Human Rights Obligations in the “War Against Terrorism”? A British Australian Perspective,’ [2005] *Terrorism and Political Violence*, vol 17, 137. Note that there remain notable differences between the regimes: from the perspective of control orders, for example, the UK’s Special Immigration Appeals Commission is not fully emulated.

terrorism incidents and incidents thwarted.[157] As a result of these attacks, the counter-terrorism framework has reacted tempestuously, with the substantial augmentation of police powers and the creation of additional offences.[158] In particular, the UK has routinely deployed internment in cases related to the Northern Ireland Troubles and across the post- 9/11 landscape.[159] Such changes have numerous constitutional implications, which befit detailed analysis.

ii. United States of America

In terms of an additional jurisdiction from which issues of relevance and concern may be identified, there is perhaps one obvious choice. Zweigert and Kötz rationalize that there may be 'quite topical legal problems' that would direct the focus of the intended research,[160] and that could certainly be said of the legal response to terrorist suspects in the USA following the attacks of 11th September 2001. Those attacks on US soil were the most devastating as part of a concerted terrorism campaign amounted by Al-Qaida affiliates that was directed primarily at American interests.[161] The effects of 9/11 are still being felt and it could truly be said that the attacks catalyzed a paradigm shift in counter-terrorism law and policing.[162] The UK

[157] For an evaluation of which, see CONTEST (n 3) 24-33.
[158] The Anti-Terrorism, Crime and Security Act 2001, the Prevention of Terrorism Act 2005, the Terrorism Act 2006, the Counter-Terrorism Act 2008 and the Terrorism Prevention and Investigatory Measures Act 2011 are the major provisions in England and Wales (and, for the most part, the wider UK). There have also been myriad amendments and new powers created by secondary legislation, including Orders in Council.
[159] Below, chapter 2.
[160] Ibid 42.
[161] Congressional Research Service, Memorandum to House Government Reform Committee, *Terrorist Attacks By Al Qaeda* (Declassified, 31 March 2004) <http://www.fas.org/irp/crs/033104.pdf> accessed 10 January 2011.
[162] Anoush Ehteshami, '9/11 as a cause of paradigm shift?', Working Paper. Durham University; Dominic Johnson and Elizabeth Madin, 'Paradigm Shifts in Security Strategy: Why Does It Take Disasters to Trigger Change?' in *Natural Security: A Darwinian Approach to a Dangerous World* (eds RD Sagarin & T Taylor) (University of California Press, 2008) Ch 13; Edward Lazarus, 'Did September 11 Cause a Constitutional Paradigm Shift?' *FindLaw* (3 February 2005) <http://writ.news.findlaw.com/lazarus/20050203.html>.

and the USA were the only two Western democracies to formally declare a state of emergency following the 9/11 attacks. In the US, constitutional checks were largely circumvented by the attempt of the Bush administration to detain individuals beyond the jurisdiction of the US court hierarchy at the notorious Guantánamo Bay detention camp.[163] A state of emergency has been maintained for the last decade.[164]

By contrast, the UK Government adopted an emergency framework in addition to the use of pre-existing criminal law. Article 15 of the ECHR allows for a derogation to be entered in respect of certain Convention rights where there is an emergency or war threatening the life of the nation.[165] It is instructive that the UK Government was the only European government that found it necessary to implement the derogation mechanism.[166] The UK temporarily introduced internment for foreign national terrorist suspects. Once the emergency was terminated,[167] the UK resorted to risk-based 'control strategies' and continued with the strategy of pursuing criminal justice outcomes for terrorist suspects.[168]

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[163] Below ch 3 p146.

[164] The power to declare an emergency is vested in the President; the National Emergencies Act of 1976 (50 USC 1601-1651) provides that a period of emergency will last for 2 years subject to Presidential renewal. President Obama implemented the latest renewal on September 14, 2010. *Letter from the President on the Continuation of the National Emergency with Respect to Certain Terrorist Attacks*, White House Press Office (10 September 2010) <http://www.whitehouse.gov/the-press-office/2010/09/10/letter-president-continuation-national-emergency-with-respect-certain-te> accessed 11 May 2011.

[165] Article 15(1) ECHR provides, so far as is material here:
'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.' Art. 15(3) requires that the Secretary General of the Council of Europe should be kept appraised of any derogation and associated measures.

[166] As was observed by the ECtHR as 'striking': *A v UK* [2009] ECHR 301, para 180.

[167] In this context this refers to legal as opposed to political termination of the emergency, since it may be argued that a paradigm of 'quasi- emergency' continues to perpetuate.

[168] Walker (n 14) 1400.

The perils of the US approach have been widely documented.[169] Guantánamo Bay has long outlived its political viability, yet remains open despite the clear will contrarily expressed by the Obama administration.[170] Conversely, some of the UK provisions have been repealed, but new measures have taken their place.[171] US and UK strategies have been reined in by a confluence of constitutional mechanisms with varying degrees of success. For these reasons it could be suggested that no analysis of counter-terrorism laws in England and Wales should omit consideration of the USA framework.[172]

There is a further coherent logic to including an analysis of the legal framework of the USA for a variety of demographic and content-based reasons. There are obvious similarities in social, economic and political norms, which render Anglo-American studies particularly apposite, although care should be taken not to make too much of these.[173] English law remains very much the 'parent' of the American law tradition,[174] and both are common law jurisdictions. The American approach to the counter-terrorism strategies of detention and removal is taken at a Federal level, thus eliminating many of the potential problems of dealing with State-specific counter-terrorism provisions. Most significantly, the UKSC and the US Supreme Court (SCOTUS), as well as the ECtHR, routinely draw upon case law from these other jurisdictions.[175] Based on the nature of the

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[169] Below, ch 4 p 186-204.
[170] Below, ch 4 p 202-203.
[171] The key examples in the current context are the replacement of the control order regime with Terrorism Prevention and Investigation Measures (TPIM) by the TPIM Act 2011, or the reduction in the permissible period of pre-charge detention following the Counter-Terrorism Review 2011: see below ch 4 p237-241; ch 3 p 181-182.
[172] This point is emphasized by Zweigert and Kötz (n 121) 41.
[173] Bernhard Crossfeld, *The Strengths and Weaknesses of Comparative Law* (OUP, 1990) Ch 10.
[174] Zweigert and Kötz (n 121) 41.
[175] *A and Others v United Kingdom* App No 3455/05 (ECtHR, 19 February 2009); *A and Others v SSHD* [2004] UKHL 56; *Boumediene v Bush* 553 US 723 (2008); *Rasul v Bush* 542 US 466 (2004).

current study, these jurisprudential sources therefore have a valuable place in the present investigation and should not be ignored.

iii. Constitutional differences

Unlike England and Wales, the US legal system is based on a supreme Constitution, adjudicated on by SCOTUS, which possesses a strike down power when it considers legislation to be unconstitutional.[176] There is a concomitant divergence in the ways in which human rights protection is ensured. The US Constitution formally offers relevant protection in the form of the First, Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments.[177] By contrast, the UK, as a member of the European Union, has acceded to the ECHR, which guarantees similar rights.[178] These rights are given further effect in UK law by the Human Rights Act 1998 (HRA), which provides a domestic enforcement mechanism.[179] Over and above the protection afforded by the ECHR, the law in England and Walse has long embraced the notion of 'negative liberty': an individual has the right to do anything that is not prohibited by law.[180]

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[176] On the nature of the SCOTUS, see Edwin Meese, 'The Supreme Court of the United States: Bulwark of a Limited Constitution' (1986) 27 South Texas Law Review 455; as to the nature of the constitution itself, see e.g. William J Brennan Jr, 'The Constitution of the United States: Contemporary Ratification' (1986) 27 South Texas Law Review 433. See further ch 2 below.

[177] US Cons ams 1, 4, 5, 6, 8 provide for the freedom of religion, and speech; search and seizure; trial and punishment; due process; and the prohibition on cruel and unusual punishment.

[178] Articles 2, 3, 5, 6, 8, 10 and 11 respectively guarantee the right to life; prohibition on torture and inhuman and degrading treatment or punishment; right to liberty and security; right to a fair trial; right to respect for private and family life; freedom of expression; and the freedom of assembly and association.

[179] s. 6(1) HRA provides that 'it is unlawful for a public authority to act in a way which is incompatible with a Convention right', which expressly includes the courts by virtue of s. 6(3)(a). When considering the judicial review of a detention decision, for example, the courts must ensure that the relevant ECHR rights are protected. s. 7(1) HRA allows an individual to bring proceedings against a public authority in such instances. For further discussion of these provisions, see Francesca Klug, 'Judicial Deference under the Human Rights Act 1998' (2003) 2 European Human Rights Law Review 125; H Fenwick, G Phillipson, and R Masterman, R (eds) *Judicial Reasoning under the UK Human Rights Act* (Cambridge University Press 2007).

[180] Helen Fenwick, *Civil Liberties and Human Rights* (Routledge-Cavendish, 2007) 1.

This plethora of augmented rights protection in England and Wales stands in stark contrast to the codified protection that stems from the Bill of Rights in the US. It has been argued, for example, that flexible doctrines of limitation under the ECHR are more effective at upholding human rights standards while accommodating security interests than the categorical approach espoused by the US Constitution.[181] The constitutional differences here are such that the transposition of American mechanisms into the legal framework of England and Wales (and vice versa) may not be possible. These observations support the view that while a study of the American jurisdiction is appropriate, traditional comparative macro-analysis does not befit the present investigation.

iv. Alternative Jurisdictions

Having established the rationale for an Anglo-American investigation, it is natural to consider whether an analysis of any other jurisdictions would be beneficial to the present thesis. There are numerous potential suitors here: Australia and New Zealand, for example, share the common law tradition, yet the former's significant emulation of the UK's counter-terrorism laws may mean that there is little to be learned from such an analysis. A Canadian comparison may be appropriate and could deserve further study: its terrorism legislation is similar to that passed by the USA following the 9/11 attacks.[182]

The present investigation restricts itself to the law of England and Wales, drawing on the practices of the USA, for one simple reason. A narrow focus to the thesis has been identified and the current methodology has been selected to allow the research aim to be addressed. Clarity of

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[181] Stefan Sottiaux *Terrorism and the Limitation of Rights in the U.S. Constitution* (Hart 2008) 27-32.
[182] See generally Kent Roach, *Consequences for Canada* (Queen's University Press 2003).

analysis and detailed scrutiny of the provisions are possible with these parameters. Broadening the parameters risks obfuscating the recommendations and focus.[183] Further research, however, could legitimately be directed at alternative jurisdictions in these areas.

III. Doctrinal versus socio-legal research

The hypothesis states that doctrines around 'constitutional optimization' may promote a more satisfactory solution in terms of the executive treatment strategies that are deployed against terrorist suspects. These treatment strategies all have a legislative basis,[184] and several of the doctrines of constitutional law that are examined in chapter 2 are similarly based in statute.[185] Other relevant doctrines have emerged through case law precedent.[186] Nonetheless, there continues to be much debate about the value and utility of doctrinal research methods juxtaposed with an emergent body of socio-legal discourse.[187] Various permissible methodologies exist within the broad discipline of law, and often no bright

[183] Basil Markensinis, 'Comparative Law – A subject in search of an audience' (1990) 53 Modern Law Review 1, 21. For similar reasons, the legal systems of jurisdictions further afield are not examined: as well as the relevant comparative hurdles that have been identified above, an additional language barrier would present a formidable challenge to the present research: see Crossfeld (n 126) Ch 13.

[184] The pre-charge detention regime is implemented under Schedule 8 of the Terrorism Act 2000, as amended by, *inter alia*, the Terrorism Act 2006; the (repealed) preventive detention regime operated under Part IV of the Anti-Terrorism, Crime and Security Act 2001; the control order regime was implemented by the Prevention of Terrorism Act 2005, now replaced by the Terrorism Prevention and Investigation Measures Act 2011; the deportation regime operates under the Immigration Act 1971.

[185] The principal example here is the positive protection of Human Rights under the Human Rights Act 1998 and the European Convention on Human Rights.

[186] See ch 2 p 65-73. The principle of Parliamentary sovereignty, for example, is a common law construct: see the dicta of Lord Reid in *Madzimbamuto v Lardner-Burke* [1969] 1 AC 645. The theoretical constitutional doctrine of separation of powers has similarly been afforded judicial recognition: '[i]t cannot be too strongly emphasised that the British constitution, though largely unwritten, is firmly based on the separation of powers: Parliament makes the laws, the judiciary interpret them,' *Duport Steels Ltd and Others v Sirs and Others* [1980] 1 WLR 142, 158 (Lord Diplock).

[187] See, for example, Roger Cotterrell, 'Subverting Orthodoxy, Making Law Central: A View of Sociolegal Studies' (2002) Journal of Law and Society vol 29, 632; Mark Van Hoecke and Mark Warrington, 'Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law' (1998) 47, 495; Paddy Hillyard, 'Law's Empire: Socio-legal Empirical Research in the Twenty-first Century' (2007) Journal of Law and Society 34, 266.

line separates the various approaches. Arthur's analysis, in diagrammatic form, provides a pertinent (if simplistic)[188] illustration of the various categories of legal research:[189]

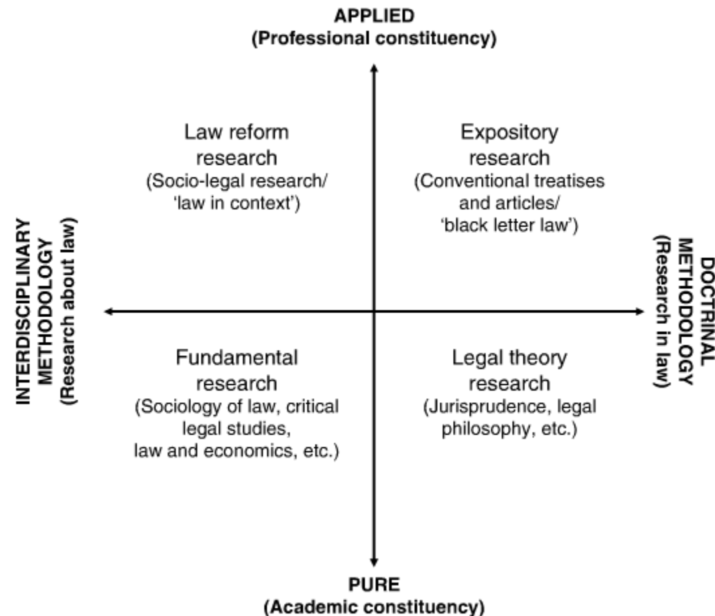

Figure 1

IV. Doctrinal research

Arguably the most prolific, and indeed conventional, approach to legal research is represented by the upper right quadrant: the 'doctrinal' discipline.[190] Doctrinal research is 'concerned with the formulation of 'doctrines' through analysis of legal rules'[191] or alternatively the 'the whole body of writing about the law by those learned in it'.[192] In England and Wales, a doctrinal study places primacy upon legislation and case law precedents, with a growing recognition of academic works and alternative

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[188] Simplistic since it is not always possible to separate the quadrants: overlap is inevitable.
[189] H W Arthurs, *Law and Learning: Report to the Social Sciences and Humanities Research Council of Canada by the Consultative Group on Research and Education in Law* (Social Sciences and Humanities Research Council of Canada 1983).
[190] Paul Chynoweth, 'Legal Research' in Andrew Knight and Les Ruddock (eds), *Advanced Research Methods in the Built Environment* (Blackwell 2008) 31. Chynoweth argues that doctrinal work provides the 'defining characteristics' of legal research.
[191] Ibid 29.
[192] B Nicholas, *The French Law of Contract* (2nd ed, Clarendon 1992) 21.

sources over the last several decades.[193] A 'doctrinal' approach therefore implies a scientific[194] evaluation of the legal principles that operate, although identification of the doctrines themselves is not always a straightforward task.[195] Doctrinal research may be considered as simply an exercise in 'deductive logic' based on the available legal sources, an exercise in inductive reasoning or the drawing of analogies to particular cases.[196] In the field of the literature on counter-terrorism law in England and Wales, current scholarship makes no reference to methodologies beyond a statement that the work is 'doctrinal' and 'positive' in nature,[197] and PhDs in analogous fields follow a similar route.[198]

Doctrinal research cannot, however, operate in a vacuum if it is to provide a complete picture of a particular legal problem or postulate a legal solution: it may often be necessary, for example, to consider the relevant historical, social or political context.[199] Laws evolve through the doctrine of judicial precedent which, it has been suggested, provides the judiciary with the opportunity to determine cases based on the 'result of more or less definitely understood views of public policy; most generally … the unconscious result of instinctive preferences and inarticulate

[193] By contrast, civil law jurisdictions may have awarded greater significance to academic scholarship over a sustained period (ibid).
[194] Jaap Hage, 'The Method of a Truly Normative Legal Science' in Mark Van Hoecke, *Legal Doctrine: Which Method(s) for What Kind of Discipline?* (Hart 2011) Ch 2.
[195] Langdell, Cases on Contracts (1871) (Lawbook Exchange, reprint 1999) viii-ix.
[196]Chynoweth (n 190) 32.
[197] Walker, *Blackstone's Guide* (n 14) 1: 'Since this book is concerned with positive law, the moral vindication of terrorists or of the state which opposes them will not be considered'.
[198] See, in particular, Clive Walker, *The Prevention of Terrorism in British Law* (2nd edn, Manchester University Press 1992) 36: 'The arguments for or against the use of terrorism will not be taken further. The concern here is with the positive law and its role in countering terrorism, whereas the issue of justification questions not that laws are able to combat terrorism but whether they should do so. This is evidently a question to which the laws themselves cannot provide an answer since it is their very authority which is in doubt whatever their content'.
[199] In constitutional law, it is acceptable to conduct a study that is positive but includes relevant socio-legal method: see Alis Lugton, 'Citizen UK and the European Convention for the Promotion and Protection of Human Rights and Fundamental Freedoms' (University of Leeds PHD, ILS 15278485, 2008).

convictions'.[200] In this way, policy judgments arguably influence legal reasoning, and there has been a growing consensus in the courts that such considerations may be relevant.[201] In particular, the UK constitution is inherently political,[202] and so it follows that doctrinal sources will not provide all of the necessary source material for an investigation of this nature.

V. Socio-legal research

The dichotomy between different legal methodologies is narrowing and has been described as 'a somewhat schizophrenic situation in which … legal doctrine, is basically studying law as a normative system, limiting its "empirical data" to legal texts and court decisions, whereas other disciplines study legal reality, law as it is'.[203] Legal research could be categorized as '"an empirical-hermeneutical discipline" … Indeed, it has empirical aspects, which make it perfectly comparable with all empirical disciplines, but the core business of legal doctrine is interpretation, which it also has in common with some other disciplines'.[204]

[200] Oliver Wendell Holmes, "The Path of the Law," (1897), in his Collected Legal Papers (1920), 194-95, 10 Harvard Law Review 457.
[201] As to the inclusion of policy judgments, with particular emphasis on the growing assertiveness of the British judiciary, see Richard Maiman, 'The "War on Terror" in Court: A Comparative Analysis of Judicial Empowerment' http://www.britishpoliticsgroup.org/Maiman.pdf accessed 8 January 2012. The original position that academic writings had no place in judicial reasoning (elucidated in *Donoghue v Stevenson* [1932] UKHL 100, per Lord Buckmaster) has been significantly relaxed. For empirical commonwealth studies see Russell Smythe, 'Judges and Academic Scholarship: An Empirical Study of the Academic Publication Patterns of Federal Court and High Court Judges' (2002) 12 Queensland Institute Law and Justice Journal; AC Castles, 'Now and Then: The Use of Texts and Other Legal Writings in Australian courts' (1992) 66 ALJ 92.
[202] Below ch 2 p55.
[203] Mark Van Hoecke, *Legal Doctrine: Which Method(s) for What Kind of Discipline?* (Hart 2011) 2.
[204] Ibid 3.

Empirical legal research has value in terms of promoting understanding of the operation of the law in the 'real world'.[205] Empirical research may be conducted through statistical analyses or an analysis of the primary and secondary legal sources themselves, with the doctrines checked against judicial practice.[206] The difficulty arises where a decision or law requires interpretation: these decisions are normative rather than absolute. A contextual empirical study is therefore possible: such a study is searching for a 'better law,' which requires value judgments regarding a plethora of potentially competing interests.[207] Within an empirical methodology it is possible to incorporate various inter-disciplinary studies, including sociology, philosophy, psychology and economics, since it is suggested that even within legal doctrine, the influence of these areas can be felt.[208]

In the sphere of counter-terrorism law, checking legal doctrines against their operation in the 'real world' is notoriously difficult given the underlying secrecy necessary to assuage national security concerns. There is a veil of secrecy that surrounds statistical information on the operation of specific counter-terrorism statutes and in particular on the regimes of terrorist detention, control and removal.[209] One way in which the present study will seek to redress this balance in methodological terms will be to incorporate reports of the Independent Reviewer of Terrorism Legislation, who has been granted security clearance and has access to full details

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[205] Nuffield Inquiry on Empirical Legal Research, 'LAW IN THE REAL WORLD: Improving Our Understanding Of How Law Works, Final Report And Recommendations' (London 1996) <http://www.ucl.ac.uk/laws/socio-legal/empirical/docs/inquiry_report.pdf> accessed 10 January 2012.

[206] A Ross, *On Law and Justice* (Stevens & Sons 1958) 40.

[207] Van Hoecke (n 203) 10.

[208] John Baldwin and Gwynn Davis, 'Empirical Research in Law' in Peter Cane and Mark Tushnet, *The Oxford Handbook of Legal Studies* (OUP 2003) 881.

[209] Since 2010, there have been annual publications of the use of various terrorism-related powers under the Terrorism Act 2000; CONTEST (n 3) makes reference to specific numbers of terrorist against whom deportation proceedings have been instigated; Lord Carlile (n 70) and now David Anderson QC (n 69) includes statistics on the use of control orders / TPIMs. In previous years, this material was not all publically available.

regarding the operation of terrorism-related provisions.[210] It is also necessary to establish a series of benchmarks against which the relevant legal sources may be evaluated. This is the function of Chapter Two.

It is clear that there is not always a concrete distinction between doctrinal and socio-legal research; the inclusion of a degree of contextualization does not preclude an ostensibly 'doctrinal' analysis from being conducted.[211] 'In practice, even doctrinal analysis usually makes at least some references to other, external factors as well as seeking answers that are consistent with the existing body of rules'.[212] As Van Hoecke has illustrated, for example, 'there is no agreement among legal theorists on the nature of legal doctrine as a discipline… [d]escription of the law is closely linked to its interpretation and, when describing the law, the legal scholar is wording hypotheses about its existence, validity and meaning.'[213]

As a result of the crossover between these methodologies, this thesis does not follow a single named approach, and falls somewhere near the middle of the 'x' axis in Figure 1.[214] Chynoweth explains:

> 'it is probably incorrect to describe the process of legal analysis as being dictated by a 'methodology'… The process involves an exercise in reasoning and a variety of techniques are used, often at a subconscious level, with the aim of constructing an argument

[210] the reviewer has 'complete independence from government; and unrestricted access, based on a very high level of security clearance, to documents and to personnel within Government, police and security services' Joint Committee on Human Rights, Justice and Security Green Paper (Cm 8194), Independent Reviewer Supplementary Memorandum for the Joint Committee (19 March 2012) [4].
[211] It is common for professed 'socio-legal' research to be doctrinal at its core: see Fiona Cowney, *Legal Academics: Cultures and Identities* (Hart 2004) 54; Brian Tamanaha, *Realistic Socio-Legal Theory* (Oxford 1997) 35.
[212] Chynoweth (n 190) 30.
[213] Van Hoecke (n 207) 19.
[214] Felix Frankfurter, 'The Conditions for, and the Aims and Methods of, Legal Research' (1930) 15 Iowa Law Review 129.

which is convincing *accorded to accepted, and instinctive, conventions of discourse within the discipline'*.[215]

In terms of the positioning of the methodology across the 'y' axis in Figure 1, the focus is very much on the upper quadrants. There is an evident distinction between 'pure' and 'applied' legal research: the former may be categorized as 'academic' research while the latter has some 'particular purpose' in mind.[216]

A theoretical or jurisprudential discussion would not add anything meaningful by way of practical suggestions to the current counter-terrorism or constitutional framework. It follows that an examination of principles in relation to natural law[217] or jurisprudential studies, such as the work of Austin,[218] Bentham,[219] Dworkin[220] or Rousseau[221] is not conducted here. Ultimately the methodology that will be adopted will be in accordance with the conventions of the discipline of Public Law generally and counter-terrorism law specifically. Contextual analysis will be provided as appropriate to support the application of the relevant legal doctrines. Given the variety of material that will be drawn on by the present investigation, it is instructive to examine the nature of the sources from which the analysis will be derived.

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[215] Chynoweth (n 190) 34-35. Emphasis added.
[216] ibid 31.
[217] Such as those advocated by Cicero, Aristotle and Aquinas: see generally R Wacks, *Understanding Jurisprudence: An Introduction to Legal Theory* (OUP 2005).
[218] Austin, *The province of Jurisprudence Determined* (1832, reprint 1995, Cambridge University Press).
[219] See HLA Hart, *Essays on Bentham* (Clarendon, 1982).
[220] Ronald Dworkin, *Taking Rights Seriously* (Hart 1977).
[221] Jean-Jacques Rousseau, *The Social Contract and Discourses* (1762) (JM Dent, 1977). It is axiomatic that this is not intended to represent a closed list of philosophical legal discourse.

VI. Source material

Any legal analysis will include discussion of three primary sources of law in England and Wales: statute, case law precedent and International Treaties. Judges, legal practitioners and jurists also routinely draw on a myriad of secondary sources. These include Parliamentary debates, Reports of Parliamentary Committees, Reports of the Independent Reviewer of Terrorism Legislation, reports of Non-Government Organizations (NGOs), and *amicus curae* briefs. Newspaper articles may be relevant to the analysis since they often report on terrorism cases and the practical operation of terrorism-related provisions.

The juxtapositioning of each of these sources across the doctrinal / socio-legal divide is not always clear. Leading self-professed 'black-letter' or 'doctrinal' literature in the field routinely includes Parliamentary material, including reports on the terrorism legislation by the Independent Reviewer, Parliamentary Committees and other bodies.[222] Moreover, the same research has provided a contextual political analysis of the enactment of previous terrorism-related statutes.[223] It could further be argued that since legal research is concerned with a normative interpretation of legal precedents and doctrine, the fact that the courts themselves have often

[222] See e.g. Keith Ewing, *Bonfire of the Liberties: New Labour, Human Rights, and the Rule of Law* (OUP, 2010) Ch 7, which *inter alia* makes reference to Hansard, Newspaper articles, Select Committees' Reports, Reports of the Independent Reviewer, academic discussion, as well as case law and statute. See also Walker, *Blackstone's Guide* (n 14), which uses all of the same sources, with perhaps even more focus on Home Office publications and Hansard. For a comparable US perspective that draws on equivalent sources, see Bruce Ackerman, *Before The Next* Attack (Yale, 2006). Established Public Law books, such as the eminent Bradley and Ewin (n 140) rely on the same material, as does Ian Loveland, 'Constitutional Law, Administrative Law, and Human Rights: A critical introduction' (5th ed, OUP 2009); Mark Elliot & Robert Thomas, 'Public Law' (OUP 2011); and Hilaire Barnett, 'Constitutional and Administrative Law' (9th ed, OUP 2011).

[223] See e.g. the explanation of the background to the birth of the Prevention of Terrorism (Temporary Provisions) Act 1974 by Clive Walker, *The Prevention of Terrorism in British Law* (2nd edn, Manchester University Press 1992) 43-44, including a breakdown of the Parliamentary passage of the act by reference to Hansard, and 323, with a discussion of various counter-terrorism policies and their practical implementation.

referred to such secondary sources in their judgments[224] brings a variety of alternative legal sources within the doctrinal sphere.

i. Parliamentary material

Prior to the famous case of *Pepper v Hart*,[225] the extent to which Parliamentary material could be harvested in a traditional doctrinal legal study was perhaps questionable, since the courts were not entitled to look to Hansard when interpreting a statute.[226] In that case, the House of Lords held that it was permissible for judges to look to Hansard in order to ascertain the intention of Parliament where there was some ambiguity regarding statutory interpretation.[227] Access to Parliamentary material in the context of the constitutional oversight of terrorism legislation is fundamental, since it goes to the heart of the Parliamentary oversight mechanism,[228] and is routinely drawn on by academics in the field without further methodological justification.[229] This includes not just access to

[224] An exhaustive list is impossible here, but for some examples see: *A and Others v SSHD* [2004] UKHL 56, [22] & [39] (citation of JCHR report); [119] (citation of *Hansard* and Select Committee Reports); [201-203] (academic sources, including Walker's *Blackstone's Guide* (n 14). See also *A v United Kingdom* (2009) 49 EHRR 29, 695 (citation of JCHR report); 702, 714 (*amicus curae* submission). *A v HM Treasury* [2010] UKSC 2 cites *Hansard* ([15-16], [43], [152], [213], [222]). For citation of reports of the Independent Reviewer, see e.g. *Gillan and Quinton v United Kingdom App no 4158/05 (ECtHR, 12 January 2010)* [37-43], [83]. In the lower courts, citation of government reports, official correspondence and responses to the Independent Reviewer of Terrorism legislation are even more common, since they directly impact on the decision making process of the Home Secretary, whose decisions are routinely challenged through judicial review in the control order regime and the TPIM regime: see e.g. *AM v SSHD* [2011] EWHC 2486, *SSHD v BF* [2011] EWHC 1878. Of course, the use of such material in the lower courts is for factual, as opposed to doctrinal purposes, but it nonetheless demonstrates that the 'real life' application of these principles in terrorism-related cases.

[225] Pepper (Inspector of Taxes) v Hart [1993] A.C. 593; [1992] 3 W.L.R. 1032; [1993] 1 All E.R. 42.

[226] This 'exclusionary rule' was judge-made: see e.g. *Davis v Johnson* [1979] AC 264.

[227] Reference would be permitted where the legislative wording was ambiguous, obscure or would lead to absurdity; the material could be any Parliamentary material necessary to understand Parliamentary statements and their effect, provided he statements were clear: [1993] AC 593, 634 (Lord Browne-Wilkinson).

[228] See ch 2 p 78-87.

[229] See e.g. Walker, *The Prevention of Terrorism in British Law* (n 223); Walker, *Blackstone's Guide* (n 14); Ewing (n 222); David McKeever, 'The Human Rights Act and anti-terrorism in the UK: one great leap forward by Parliament, but are the courts able to slow the steady retreat that has followed?' (2010) Public Law 110.

Hansard, but also to the considerable corpus of literature that Select Committees, in the provision of governmental oversight, have built up.[230] Current academic practice in this field suggests that the inclusion of such material is possible within a 'positive' analysis.[231]

ii. Reports of the Independent Reviewer of Terrorism Legislation

In the UK, Lord Carlile acted as the Independent Reviewer of Terrorism Legislation for over a decade, and produced myriad reports on the operation of various terrorism-related provisions.[232] His Lordship has now been replaced by David Anderson QC, and in the interim period a report on the Counter-Terrorism Review 2011 was conducted by Lord Macdonald.[233] All Reviewers have been distinguished lawyers, tasked with the provision of independent oversight over various aspects of the implementation of the Government's nebulous counter-terrorism strategy.[234] Reports include statistical accounts of the use of counter-terrorism powers, the impact of recent counter-terrorism judgments, and practical issues in relation to the 'real life' operation of the terrorism laws

[230] Key Committees include the Constitution Committee, the Draft Detention of Terrorist Suspects (Temporary Extension) Bills Committee, and the influential Joint Committee on Human Rights. In particular, the JCHR has published numerous reports on the operation of counter-terrorism provisions that are released in order to inform subsequent Parliamentary debate. These are referred to where appropriate in the analysis. The most recent example is the JCHR, *The Justice and Security Green Paper: Twenty–fourth Report of Session* 2010–12 (HL 286 HC 1777, 2012).

[231] Above (n 222). Even if this were not the case, its inclusion here is necessary and would simply reflect a methodology between the socio-legal and doctrinal divide in Figure 1.

[232] The reports are all available online from <http://terrorismlegislationreviewer.independent.gov.uk/publications/>.

[233] Lord Macdonald, Review of Counter-*Terrorism and Security Powers: A Report by Lord Macdonald of River-Glaven QC* (Cmd 8003, 2011) 4 (Macdonald Report).

[234] s. 36 of the Terrorism Act 2006 requires the Independent Reviewer to report on proscription of organisations, stop and search powers, arrest and detention powers, and prosecutions for terrorist offences. Section 31 of the Terrorist Asset-freezing Act 2010 requires an annual report on Part I of that Act. An annual review of Control orders was required under s. 14 of the Prevention of Terrorism Act 2005. There have also been ad hoc reports, including the Report on the Definition of Terrorism (Lord Carlile, The Definition of Terrorism (Cmd 7052, 2007)). David Anderson QC is also to report on the operation of the new TPIM regime pursuant to the TPIM Act 2011.

generally.[235] These reports have considerable relevance to the present study since they are routinely invoked during the passage of new legislation, and in annual renewals of 'temporary' terrorism provisions,[236] during which new clauses and existing powers may be challenged.[237] Reports of the Independent Reviewer are drawn on by Parliamentary Committees, including the influential Joint Committee on Human Rights.[238] They contain an invaluable source of information and analysis from which a 'better law' may be constructed. In strict terms, inclusion of this material may be considered to be towards the contextual side of the socio-legal / doctrinal divide. Their inclusion is accepted practice in academic literature in the field.[239]

iii. NGO reports / Amicus Curae briefs

The extent to which amicus curae briefs could be regarded as falling within a doctrinal analysis is questionable. NGOs are increasingly intervening in ongoing cases both in domestic and European cases by the preparation of detailed 'submissions'.[240] These written submissions are referred to the court orally by counsel and are often summarized in final judgments,[241] in

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[235] See, for example, Lord Carlile of Berriew, *Second Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005* (19 February 2007); *Third Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005* (18 February 2008); *Fourth Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005* (3 February 2009); *Fifth Report of Independent Reviewer Pursuant to s. 14(3) of the Prevention of Terrorism Act 2005* (1 February 2010); Lord Carlile, *Sixth Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005* (3 February 2011).
[236] Home Office, *Counter-Terrorism Policy and Human Rights (Ninth Report): Annual Renewal of Control Orders Legislation* (Cmd 7368, 2008). These proposed amendments to the 2005 Act were subsequently defeated.
[237] HC Deb 22 February 2007, col 442 (Patrick Mercer MP).
[238] See e.g. JCHR, *Counter-Terrorism Policy and Human Rights (Ninth Report): Annual Renewal of Control Orders Legislation 2008*; *Tenth Report of Session 2007-08* (HL 57 HC 356, 2007).
[239] Above (n 222).
[240] See e.g. *Al Rawi and others v The Security Service and others* [2011] UKSC 34; *Al-Jedda v United Kingdom (2011) 53 EHRR 23; A v United Kingdom* (2009) 49 EHRR 29; *Gillan and Quinton v United Kingdom App no 4158/05 (ECtHR, 12 January 2010); A & Others v SSHD [2004] UKHL 56.*
[241] See, for example, International Bar Association, '*A and Others v SSHD*: Written

a manner that reflects the established practice of written *amicus curae* briefs in the United States.[242] Increasingly NGOs have been granted permission to provide written submissions to the UKSC.[243] Given their inevitable impact on judicial reasoning, the utility to the present study is clear. Such reports will be referred to where appropriate in the thesis, and are an emerging legal source of importance.[244] More broadly, reports of NGOs that are not submitted to the courts still have value by providing an analysis of the legal provisions and the impact on the constitutional doctrines that will be established in chapter 2. Inclusion of such material provides invaluable contextual detail to the study.

iv. Newspaper articles

Terrorism-related cases are often quickly reported in the media. Broadsheet newspapers, including the Times, the Telegraph, the Independent and the Guardian, frequently include analysis of counter-terrorism powers and individual case studies. Inclusion of these sources will ensure currency of the present study and also allow reference to legal arguments raised by commentators as they arise. Once again, these sources provide contextual detail and depth to the current study.

Submissions Of The Commonwealth Lawyers Association, The Human Rights Institute Of The International Bar Association And The International Commission Of Jurists' <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=e7d5826a-9162-4a9e-b50a-5caf4097a6d6> accessed 10 December 2011.

[242] Delmar Karlen, 'Appeal in England and United States' (1962) 78 Law Quarterly Review 371.

[243] Amnesty International, 'UK: Amnesty International Submission to House Of Lords Opposing Indefinite Detention <http://www.amnesty.org.uk/news_details.asp?NewsID=15624> accessed 10 December 2011.

[244] On the evolution of submissions to the UK court and the contrast between UK and US practices, see generally Michael Zander, *The Law-Making Process* (5th ed, Butterworths 1999) ch 7.

Conclusion: a contextual 'positive' study, which draws upon the experiences and practices of the United States of America

The stated aim of this thesis is to search for ways in which 'constitutional optimization' may be achieved in the treatment strategies deployed against terrorist suspects, and to offer corresponding suggestions for reform in order to find 'better law' for England and Wales.[245] Where appropriate, synergies and disparities in the practices of the USA will be referred to in the analysis, in order to identify any issues of relevance. It has been seen that rules of law are 'normative',[246] and hence there is a need to assess the operation of the legal doctrines in context. It is a fundamental norm that the constitution shall be obeyed.[247]

Given the political nature of the UK constitution, an interwoven nexus of political considerations are of undoubted relevance: the impact of political rhetoric on legal norms should not be underestimated.[248] The study is alive to such considerations; political impetus has often acted as a lodestar for legislative revision in these areas.[249] The impact of politics on the doctrine of constitutional optimization will be addressed, so far as it is relevant, through an analysis of the above sources, including Parliamentary material, relevant reports and newspaper articles.

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[245] A series of suggestions for constitutional optimization is therefore drawn from the analysis: see Eric Stein, 'Uses, Misuses- And Nonuses of Comparative Law' (1978) 72 Northwestern University Law Review 198, 216; Mark Tushnet, 'The Possibilities of Comparative Constitutional Law' (1999) 108 Yale Law Journal 1226, 1229.
[246] H Lauterpacht, 'Kelsen's Pure Science of Law' in Ivor Jennings, *Modern Theories of Law* (first published 1933, Universal 2005) 108.
[247] Ibid 109.
[248] Adam Tomkins, 'Inventing Human Rights Law and Scholarship' (1996) 16 Oxford Journal of Legal Studies 1.
[249] See, for example, the Counter-Terrorism Review 2011 in a UK context: below, ch 4 p237-239.

Chapter Synopsis

The nebulous term 'constitutional optimization' is fully defined in chapter 2, which establishes the four benchmarks that will be applied to the remainder of the thesis. Consideration is given to the meaning of orthodox doctrines of constitutional law, including the Rule of Law, Parliamentary Sovereignty, and the Separation of Powers. The chapter examines the requirement for a proportionate response between the maintenance of national security and human rights, particularly in times of terrorism 'emergency'. Competing theories as to how this may be achieved are introduced.

Chapter 3 applies the benchmarks to the use of detention provisions in relation to Northern Ireland-related terrorism, before tracing the analysis up to the events of 9/11 and beyond. The chapter examines internment and pre-charge detention, including the use of Guantánamo Bay in the United States.

Chapter 4 examines the use of control regimes. The use of control orders vis-à-vis the applicable constitutional benchmarks are analysed, up to and including the recent introduction of a regime of Terrorism Prevention and Investigation Measures (TPIMs), which came into force in January 2012.

Chapter 5 analyzes the removal strategy, with specific focus on deportation and the obstacles that may preclude it. The chapter provides an extended critique of the 'deportation with assurances' (DWA) regime in light of the constitutional doctrines previously established.

Chapter 6 conflates the findings into three recommendations, all of which are designed to address the quadripartite aim of the investigation. A range of tailored suggestions for reform to the detention, TPIM and DWA regimes are made. Several possible constitutional changes to counter-

terrorism law generally are also postulated; these may warrant future analysis and further study.

Chapter 2

A search for 'Constitutional Optimization'

As will be evident throughout this chapter, this investigation is concerned with 'constitutionalism': the observance of constitutional doctrines of importance. The phrase 'constitutional optimization' is used simply to reflect that the thesis seeks ways in which 'better laws' may be achieved across the strategies of terrorist detention, control and removal. This remit allows for the recommendation of changes to particular powers or provisions, and also may reveal potential modifications to broader constitutional oversight mechanisms.

In what ways, then, may recommendations for change be 'better' than the current provisions? As was noted in chapter 1, the criticisms directed at terrorism detention, control and removal provisions relate to their lack of certainty, potential for arbitrariness, disproportionate use of executive power, and a lack of effective oversight of governmental action.[1] These criticisms stem from pre-existing principles of constitutional law. In order to suggest meaningful recommendations for reform, it is first necessary to analyze these constitutional doctrines with a view to identifying how terrorism treatment strategies may be improved. This chapter is structured in two sections, each with four parts.

Section 1 establishes the constitutional underpinning required to contextualize the investigation. Following a discussion of the meaning of the term 'constitution', part I analyses the meaning of the doctrine of the 'rule of law', since its implications are pervasive. Part II considers the concept of 'Parliamentary sovereignty', including the notable doctrines of express and implied repeal that have implications for any recommendations made by the thesis. Part III examines the doctrine of

[1] Above, ch 2 p 2-3.

'separation of powers', which is fundamental to the provision of oversight of executive action. Part IV then assesses the impact of human rights concerns vis-à-vis the doctrine of proportionality.

Section 2 then applies the general constitutional principles and theories to the current investigation. Part I examines the constitutional doctrines in light of the legal framework of the USA. Part II analyses the nature of a terrorism 'emergency' and introduces competing theories as to how an emergency may be effectively curtailed. Part III addresses the notion of 'judicial deference', since it is a recurring feature of the thesis. Finally, part IV concludes by conflating the constitutional doctrines into four overarching benchmarks. These benchmarks will then be applied to the strategies of detention, control and removal in subsequent chapters.

Section 1: Defining 'constitution'

It may seem elementary to begin a discussion of this type with the definition of 'constitution'. Much of the thesis, however, is contingent upon the constitutional oversight of executive action that occurs in England and Wales, and definitional parameters are required. The term 'constitution' itself has two potential meanings. 'In the narrow meaning, a constitution means a document having a special legal status which sets out the framework and principal functions of the organs of government within the state and declares the principles by which those organs must operate.'[2] In countries with a constitution under this definition, the document has a special sanctity, and a supreme court is established in order to adjudicate issues. At a Federal level, such is the constitutional make-up of the USA.[3]

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[2] AW Bradley & KD Ewing, *Constitutional and Administrative Law* (15th edn, Pearson 2011) 4.
[3] See below p 100-101.

By contrast, the UK does not have a codified document, but rather a constitution in the 'wider' sense of the word,[4] as defined by Bolingbroke:[5]

> 'By constitution we mean … that assemblage of laws, institutions and customs, derived from certain fixed principles of reason, directed to certain fixed objects of public good, that compose the general system, according to which the community hath agreed to be governed.'

In a modern context, the House of Lords Committee on the Constitution has provided a helpful definition:[6]

> 'that set of laws, rules and practices that create the basic institutions of the state, and its component and related parts, and stipulate the powers of those institutions and the relationship between the different institutions and between those institutions and the individual.'

Constitutional law is therefore pervasive across a variety of legal disciplines.[7] Counter-terrorism law is no exception, particularly since the government is charged with protection of its people and may seek extraordinary powers in order to discharge this duty.[8] In the context of the present investigation, constitutional law regulates the relationship between the individual (the public at large, as well as the specific terrorist suspect) and the State.[9] It also regulates the interplay between the different organs of the State. In order to be deemed 'constitutional,' executive action must be in accordance with established constitutional doctrines, and relations between the individual and the State should be 'founded on and governed by law'.[10] These notions are encapsulated by the doctrine of the 'rule of law'.

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[4] Bradley & Ewing (n 2) 4.
[5] Bolingbroke, *A Dissertation Upon Parties (1733)*, in Bolingbroke, *Political Writings* (Cambridge University Press 1977) 88.
[6] House of Lords Select Committee on the Constitution, *First Report* (HL 11, 2001) [20].
[7] Maitland, *Constitutional History (538).*
[8] See, for example, the use of proscription and internment in relation to Northern Ireland terrorism (ch 3 p 120-124); see generally Laura Donohue, *The Cost of Counterterrorism* (Cambridge University Press 2008).
[9] Bradley & Ewing (n 2) 3.
[10] ibid.

I. The rule of law

The rule of law is a cornerstone of the UK constitution, yet many of the counter-terrorism measures enacted since 9/11 have been criticized for reneging on the doctrine.[11] The concept of 'rule of law' is nebulous: the term is used to denote constitutional democratic ideals,[12] and may be thought of as a broad political doctrine as opposed to a concrete principle necessary to ensure the observance of constitutionalism.[13] In order to establish benchmarks from this doctrine, therefore, it is first necessary to separate the political theory regarding the rule of law from the positive legal obligations that it imparts.

Philosophical aspects of the rule of law

As a broad doctrine, the rule of law can be traced back to Plato and Aristotle. The latter stated that the rule of law is preferable to that of any individual.[14] The doctrine in this context has its roots in natural law theory. As advocated by Cicero, natural law provides a universal form of 'higher law', discoverable through reason: 'True law is right reason in agreement with Nature; it is of universal application, unchanging and everlasting … [God] is the author of this law, its promulgator, and its enforcing judge'.[15] In the middle ages, Aquinas determined that man-made law that failed to conform to principles of natural law was invalid: *lex injusta non est lex.*[16] The sovereignty of law gained prominence in accordance with the Christian faith, finally being positively asserted after the Glorious

[11] Above, ch 1 p 2.
[12] Lord Bingham, 'The Rule of Law' [2007] CLJ 67.
[13] J Rawls, *A Theory of Justice* (2nd ed OUP 1999) 238. Note that Leyland states that the rule of law 'should be used as the basis for criticizing, not admiring, our legal culture' (Peter Leyland, *The Constitution of the United Kingdom: A Contextual Analysis* (Hart 2012) 71.
[14] Aristotle, *Politics* (Forgotten Books, 1977).
[15] Cicero, *De Republica* (Rudd translation, 1998 OUP) 3.22.33.
[16] Summa Theologica, in d'Entreves, *Natural Law* (2nd ed, Hutchinson 1970).

Revolution and Settlement of 1688, which affirmed the sovereignty of Parliament.[17]

The rule of law has been pervasive as a political doctrine. The social contract theory of Thomas Hobbes, for example, provides that man is incapable of regulating his own life in peace and harmony and must surrender sovereignty to the state in order to gain security;[18] such is the 'contract' that must be formed.[19] Paine suggested that the rights of individuals are held by the government on trust for the people.[20] Under these theories, man-made laws may be invalid where they conflict with such higher forms of natural law or sources of rights. In practice, however, the doctrine of the rule of law is given positive effect in one way: the use of judicial review.[21] The potential for untrammeled power has been curtailed.[22] It follows that the practical impact of this doctrine on the present investigation will be considered, as opposed to the background philosophical debate. This approach reflects the adopted methodology.

The practical impact of the Rule of Law

The essence of the rule of law was separated into three ideals by Dicey. While these principles are outdated in several respects, they continue to have some relevance and are worthy of elucidation:[23]

> '[the rule of law means], in the first place, the absolute supremacy or predominance of regular law as *opposed to the influence of arbitrary power*, and *excludes the existence of arbitrariness*, of prerogative, *or even of wide discretionary authority on the part of the government* … a

[17] For discussion of the common law roots of Parliamentary sovereignty, see below p 70-71.
[18] Thomas Hobbes, *The Leviathan* (1651) (JM Dent, 1973).
[19] Jean-Jacques Rousseau, *The Social Contract and Discourses* (1762) (JM Dent, 1977) 176. Note that Rousseau and Hobbes' stances are different in several respects.
[20] Thomas Paine, *Rights of Man* (1791, Part I) (Penguin 1984, 1988).
[21] This forms an essential part of the Separation of Powers: see below p 88-90.
[22] As is the case under the doctrine of Parliamentary Sovereignty: see below p 65-72.
[23] AV Dicey, *Introduction to the Study of the Law of the Constitution* (Liberty Fund reprint, 8th ed Macmillan 1915, reprint Macmillan 1885) 110.

> man may with us be punished for a breach of the law, but he can be punished for nothing else.’

Discretionary powers are now pervasive across the UK’s legal system, and so a modern interpretation of Dicey’s first principle is perhaps better thought of as a requirement for there to be appropriate checks on governmental power, and for there to be legal authority for the use of such powers.[24] As (Lord Justice) Sedley has stated, ‘[w]hen the idea of the rule of law is interpreted as a principle of constitutionalism, it assumes a division of governmental powers or functions that inhibits the exercise of arbitrary state power.’[25] It is arguable that a power of detention without trial would violate such prohibition on arbitrary power, but this does not necessarily mean that a power of preventive detention cannot be lawfully conferred in a period of emergency, provided that a procedure with suitable legislative and judicial safeguards can be devised.[26] As Bradley and Ewing state, ‘constitutionalism and the rule of law will not thrive unless restraints apply to the government’.[27] This element of the doctrine is inextricably linked to the doctrine of Separation of Powers, which is discussed in more detail below.

The second limb of Dicey’s exposition adds to the first: it requires ‘*equality before the law*, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts.’[28] In other words, and as has been judicially demonstrated, government ministers are not above the law.[29] The rule of law in the UK constitution is currently protected through the use of judicial review.[30] Once again, the Separation of Powers is

[24] TRS Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (OUP 2003) 31.
[25] Ibid.
[26] Fiona de Londras, ‘Can Counter-Terrorist Internment Ever Be Legitimate?’ (2011) Human Rights Quarterly 33(1) 593.
[27] Bradley and Ewing (n 2) 95.
[28] Dicey (n23) 114.
[29] *M v Home Office* [1992] 2 WLR 73, 80.
[30] *R (Corner House Research) v Director of the Serious Fraud Office* [2008] UKHL 60; see further J Jowek, ‘The Rule of Law today’ in J Jowel and D Oliver (eds) *The Changing*

crucial: the extent to which the judiciary may scrutinize and limit the decisions taken by the executive is examined below.[31]

Dicey's third exposition determined that the courts were the vanguard of individual rights, and that these rights were guaranteed best by judicial decisions rather than written declarations.[32] This orthodoxy is clearly outdated:[33] although the courts will continue to uphold common law rights and protections, the influence of international treaties, most notably the ECHR, provide a system of protection that has now been integrated into the legal order of England and Wales.[34] It is this latter protection that is examined below through the human rights doctrine of proportionality.

How, then, does the rule of law provide concrete benchmarks against which the remainder of the thesis can be evaluated? In the modern UK constitution, statutory recognition is given to the doctrine.[35] There are a variety of theories as to its practical ramifications. Joseph Raz provides a comprehensive dissection of the constituent elements of the doctrine, including a requirement that laws should be prospective, open, certain and capable of guiding human conduct; judges should be independent and the courts accessible; and that individuals should have the right to a fair hearing.[36] Fenwick and Phillipson similarly separate the doctrine into three elements: there must be legal justification for government action; law shall

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Constitution (4th edn, OUP 2000) 15-18: 'The day to day, practical implementation and enforcement of the Rule of Law is through the judicial review of the actions and decision of all officials performing public functions).

[31] Below, p 88-91.

[32] '[the rule of law means] that with us the law of the constitution … are not the source but the consequence of the rights of individuals, as defined and enforced by the courts; that, in short, the principles of private law have with us been by the action of the courts and Parliament so extended as to determine the position of the Crown and of its servants; thus the constitution is the result of the ordinary law of the land' (ibid).

[33] Dicey (n23) 121.

[34] By virtue of the Human Rights Act 1998, which gives effect to ECHR principles.

[35] s. 1 Constitutional Reform Act 2005 states that the Act does not adversely affect 'the existing constitutional principle of the rule of law'.

[36] Joesph Raz, 'The Rule of Law and its virtue' (1977) 93 LQR 195.

not be retrospective; and that the law should be clear.[37] Lord Bingham has produced a detailed critique of the doctrine in a contemporary context along very similar lines,[38] describing the 'core' of the doctrine thus:

> 'that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly and prospectively promulgated and publicly administered in the courts.'[39]

Specifically, therefore, the rule of law may be thought to embody the principles that law should be prospective, certain and accessible, without undue discretion to the point of arbitrariness.[40] For the sake of clarity of argument, these synergistic themes are separated into three strands.

(i) Presumption against criminal retrospectivity

The prohibition on criminal retrospectivity is positively protected under Article 7 ECHR, and is referred to as the principle of *nulla crimien sine lege* (no punishment without law). The gradual evolution of legal precedent through common law decisions does not offend against the certainty requirements of Article 7 ECHR, as the ECtHR has held,[41] but a common law system retains the potential for uncertainty in specific areas.[42] As a consequence of this position, ATH Smith has argued for the enactment of a criminal code in order to imbue the legal regime with further certainty. [43] Lord Bingham has stated that the rule of law precludes:

> 'excessive innovation and adventurism by the judges. It is one thing to alter the law's direction of travel by a few degrees, quite another to set it off in a different direction. The one is probably foreseeable and

[37] Helen Fenwick and Gavin Phillipson, *Public Law and Human Rights* (OUP 2011) 92-110.
[38] Lord Bingham, 'The Rule of Law' [2007] CLJ 67.
[39] Ibid 69.
[40] ibid.
[41] See *R v R* [1991] 2 WLR 1065; *SW and CW v UK* [1996] 21 EHRR 363.
[42] For a detailed (and indeed world-renowned) exposition of this concept, see Anthony D'Amato, 'Legal Uncertainty' (1983) 71 California Law Review 1.
[43] ATH Smith, 'Dicey and Civil Liberties: Comment' [1985] PL 608.

> predictable, something a prudent person would allow for, the other not.'[44]

These arguments are pervasive in the current investigation. It could be argued, for example, that any detention (or alternatively, the imposition of lengthy overnight curfews, in effect amounting to daily house arrest)[45] could offend against this principle: detention could legitimately be construed as a criminal punishment in the absence of a criminal conviction.[46] Of course, in the case of control orders and TPIMs, it is the civil justice system rather than the criminal justice system that is ostensibly engaged,[47] and the government has successfully argued in court that the use of control orders or TPIMs does not amount to a criminal penalty.[48] Additionally, it could be argued that there are instances of judicial capriciousness throughout the control order jurisprudence that clearly evidence the kind of adventurousness against which Lord Bingham cautioned.[49] As will be seen, the use of judicial discretion in detention and control order cases is particularly contentious in relation to the power of statutory construction exercised under the HRA 1998.[50]

(ii) Legal Certainty

The requirement for clarity and certainty are fundamental to the protection of the rule of law, and the ECtHR has given positive guidance as to how this principle should be interpreted:[51]

[44] Lord Bingham (n 38) 71.
[45] Curfews were initially permitted in excess of 16 hours per day under the control order regime: see ch 4 p 217 and p 226 for a detailed discussion of the impact on the liberty of the individual.
[46] For example, daily curfews operate under Bail conditions. If an offender is released on Bail, subject to curfew, after sentence he will be given recognition for the time served against his sentence- thus equating the daily curfew to a criminal penalty.
[47] For discussion of this principle, see ch4 p 243-244.
[48] *SSHD v MB; Same v AF* [2007] UKHL 46. For detailed discussion of this case, see below ch 4 p 217-220.
[49] Below ch 4 p 221-225.
[50] Below ch 4 p 219-113.
[51] *Sunday Times v United Kingdom* (1979) 2 EHRR 245, [49].

> [a law should be] 'formulated with sufficient precision to enable the citizen to regulate his conduct; he must be able, if need be with appropriate advice, to foresee to a degree that is reasonable in all the circumstances, the consequences which a given action may entail.'

Nonetheless, the court recognized whilst certainty was 'highly desirable,' it could never be an absolute requirement.[52] Lord Bingham has captured the essence of this principle: 'the broader and more loosely-textured discretion is, the greater the scope for subjectivity and hence for arbitrariness, which is the antithesis of the rule of law'.[53] By way of a parenthetical example, the ECtHR has ruled that the use of stop and search powers, whilst conferred by statute, left an unacceptably broad discretion to individual police officers and accordingly were not prescribed by law.[54] The powers of statutory construction under the HRA 1998 provide the judiciary with a degree of latitude when it comes to determining the meaning of an imprecise statutory term,[55] and there is a natural tension between the powers of statutory interpretation and the need for legislative certainty.

(iii) Legal justification for powers of government

As was clear from Diceyean orthodoxy, government ministers and ordinary citizens are equally subjected to the law.[56] More significantly, there must be lawful authority for executive power to be exercised in the first place.[57] Broad powers that are not substantiated are unlikely to be upheld: this is now a requirement that has been bolstered by the ECHR, since any interference with ECHR rights, even if justifiable, must be prescribed by

[52] Ibid.
[53] Lord Bingham (n 38) 72.
[54] *Gillan and Quinton v United Kingdom App no 4158/05* (ECtHR, 12 January 2010).
[55] These issues are discussed below (p 92-93).
[56] *M v Home Office* [1992] 2 WLR 73,80.
[57] *Malone v UK* (1985) 7 EHRR 14.

the law or in accordance with it.[58] The considerable impact of the HRA 1998 in this area is discussed below.[59]

In the context of the present investigation, the powers of the Home Secretary to certify an individual as a foreign terrorist suspect, impose a control order or TPIM, or to determine that deportation proceedings should be instigated, are found in statute.[60] Broad discretionary power is conferred upon the Home Secretary in these instances, and the decision will be subject to judicial review. As Lord Hope has recently stated: 'the rule of law enforced by the courts is the ultimate controlling factor on which our constitution is based',[61] and this is an empty principle if it 'fails to constrain overweening power'.[62] Their Lordships have made clear that the procedural protection of the rule of law is *given effect* by the procedures of judicial review, as opposed to existing as a positive and independent constitutional principle.[63] It follows that a principal way in which the rule of

[58] Respectively, for example, Article 5(1) ECHR; Article 8(2) ECHR.
[59] For the sake of completeness, is necessary to note the existence of the Royal Prerogative as a common law doctrine that provides a range of residual executive powers that can be exercised without statutory authority (for detailed practical exposition of the doctrine, see Lucinda Maer and Oonagh Gay, House of Commons Library Standard Note SN/PC/03861 (2009). For general theoretical discussion, see e.g. Hilaire Barnett, *Constitutional and Adminstrative Law* (9th ed Routledge, 2011) Ch 5). While the use of the prerogative undoubtedly raises issues in relation to the rule of law, since it exists as a vestigial accumulation of a range of powers previously exercised by the Crown, its application to the present study is limited (See Ministry of Justice, *The Governance of Britain: Constitutional Renewal* (Cm 7341-I, 2008)). Statute now limits the use of the prerogative in a variety of ways and the terrorism-related treatment strategies with which this thesis is concerned are not exercised under the Royal Prerogative. It should, however, be noted that if there was to be a substantial emergency, it is theoretically possible that the government could act using the Royal Prerogative in order to provide for the 'Defence of the Realm'. This controversial 'RAM' doctrine is unlikely to apply where there are codified statutory alternatives. See Text of Memorandum from Glanville Ram, First Parliamentary Counsel, 2nd November 1945, 'The RAM doctrine' (H Dep 2003/035)).
[60] Respectively Part IV of the Anti-Terrorism, Crime and Security Act 2001 (now repealed- see below ch 3 p 159-162); ss. 2-3 Terrorism Prevention and Investigation Measures Act 2011 (below ch 4 p 242; s. 5(1) Immigration Act 1971 (below ch 5 p 262-264)).
[61] *R (Jackson) v Attorney-General* [2006] 1 AC 262, [107] (Lord Hope).
[62] *R (Corner House Research and another) v Director of the Serious Fraud Office* [2008] EWHC 714 (Lord Justice Moses).
[63] *R (On The Application of Corner House Research and Others) v Director of The Serious Fraud Office* [2008] UKHL 60, [41] (Lord Bingham).

law is observed in the present study is through this subjection of executive discretion to effective judicial review.[64]

In relation to how the rule of law may otherwise be promoted, the requirement for a reduction in arbitrary powers and the provision of an appropriate degree of legislative precision must be considered by the present investigation. These may be loosely conflated into a constitutional benchmark: the requirement for legal certainty. As Lord Diplock has stated, '[a]bsence of clarity is destructive of the rule of law; it is unfair to those who wish to preserve the rule of law; it encourages those who wish to undermine it'.[65] As an underlying principle, the counter-terrorism framework should be statutorily established and limited wherever possible.

In practical terms, however, the rule of law is clearly subservient to the doctrine of parliamentary sovereignty. Lord Woolf has stated that:

> 'Our parliamentary democracy is based on the rule of law. One of the twin principles upon which the rule of law depends is the supremacy of Parliament in its legislative capacity. The other principle is that the courts are the final arbiters as to the interpretation and application of the law. As both Parliament and the courts derive their authority from the rule of law so both are subject to it and can not act in manner which involves its repudiation.'[66]

This sentiment captures the interconnected nature of the doctrines of the rule of law, parliamentary sovereignty and separation of powers. These latter principles must now be examined in order to provide the remaining benchmarks against which the executive strategies of detention, control and removal can be anlaysed.

[64] 'the judges, in their role as journeymen judgment-makers, are not free to dismiss the rule of law as meaningless verbiage, the jurisprudential equivalent of motherhood and apple pie, even if they were inclined to do so,' Lord Bingham (n 38) 69.
[65] *Merkur Island Shipping Corporation v Laughton* [1983] 2 AC 570, 614 (Lord Diplock).
[66] Lord Woolf, 'Droit public: English style' [1995] PL 57, 68.

II. The Legislative Supremacy of Parliament (parliamentary sovereignty)

The orthodox exposition of supremacy is by Dicey, who stated that Parliament has, 'under the English constitution, the right to make or unmake any law whatever; and further … no person or body is recognized by the law of England as having a right to override or set aside the legislation of Parliament.'[67] Parliament is supreme over the other branches of the state, as was famously reiterated by Lord Reid:

> 'It is often said that it would be unconstitutional for the United Kingdom Parliament to do certain things, meaning that the moral, political and other reasons against doing them are so strong that most people would regard it as highly improper if Parliament did those things. But that does not mean that it is beyond the power of Parliament to do such things. If Parliament chose to do any of them, the courts could not hold the Act of Parliament invalid.'[68]

Thus Parliament enjoys the legislative competence to amend the Bill of Rights 1689,[69] just as it may do with the Acts of Union, possibly altering the make-up of the United Kingdom, contingent upon a possible Scottish referendum on independence.[70] Similarly, Parliament can amend the Parliamentary procedure by which legislation is passed in the first instance,[71] or legislate to allow indefinite detention without trial.[72] This

[67] Dicey (n23) 39-40.
[68] *Madzimbamuto v Lardner-Burke* [1969] 1 AC 645, 723 (Lord Reid).
[69] The Defamation Act 1996 amended Article 9 of the Bill of Rights regarding free speech in Parliament: see generally Bradley and Ewing (n 2) ch 11.
[70] White Paper, *Scotland's Future In the United Kingdom: Building on ten years of Scottish devolution* (Cmd 7738, 2009).
[71] The standard passage of a Bill was fundamentally altered by the Parliament Acts 1911 and 1949, which significantly curtailed the power of the House of Lords to obstruct the passage of a Bill that had been passed by the (elected) House of Commons. For a thoughtful discussion on the modern impact of the 1911 and 1949 Acts, see Rivka Weill, 'Centennial to the Parliament Act 1911: the manner and form fallacy' [2012] Public Law 105.
[72] Such provisions were enacted during, for example, World War II. Section 1(1) Emergency Powers (Defence) Act 1939 provided the statutory power under which Defence Regulations could be promulgated. This expressly included the power to make regulations 'for the detention of persons whose detention appears to the Secretary of State to be expedient in the interests of the public safety or the defence of the realm (s.1(2)).

legislative supremacy extends only to full Acts of Parliament, and not secondary or 'delegated' legislation.[73]

While Parliament enjoys theoretical unfettered power, it is often necessary to distinguish between what is possible in practice and what is possible in light of political realities. As Lord Hope has put it, 'Parliamentary sovereignty is an empty principle if legislation is passed which is so absurd or so unacceptable that the populace at large refuses to recognise it as law'.[74]

In modern times, the doctrine has been questioned given the increasing influence of European law following the European Communities Act 1972.[75] It is unlikely that Parliament would legislate against principles of International law, which are growing in influence, but this does not mean that the power does not exist.[76] The influence of the HRA 1998 has also had a deliberate and marked impact on public authorities, including the courts, when it comes to the interpretation of statutes passed by Parliament.[77] These issues require some further exploration.[78]

(i) the doctrine of implied and express repeal: binding successive Parliaments?

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[73] Hence the House of Lords was able to quash secondary legislation in the form of the designated derogation during the use of preventive detention following 9/11: see below ch 3 p 160.

[74] *R (Jackson) v Attorney-General* [2005] UKHL 56 [2006] 1 AC 262, 308 (Lord Hope).

[75] Lakin opines that the doctrine is 'obselete' (Stuart Lakin, 'Debunking the Idea of Parliamentary Sovereignty: The Controlling Factor of Legality in the British Constitution' [2008] Oxford Journal of Legal Studies vol 28, 709; Barber states that the doctrine is now non-existent following the case of *R v Secretary of State for Transport Ex parte Factortame Ltd* (C-213/9) [1990] ECR I-2433 (ECJ): N Barber, 'The Afterlife of Parliamentary Sovereignty' [2011] International Journal of Constitutional Law Vol 9, 144.

[76] *Cheney v Conn* [1968] 1 All ER 779, 782 (Ungoed-Thomas J).

[77] s. 6(1) HRA 1998 makes it unlawful for a public body to act in a way that is incompatible with the ECHR; this includes the courts by virtue of s. 6(3)(a).

[78] For the sake of completeness, it should be noted that issues are also raised in relation to devolution of powers, and British membership of the European Union. Since these issues are largely irrelevant to the present investigation, they are not considered further.

It has been observed that the Supremacy of Parliament means that Parliament can 'make or unmake' any law: the doctrine of express repeal states that any statute, including 'constitutional statutes', such as the HRA 1998, the Constitutional Reform Act 2005, or the ECA 1972, can be repealed where clear legislation is passed to that effect.[79] The doctrines of express and implied repeal are of essential importance to the current investigation. A search for a 'better law' must recognize the limits that could be imposed by each Parliament: any statutory amendments recommended by the thesis will be vulnerable to repeal.

It is evident that there may be considerable political constraints placed on the legislature, of which Diceyean theory was cognizant.[80] No statute can be legally entrenched in the UK constitution, though there can be a degree of political entrenchment where the repeal of a statute would be unthinkable due to moral, political or economic constraints.[81] In a modern context, it could be considered that the repeal of the Human Rights Act 1998, for example, may prove politically unpalatable to the integrity of the current Coalition Government.[82]

The doctrine of implied repeal exists to preserve the sovereignty of Parliament and prevent a subsequent Parliament from being bound by its predecessor.[83] This doctrine has been described as an 'oversimplification':[84] Parliament can, for example, alter its own

[79] *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin), [2003] QB 151, 186-187 (Laws LJ).
[80] 'the electors shall by regular and constitutional means always in the end assert itself as the predominant influence in the country. But this is a political, not a legal fact. The electors can in the long run always enforce their will' (Dicey (n 23) 27-28).
[81] This point was captured by the *ratio decidendi* in *Madzimbamuto v Lardner-Burke* [1969] 1 AC 645, 723 (Lord Reid).
[82] HM Government, *The Coalition: Our Programme For Government* (2010) <http://webarchive.nationalarchives.gov.uk/20100919110641/http://programmeforgovernment.hmg.gov.uk/files/2010/05/coalition-programme.pdf> makes reference to 'build on' (and not detract from) the protection of the ECHR.
[83] *Ellen Street Estates Ltd v Minister of Health* [1934] 1 KB 590.
[84] Bradley and Ewing (n 2) 61.

composition, thus impliedly binding its future reincarnations.[85] Equally, Parliament may alter the geographical extent of its legislative competence.[86] The doctrine of implied repeal is not unduly restrictive to the present thesis. Constitutional statutes cannot be impliedly repealed;[87] designation of a statute accordingly should help ensure its preservation. It is much more problematic, however, to entrench legislation and protect it from the doctrine of express repeal.

(ii) Altering the procedure for the passage of legislation

It is not the intention of the present study to scrutinize the role of Parliament in the passage of legislation,[88] but it is important to assess whether it is *possible* to change the parliamentary procedure for the passage of a statute. Some light was recently cast on this issue by the House of Lords in the case of *R (Jackson) v Attorney-General.*[89] In *Jackson,* both the Parliament Act 1911 and 1949[90] were declared to constitute full Acts of Parliament, notwithstanding the fact that the latter had been passed using special words of enactment that did not require the

[85] For example, the House of Lords Act 1999 removed all but 92 hereditary peers from the upper chamber; the House of Commons Disqualification Act 1972 excludes categories of individuals from serving in the House of Commons.
[86] This is clear from (for example) the Devolution Acts of 1998; the Statute of Westminster 1931; the Canada Act 1982.
[87] *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin), [2003] QB 151, 186-187 (Laws LJ).
[88] See generally below, p 76-78.
[89] *Jackson* (n 74).
[90] It is not necessary to discuss the detail of the Parliament Acts 1911 and 1949: suffice it to say that they provide that the democratically elected House of Commons may overrule the House of Lords when there is an impasse as to the passage of legislation: the House of Lords now enjoys only a power of delay (one year over two parliamentary sessions in non-money Bills) rather than the ability to veto a Bill. In real terms, however, the power of the Lords should not be underestimated here for several reasons. First, Lords' amendments will frequently be accepted by the Commons in order to prevent a Bill from running out of Parliamentary time and therefore failing. This means that in an emergency context, the House of Lords wield formidable power vis-à-vis the passage of legislation. Second, depending on the impending reform of the House of Lords, it is arguable that a new Upper chamber, being 80% elected, should not be subservient to the Commons. See generally Hilaire Barnett, *Constitutional and Administrative Law* (9th edn Routledge, 2011) 350-355; as to reform of the House of Lords, see the Joint Committee on the Draft House of Lords Reform Bill, *First Report*, (HL 284 i-iii HC 1313-i-iii, 2012).

consent of the House of Lords. The courts were therefore not empowered to treat a Bill so passed as delegated legislation. This case has numerous implications for the present investigation; it is clear that the House of Lords can, on occasion, be sidestepped when it comes to the passage of legislation. Lord Steyn has stated that:[91]

> 'apart from the traditional method of law making, Parliament acting as ordinarily constituted may functionally redistribute legislative power in different ways. For example, Parliament could for specific purposes provide for a two-thirds majority in the House of Commons and the House of Lords.'

Similarly, Lady Hale declared that:[92]

> 'If Parliament can do anything, there is no reason why Parliament should not decide to redesign itself, either in general or for a particular purpose… If the sovereign Parliament can redefine itself downwards, to remove or modify the requirement for the consent of the Upper House, it may very well be that it can also redefine itself upwards, to require a particular parliamentary majority or a popular referendum for particular types of measure. In each case, the courts would be respecting the will of the sovereign Parliament as constituted when that will had been expressed'.

This power is of considerable importance to the current thesis, since it may provide an avenue by which Parliament can supervise the use of executive powers in an emergency context. Altering the process for the passage of legislation remains problematic.

When it comes to amending the procedure by which new Bills are passed, or the 'manner and form' of such Bills,[93] there is clearly some evidence from *Jackson* that the Parliament Act procedure may be used in relation to issues of constitutional importance, including where changes in the composition and function of the House of Lords are contemplated.[94]

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[91] ibid 296 (Lord Steyn).
[92] ibid 318-319 (Lady Hale).
[93] Bradley & Ewing (n 2) 67.
[94] It is sufficient to note … that a conclusion that there are no legal limits to what can be done under section 2(1) does not mean that the power to legislate which it contains is

Jackson suggests that changes could be made to the procedure by which new Bills are passed. If a new procedure were created by Parliament, the courts would subject it to the judicial test of the 'enrolled Act' rule.[95] There is some authority that if the stipulated 'manner and form' had not been followed, the courts could rule a subsequent statute to be invalid.[96] This power would almost certainly last only for the length of the authorizing Parliament. Beyond that parliamentary session, it is likely that only political entrenchment could be sought to minimize the likelihood of future express repeal.

(iii) Judicial control over legislation

As will be explored further in the context of Separation of Powers below, orthodox principles of parliamentary sovereignty, encapsulated in *Madzimbamuto*, dictate that the courts are not able to strike down an Act of Parliament.[97] But this has not always been the case. Perhaps the most famous *dicta* comes from *Dr Bonham's case*, in which Coke CJ stated:[98]

> 'in many cases, the common law will control Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such Act to be void.'

The judiciary has since performed a *volte-face* regarding this sentiment.[99] Nonetheless, there have been some cautionary words expressed by the

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without any limits whatever' *Jackson* (nx) 308 (Lord Hope). See generally Bradley & Ewing (n 2) 66.

[95] *BRB v Pickin* [1974] 3 All ER 923.

[96] *Jackson* (n 74) 319 (Lady Hale).

[97] This is clearly different to the position in the United States, where the SCOTUS has the power to strike down Congressional Acts as unconstitutional (*Marbury v Madison* 1 Cranch 137 (1803)).

[98] *Dr Bonham's Case* (1610) 8 Co Rep 113b, 118a.

[99] See, for example, *BRB v Pickin* [1974] 3 All ER 923, 'In earlier times many learned lawyers seem to have believed that an Act of Parliament could be disregarded in so far as it was contrary to the law … but since the supremacy of Parliament was finally demonstrated by the Revolution of 1688 any such idea has become obsolete' (Lord Reid).

judiciary in recent times. In 1995, Lord Woolf warned that if Parliament 'did the unthinkable'[100] and legislated contrary to the court's protection of the rule of law, then 'there are even limits on the supremacy of Parliament which it is the courts' inalienable responsibility to identify and uphold'.[101] More recently, in *Jackson*, Lord Steyn enjoyed a constitutional frolic of his own when, obiter, he stated that:

> '[T]he supremacy of Parliament is still the *general* principle of our constitution. It is a construct of the common law. The judges created this principle. If that is so, it is not unthinkable that circumstances could arise where the courts may have to qualify a principle established on a different hypothesis of constitutionalism. In exceptional circumstances involving an attempt to abolish judicial review or the ordinary role of the courts, the [UKSC] may have to consider whether this is a constitutional fundamental which even a sovereign Parliament acting at the behest of a complaisant House of Commons cannot abolish.'[102]

Such drastic action is, of course, unlikely.[103] Instead, the courts are likely to intervene when issues of individual rights are at stake, since an 'ingenious'[104] framework has been established in the Human Rights Act 1998 by which sovereignty is (potentially) maintained.[105] Consideration of this mechanism is provided below, since it is of continued relevance to the current thesis.

An additional important feature of the current investigation is the role of the jurisprudence of the ECtHR in the UK constitution. Article 45 ECHR

[100] Lord Woolf, 'Droit public: English style' [1995] PL 57, 69.
[101] Ibid.
[102] *Jackson* (n 74) 302-303 (Lord Steyn). Original emphasis. It could be suggested that this approach would be more consistent with natural law theory, but the courts would be unlikely to couch their reasoning in these terms.
[103] See further the dicta of Lords Bingham and Carswell (ibid), and see, in particular, the criticism of this position by Richard Ekins, 'Acts of Parliament and the Parliament Acts' (2007) LQR 91-115; Jeffrey Jowell, 'Parliamentary sovereignty under the new constitutional hypothesis' (2006) Public Law 562.
[104] Aileen Kavanagh, Constitutional Review under the UK Human Rights Act (Cambridge University Press 2009) 313.
[105] Sections 3 and 4 of the 1998 do not affect the continuing validity of primary legislation. See below p 92-93.

subjects all signatories to the jurisdiction of the ECtHR when determining issues of ECHR law. But Strasbourg's role has been subjected to caustic debate, aimed at a perceived diminution of national sovereignty vis-à-vis an increased willingness of the court to rule against offending statute and common law precedent, together with procedural concerns that the current structure is unworkable and that the backlog of cases is unacceptably high.[106] The focal point of these arguments has shifted from the voting rights of prisoners,[107] to a glut of immigration-related decisions. On 29th April 2011, a High Level Conference of the Committee of Ministers of the Council of Europe issued a declaration that sought to limit ECtHR involvement in deportation and extradition hearings.[108] The declaration:

> 'invites the court, when examining cases related to asylum and immigration, to assess and take full account of the effectiveness of domestic procedures and, where these procedures are seen to operate fairly and with respect for human rights, to avoid intervening except in the most exceptional circumstances'.[109]

This statement complements the position that the ECtHR should reflect in its case law that its role is not that of a 'fourth-instance' court and should avoid re-examination of issues of fact and law that had been decided by

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[106] High Level Conference on the Future of the European Court of Human Rights: Brighton Declaration, 19-20 April 2012, <http://www.coe.int/en/20120419-brighton-declaration/>.

[107] In *Hirst v UK* (2006) 42 EHHR 41, the ECtHR held that the UK's blanket ban on prisoners' voting rights was a violation of Article 3 of the First Protocol to the ECHR. The issue was put to 'consultation' but ultimately the ban was not lifted: see generally House of Commons Library, *Prisoners' voting rights Standard Note* (SN/PC/01764, 7 September 2011). MPs debated the issue and, in a non-binding free vote, passed a motion upholding the status quo by 234 votes to 22 (with ministerial and opposition abstentions): Hansard, HC Deb 10 February 2011, Col 584.

[108] *High Level Conference on the Future of the European Court of Human Rights organized within the framework of the Turkish Chairmanship of the Committee of Ministers of the Council of Europe* (IZMIR, Turkey 26 – 27 April 2011) <http://www.coe.int/t/dghl/standardsetting/conferenceizmir/Declaration%20Izmir%20E.pdf > accessed 15 June 2011.

[109] Ibid 3.

national courts'.[110] The Lord Chancellor indicated that the government would seek consensus as to change in the Court's remit during Britain's Chairmanship of the Council of Europe, and there has since been a 'Brighton Declaration' to that effect.[111]

The Brighton Declaration does not make the huge inroads into the scope and remit of the ECtHR that the UK government and other parties may have liked,[112] but it does contain some relevant changes. There is a restated commitment for States to prevent ECHR violations through changes to national law and its application by domestic courts, but the declaration also 'welcomes' pre-existing principles of 'subsidiarity' and 'margin of appreciation', and encourages the court to give 'great prominence' to the doctrines.[113] The ECHR preamble is to be amended to make reference to both.[114] There is also a provision that suggests that a new 'advisory role' could be created for the ECtHR, by which Strasbourg's non-binding opinion could be sought by national courts in certain cases.[115]

[110] Ibid 5. A Commission has been established in the UK to look at reform of the ECtHR, given its immense workload and backlog of cases, which currently stands in excess of 152,000 (as of November 2011: ECtHR Statistics, 1/1-30/11/2011<http://www.echr.coe.int/NR/rdonlyres/7B68F865-2B15-4DFC-85E5-DEDD8C160AC1/0/Stats_EN_112011.pdf> accessed 20 December 2011). The Commission has, *inter alia,* made interim recommendations to ministers that urgent reform should be pursued in a time-bound programme during the UK's Chairmanship of the Council of Europe, though ministers have made it clear that further reform will take time to achieve (Sir Leigh Lewis, Chair of the Commission on a Bill of Rights, letter to ministers, 28th July 2011 <http://www.justice.gov.uk/downloads/about/cbr/cbr-court-reform-interim-advice.pdf> 3). Some inroads have already been made with Protocol 14, which came into force in 2010.
[111] *High Level Conference on the Future of the European Court of Human Rights: Brighton Declaration* 19-20 April 2012, <http://www.coe.int/en/20120419-brighton-declaration/>
[112] See e.g. Martin Beckford, 'European Court of Human Rights reforms 'to be watered down' *Telegraph* (London, 17th April 2012) <http://www.telegraph.co.uk/news/politics/david-cameron/9208185/European-Court-of-Human-Rights-reforms-to-be-watered-down.html>
[113] For a discussion of these doctrines, see below p 98-100.
[114] Brighton Declaration (n 111) [9], [12].
[115] Ibid [12].

The right of individual petition remains a 'cornerstone' of the ECHR mechanism.[116]

The ramifications of the potential changes are, as yet, uncertain. It is nonetheless clear that the ECtHR has been encouraged to interfere less in domestic legal proceedings, particularly where there is a high degree of confidence in the robustness of the judicial system.[117] Some academics have noted that this impetus has already been felt across recent judgments.[118] It is possible that the role of the UKSC could be strengthened, and also that the time-lag between individual application and the rendering of final judgment considerably shortened.[119] The ECtHR will continue to play a key role in adjudicating on ECHR issues. In a terrorism-related context, there have been numerous significant judgments by Strasbourg that will be discussed as part of the investigation, and the ability of the ECtHR to limit executive actions taken by the UK government will be considered.

III. The Separation of Powers

Since this thesis is concerned with executive powers and their oversight mechanisms, it follows that the separation of powers is a doctrine of fundamental importance. This doctrine refers to the separation of the three arms of the state: the legislature, executive and judiciary.[120] In a terrorism-

[116] Ibid [13].
[117] Editorial, 'Human Rights Reforms: Brighton Conference Hopes To Limit Powers Of ECHR' (*Huffington Post 19 April 2012)* *<http://www.huffingtonpost.co.uk/2012/04/19/human-rights-reforms-brighton-europe-echr_n_1436403.html>.*
[118] Helen Fenwick, 'An appeasement approach in the European Court of Human Rights?' UK Constitutional Law Group <http://ukconstitutionallaw.org/2012/04/05/helen-fenwick-an-appeasement-approach-in-the-european-court-of-human-rights/>.
[119] Indeed this is one of the central points of the reforms: Brighton Declaration (n 111) [16]: 'The number of applications made each year to the Court has doubled since 2004. Very large numbers of applications are now pending before all of the Court's primary judicial formations. Many applicants, including those with a potentially well-founded application, have to wait for years for a response.'
[120] See generally Bradley and Ewing (n 2) 80.

related context, the relevant member of the executive is usually the Home Secretary (SSHD), and the High Court and the Special Immigration Appeals Commission, as well as the appellate courts, provide judicial supervision.[121]

Total separation of powers is impossible both in theory and practice, if a State is to function at all. Montesquieu captured the traditional essence of the doctrine:

> 'When legislative power is united with executive power in a single person or in a single body…., there is no liberty … Nor is there liberty if the power of judging is not separate from legislative power and from executive power. If it were joined to legislative power, the power of the life and liberty of the citizens would be arbitrary, for the judge would be legislator. If it were joined to executive power, the judge could have the force of an oppressor.'[122]

In the absence of a codified, written constitution, the separation of powers is only weakly observed in the United Kingdom.[123] It is inevitable each branch of the state will exercise some control over the other. By way of analogy, the United States constitution explicitly provides for the separation of powers,[124] but even in the US, total separation is impossible: instead, there is a system of checks and balances that enables each branch to assert control over the other and prevent one function from

[121] This is in relation to England and Wales: s. 7(3)(a) Special Immigration Appeals Commission Act 1997.

[122] Montesquieu, *The Spirit of the Laws* (ed Cohler, Miller and Stone, Cambridge University Press, 1989) ch 6.

[123] Although Parts II and III of the Constitutional Reform Act 2005 made some headway with further separation through the creation of the UKSC and the reallocation of the (former) judicial roles of the Lord Chancellor (now Secretary of State for Justice, Chris Grayling MP).

[124] Article 1 establishes the legislative power in Congress; Article 2 vests the executive power in the President; Article 3 vests the judicial power in SCOTUS.

usurping excessive power.[125] Bradley and Ewing define a tripartite doctrine as follows: (a) the same persons should not form part of more than one of the branches of state; (b) one branch of the state should not control or intervene in the work of another, and (c) one branch should not exercise the functions of the other.[126] The overlaps, controls, and checks and balances that operate require some analysis since they provide oversight and scrutiny of executive measures of terrorist detention, control and removal.

Legislature and executive

It has been stated that through the Parliamentary executive[127] that exists in the UK, there is almost 'complete fusion' between these two limbs of State.[128] It is nonetheless accepted that the 'control' that each branch exercises over the other is subject to limitations. Thus while a government with a strong majority in the House of Commons may be able to force through legislation with relative ease,[129] Parliament still exercises supervision over the process and can scrutinize and attenuate excessive executive demands.[130]

[125] See generally Bruce Ackerman, 'The New Separation of Powers' [2000] 113 Harvard Law Review 634.
[126] Bradley & Ewing (n 2) 83.
[127] Pippa Norris, *Driving Democracy: Do Power Sharing Institutions Work?* (Cambridge Univeristy Press 2009) Ch 6. The phrase denotes the fact that the government (i.e. the executive) are part of Parliament (either the House of Commons or the House of Lords).
[128] Members of the government, by convention, are members of either House of Parliament (as to the 'near complete fusion', see Walter Bagehot, *The English Constitution* (Oxford, 2001) 65).
[129] 'the balance of advantage between Parliament and Government in the day to day working of the Constitution is now weighted in favour of the government to a degree which arouses widespread anxiety' *House of Commons Select Committee on Procedure* (HC 588-1, 1977) viii.
[130] By constitutional convention, the House of Commons can oust a government which fails to command a majority on an issue of confidence. In the current constitutional framework, the Coalition enjoys a working majority of 83 seats. For specific terrorism-related examples, see e.g. below ch 3 p 175-176 (extensions to pre-charge detention limits); below ch 4 p237-238 (political background to the passage of the TPIM regime).

The two main doctrines that manage government responsibility are individual[131] and collective ministerial responsibility.[132] Ministers are collectively responsible to Parliament for the conduct of government, while individual ministers are accountable for the conduct of their department;[133] if there is a failure in the department, the convention (which has been weakening in recent years) states that the Minister should accept ultimate responsibility and resign.[134]

For the purposes of the present investigation, this doctrine is important vis-à-vis the supervision of the powers exercised by the Home Secretary; the duty to inform Parliament gives a valuable opportunity to question and scrutinize the actions of the Home Office specifically and the government generally. The requirement for the Home Secretary to keep Parliament informed has been enshrined in statute in some of the terrorism-related executive measures.[135] In practice, these reports to Parliament, together with the concomitant 'annual renewal' debates,[136] and debates on the introduction of new terrorism-related legislation,[137] have provided the principal ways in which Parliamentary control has been asserted. The Parliamentary oversight mechanism may be examined in three categories: the provision of legislative, pre-legislative and post-legislative scrutiny.

[131] House of Commons Library, 'Individual ministerial responsibility- issues and examples' Research Paper 04/31 (2004).
[132] House of Commons Library, 'The collective responsibility of Ministers: an outline of the issues' Research Paper 04/82 (2004).
[133] For relevant discussion as to the operation of these doctrines, see Bradley and Ewing (n 2) 104-109; Barnett (n 90) 221-240; A Tomkins, *Our Republican Constitution* (Hart 2005) 1-7.
[134] Ibid.
[135] For the control order obligation, see s. 14(1) Prevention of Terrorism Act 2005; for the obligation of review under the previous powers of preventive detention, see s. 122 Anti-Terrorism, Crime and Security Act 2001; for the requirement of the Home Secretary of State to lay before Parliament the report of the Independent Reviewer on the operation of Terrorism Prevention and Investigation Measures, see s. 20(5) TPIM Act 2011.
[136] For the annual renewal of detention powers and control orders, see below ch 3 p 155, 177-178; below ch 4 p 213-215, 225, 227.
[137] For discussion of the debate on TACT 2000, see ch 3 p 135-137; for the debate on ATCSA 2001, see ch 3 p 152, 156-157; for the debate on POTA 2005, see ch 4 p 209, 212; for the debate on TACT 2006, see ch 3 p 174; for the debate on the TPIM Act 2011, see ch 4 p 238, 249.

(i) Legislative Scrutiny

The steps by which a Bill becomes an Act of Parliament give numerous opportunities for scrutiny.[138] Generally, 'better scrutiny produces better legislation':[139] Parliament can examine both the justification for the policies and also the clarity of the technical language used. Specific benchmarks for scrutiny should also be considered, such as compatibility with the ECHR and overall clarity and impact of the precise terminology used.[140] The effectiveness of Parliamentary scrutiny, however, is subject to numerous limitations. These limitations concern both the governmental dominance of Parliament and also on the ability of Parliamentary members to effectively scrutinize the impact of technical legislation. The former Chair of the House of Commons Public Administration Committee has stated that:[141]

> 'In outward form legislation is carefully scrutinized through an elaborate series of parliamentary stages, including detailed consideration in committee. The reality is that the whole process is firmly controlled by the government, serious scrutiny by government members is actively discouraged, any concession or amendment is viewed as a sign of weakness, and the opposition plays a game of delay. The result is that much legislation is defective … and the government's control of the parliamentary timetable means that many [Lords] amendments are simply voted through the Commons without any scrutiny at all. It is all deeply unsatisfactory.'

In terms of governmental control, the parliamentary system at Westminster returns a government (or, as was the case in 2010, a Coalition government) that commands the majority of at least 50% of MPs, and hence voting on legislation is in accordance with Party loyalties. The Party

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[138] For a discussion of these principles, see Bradley and Ewing (n 2) 185-202; Barnett (n 90) 310-315; Elliot and Thomas, *Public Law* (OUP 2011) 186-202; Ian Loveland, *Constitutional and Administrative Law* (OUP 2012) 129-139.
[139] Elliot and Thomas (n 138) 188.
[140] Even though Parliament is theoretically capable of legislating contrary to the ECHR, s. 19 of the HRA 1998 requires ministers, at second reading, to provide a statement of compatibility or otherwise regarding the ECHR principles; in practice, the government usually takes all measures possible to ensure that the Bill is ECHR compatible.
[141] Tony Wright, *British Politics: A Very Short Introduction* (OUP 2003) 89.

whips dominate the procedure: if the government perceives a particular vote as crucial, the whips may declare a 'three-line whip': those MPs who fail to vote along Party lines then risk expulsion from the Party.[142] In these instances, the opportunity for meaningful scrutiny will be limited. On occasion, however, MPs will vote against their party on particularly contentious issues, and this was seen in relation to the defeat of the Labour government on the issue of 90 days' detention for terrorist suspects, a rare but significant occurrence.[143] Control also exists over the timetabling of legislation, since the government determines the legislative programme and the time that is allocated to the debate on each stage is set in advance.[144] Reforms are currently pending that will seek to reduce governmental control of the parliamentary programme, but it remains to be seen how these will be implemented in practice.[145]

In instances where legislation is hurriedly passed in response to a terrorism-related emergency or threat, Parliamentary time will be inevitably curtailed, and the likelihood of serious political opposition is severely reduced.[146] This raises palpable concerns regarding the degree of scrutiny to which such fast-track legislation will be subjected, and these issues are discussed in more detail below.[147] The provision of additional safeguards is essential, and the House of Lords Constitution Committee has made three suggestions. These recommendations state that fast-tracked legislation should usually be subjected to a sunset clause; early post-legislative scrutiny should be the norm; and the government should

[142] Erskine May, *Parliamentary Practice* (23rd edition, 2004) 250.
[143] Below, ch 3 p 174-175.
[144] House of Commons Standing Order 83A-83I.
[145] Sir George Young, *Parliamentary reform: the Coalition Government's agenda after Wright,* Speech by Sir George Young Bt MP, Leader of the House of Commons to the Hansard Society, London <www.hansardsociety.org.uk/files/folders/2619/download.aspx>.
[146] See, for example, the response to the Birmingham bombs: below ch 3 p 126; the response to the Omagh bomb, below ch 3 p 130; the response to 9/11, below ch 3 p 143-153.
[147] Below p 108-109.

explain to Parliament why a fast-tracked procedure is being sought in the first place.[148] Although these suggestions have not been fully implemented, they are of continuing relevance to the present investigation.

There is also an issue in relation to the competence of MPs to conduct scrutiny of technical legislative provisions.[149] Commentators and parliamentarians have expressed concern regarding a perceived lack of expertise when it comes to the provision of detailed scrutiny: MPs and peers often do not understand the entire impact of the legislation upon which they are voting.[150] As to how this deficiency may be addressed, both the House of Lords and Select Committees play important roles.[151]

The House of Lords provides an important bulwark against executive power, even where the House of Commons has acceded to the demands of the government.[152] Party politics is less of a concern in the Upper Chamber, and there are often seasoned experts in various fields who are equipped to provide a forensic examination of the issues. In the present context, for example, Baroness Eliza Manningham-Buller, former Director General of the Security Service, was voracious in her criticism of the potential extension of pre-charge terrorism detention,[153] and Lord Lloyd of Berwick, whose report provided the legislative backbone of the Terrorism Act 2000,[154] has also led Lords' rebellions on other matters.[155] While an

[148] House of Lords Select Committee on the Constitution, *Fast track legislation: Constitutional Implications and Safeguards* (HL 116 2008-9).
[149] For a discussion of these issues, see above (n 141).
[150] 'a number of parliamentarians explained …. that the content of anywhere from a quarter to a half of all legislation they voted on was effectively a mystery to them' Brazier, Kalitowski and Rosenblatt, *Law in the Making: Influence and Change in the Legislative Process* (London 2008) 194.
[151] discussed further below: see p 81-84.
[152] See, for example, the House of Lords' rejection of 42 days' terrorist detention: below ch 3 p 175.
[153] Ibid; and see Hansard HL Deb 8 July 2008, col 647.
[154] Llord Lloyd, *Inquiry into Legislation against terrorism* (Cmd 3420, 1996).
[155] For example, in relation to an amendment to create an Independent Commissioner for Terrorist Suspects during the passage of the Coroners and Justice Act 2009: Hansard HL Deb 13th July 2009 col 993-994.

analysis of an elected Upper Chamber is beyond the scope of this thesis, it is at least arguable that removal of this expertise is undesirable. There remain two significant limits on the power of the Upper Chamber. The first, in relation to the Parliament Acts 1911 and 1949, has already been discussed.[156] The second limitation is provided by the Salisbury convention, which states that the House of Lords will not block legislation that has been in the manifesto of the government and therefore (arguably) reflects the majority will of the electorate.[157]

A second, and fundamental, source of legislative scrutiny lies in the work of Select Committees. Committees are provided for in House of Commons Standing Orders; generally speaking the structure of the Committees mirror the structure of the main governmental departments.[158] Select Committees are appointed for the life of Parliament to examine the 'expenditure, administration and policy' of the relevant department.[159] Each Committee is constituted of between 11 and 14 backbench MPs, and may question broader public authorities and executive agencies.[160] Committees have the power to question government ministers, as well as other experts, in order to discharge their functions effectively. The Chair of each Committee is now elected by secret ballot in order to inject a degree of independence into the proceedings (Chairs were previously selected by Party whips).[161] Committees are free to set their own investigative remit and do not require the approval of the government, although each Committee has a majority of members from the government's party.[162] As has been determined by the House of Commons Liaison Committee:

[156] Above p 68.
[157] Erskine May (n 142).
[158] House of Commons Standing Order 121-152C.
[159] See generally Bradley & Ewing (n 2) 209; Erksine May (above n 142).
[160] House of Commons Standing Order 122B.
[161] HC Deb 26 May 2010 Col 171.
[162] Bradley and Ewing (n 2) 209.

> 'Select Committees had become a vital source of scrutiny, analysis and ideas; they had made the political process more accessible; and they had provided a much-needed climate of Parliamentary accountability. In so doing, they became more visible and widely known, and an entrenched part of our constitutional arrangements.'[163]

The role of such Committees in the context of counter-terrorism legislation is vital: the Joint Committee on Human Rights (JCHR)[164] has provided reports on a panoply of terrorism-related powers, including indefinite detention,[165] pre-charge detention,[166] control orders,[167] and the deportation of terrorist suspects.[168] These reports often inform debate in Parliament during the passage and/or renewal of relevant provisions and therefore can influence voting in the House, perhaps against the government.[169] The reports of the Independent Reviewer provide a valuable additional resource that informs the work of the relevant Committees.[170]

(ii) Pre-legislative scrutiny

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[163] House of Commons Liaison Committee, HC 321 (2001) para 2.
[164] House of Commons Standing Order 152B.
[165] JCHR, *Continuance in force of sections 21 to 23 of the Anti-Terrorism, Crime and Security Act 2001* (HC 462 HL 59, 2003).
[166] JCHR, *Counter-Terrorism Policy and Human Rights: Prosecution and Pre-Charge Detention, Twenty-fourth Report of Session 2005-6* (HL 240 HC 1576, 2006).
[167] JCHR, *Counter-Terrorism Policy and Human Rights (Ninth Report): Annual Renewal of Control Orders legislation 2008, Tenth Report of Session 2007-8* (HL 57 HC 356, 2007); JCHR, *Counter-terrorism Policy and Human Rights (Sixteenth Report): Annual Renewal of Control Order Legislation 2010* (HL 64 HC 395, 2010); JCHR, *Counter Terrorism Policy and Human Rights (Fourteenth Report): Annual Renewal of Control Orders Legislation 2009* (HL 37 HC 282, 2009); JCHR, *Counter–Terrorism Policy and Human Rights (Sixteenth Report): Annual Renewal of Control Orders Legislation 2010*, *Ninth Report of Session 2009–10* (HL 64 HC 3, 2009); JCHR, *Eighth Report, Renewal of Control Orders Legislation 2011* (HL 106 HC 838, 2011).
[168] See, for example, JCHR, *The UN Convention Against Torture (CAT)*, *19th Report of Session 2005-06* (HL 185 HC 701-I, 2006).
[169] See, for example, the government's defeat with regard to the proposed extension to pre-charge detention beyond 42 days, following the report of the JCHR (JCHR, *Nineteenth Report of Session 2006-07, Counter-Terrorism Policy and Human Rights: 28 days, intercept and post-charge questioning* (HL 157 HC 394, 2007)). See ch 3 p 175 below.
[170] See, for example, JCHR, *Counter-Terrorism Policy and Human Rights (Ninth Report)* (HL 57 HC 356, 2007); JCHR, *Counter-terrorism Policy and Human Rights (Sixteenth Report* (HL 64 HC 395, 2010).

A recent innovation that has provided enhanced parliamentary oversight is the subjection of draft Bills to pre-legislative scrutiny.[171] In this way, bespoke Committees have been tasked to provide oversight and analysis of draft counter-terrorism provisions.[172] This mechanism is of particular value where it is anticipated that emergency powers may be required at some future juncture, and there is a desire to consider suitable legislative responses in a timely fashion that allows for more detailed analysis.[173] Pre-legislative scrutiny addresses a criticism raised by the Modernisation Committee that Committees have a more marginal role in the scrutiny of legislation than those found elsewhere,[174] but use of this mechanism to date has been limited and is not without criticism.[175]

Select Committees have proven their ability to scrutinize law and policy after implementation in a variety of terrorism-related areas: the JCHR assesses the impact of the ECHR,[176] whereas the House of Lords Constitution Committee will examine the constitutional implications of Public Bills.[177] Some have suggested that a 'more structured' link between the work of these various Committees and the passage of legislation in the

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[171] The majority of such pre-legislative scrutiny has occurred since 2007.
[172] See, for example, the Joint Committee on the Draft Detention of Terrorist Suspects (Temporary Extension) Bills, Draft Detention of Terrorist Suspects (Temporary Extension) Bills (HL 161 HC 893, 23 June 2011).
[173] Ibid.
[174] Modernisation of the House of Commons Committee, First Report (HC 224, 2001-2) [4].
[175] In a terrorism-related context, the principal examples are the Joint Committee on the Draft Detention of Terrorist Suspects (Temporary Extension) Bills and the Joint Committee recently established to examine the need for a Draft Terrorism Prevention and Investigation Measures Bill: see respectively ch 3 and 4 below. In other contexts, there have been some 19 Committees that have considered draft Bills since 2003 (HM Parliament, *Committees A-Z,*<http://www.parliament.uk/business/committees/committees-a-z/>). For criticism of the role of such Select Committees in the scrutiny of draft legislation, see ch 3 p 184-185 and ch 4 p 254-255.
[176] JCHR, First Report, Terms of Reference (HL 42, HC 296, 2000-2001).
[177] House of Lords Constitution Committee, *First Report*: *Reviewing the Constitution: Terms of Reference and Method of Working* (HL 11, 2001).

House would be beneficial;[178] the Hansard Society have made it explicit that governments should be responsive to suggestions for enhanced parliamentary oversight of executive action.[179] Oliver has suggested that a checklist for standards would help to enhance Parliamentary scrutiny;[180] such a checklist could include JCHR scrutiny during the pre-legislative stages. Enhanced standards of scrutiny could be sought in particular instances, such as when a statute is of particular constitutional importance.[181] Applying these proposals to the present counter-terrorism regimes could be worthy of consideration.

(iii) Post-legislative scrutiny

Once a terrorism-related statute has been passed, there remain a variety of Parliamentary techniques by which the government may be called to account. Principally, there may be provision for post-legislative scrutiny: Committees can be required to report on the operation of the statute, a year or some years after its inception, in order to reassess its effectiveness and impact. While a 3-5 year review of legislation was established in 2008,[182] this is unsuitable to some counter-terrorism regimes given the pace of legislative change: there have been six substantive counter-terrorism statutes passed since 2000.[183] As was noted in chapter 1, the role of the Independent Reviewer is crucial, since annual

[178] Clive Walker, *Blackstone’s Guide to the Anti-Terrorism Legislation* (2nd edn OUP, 2009) 55; KD Ewing, *Bonfire of the Liberties: New Labour, Human Rights, and the Rule of Law* (OUP 2010) 277.
[179] Hansard Society, *The Challenge for Parliament: Making Government Accountable* <www.hansardsociety.org.uk/files/folders/757/download.aspx>.
[180] AD Oliver, “Improving the Scrutiny of Bills: The Case for Standards and Checklists’ [2006] PL 219.
[181] RJD Hazell, ‘Time for a New Convention: Parliamentary Scrutiny of Constitutional Bills 1997-2005’ [2006] PL 247.
[182] House of Commons, *Post-Legislative Scrutiny: The Government’s Approach* (Cm 7320, 2008).
[183] Terrorism Act 2000, Anti-Terrorism, Crime and Security Act 2001, Prevention of Terrorism Act 2005; Terrorism Act 2006; Counter-Terrorism Act 2008; Terrorism Prevention and Investigation Measures Act 2011.

reports may inform scrutiny by Committees or questions in Parliament.[184] Questions and Debate in Parliament may provide an opportunity for Parliament to capitalize on this information and to scrutinize the use of executive power.

a. Questions in Parliament

Questions to the Prime Minister provides a weekly forum in which the House can highlight key issues of importance and request an input. Of more relevance to the current thesis, however, is the provision of questions to individual Ministers, including the Home Secretary. Under a rota system, Ministers are allotted a day in Parliament, Monday-Thursday while Parliament sits, for between 45 and 55 minutes.[185] Ministers are mandated to appear on that day,[186] although they may refuse to answer questions based on the public interest (for example, in cases where national security is at stake).[187] This provides a valuable opportunity for Parliamentary scrutiny, yet the Speaker randomly selects questions to be asked given their considerable number, and so not all questions are orally heard.[188] Of equal significance is the provision of written answers to questions, which are provided in Hansard and so are a matter of the public record, but again there is no obligation on the minister to provide an answer, and the public interest (national security) exception applies.[189] The final mechanism of relevance to the current study is the provision for tabling questions of 'urgent character' in Parliament where the Speaker deems them to be of public importance.[190] The utility of this mechanism

[184] See, for example, the role that the control order reports played before annual renewal of the regime: below p 226, 228, 234, 238, 241, 242.
[185] House of Commons Standing Order 21(1).
[186] Although Ministers require two days' notice: House of Commons Standing Order 22(4).
[187] Erksine May (n 142) 352.
[188] House of Commons Standing Order 22(5).
[189] Erksine May (n 142).
[190] House of Commons Standing Order 21(2).

was recently illustrated with regard to the treatment of the terrorist suspect Abu Qatada.[191] An opportunity for further debate ensued in which 59 members of Parliament questioned the Home Secretary, notwithstanding the Home Secretary's determination not to be drawn on some specifics.[192] These questions showcase the ways in which popular and media opinion may influence Parliamentary business and the ways in which the government may be held to account.[193]

b. Debates

Half an hour of Parliamentary time is scheduled daily in which a private member can raise an issue and receive a reply from a minister, but these are not the usual fora in which terrorism-related issues are likely to be discussed.[194] Similarly, in theory, emergency debates may be used in relation to 'specific and important' matters from Monday to Thursday, with the assent of the Speaker[195] and leave of the House, or at least the support of 40 MPs.[196] This procedure has fallen into disuse in recent years.[197] The existence of 20 'Opposition days' are of considerable theoretical importance, since the leader of the Opposition may determine the parliamentary business,[198] but since 1997 there have been no debates tabled about terrorism-related issues.[199] It is axiomatic that the government could in theory be called to account in this way, although time constraints may prevent urgent terrorism-related issues from being so

[191] HC Deb 19th April 2012, Col 507.
[192] HC Deb 19th April 2012, Col 507-526.
[193] See ch 5 p 266, 276 below for a discussion of the Abu Qatada case, and some of the vitriolic media coverage and debate that the case engendered.
[194] House of Commons Standing Order 9(7).
[195] Who need provide no justificatory reasons: House of Commons Standing Order 24(5).
[196] House of Commons Standing Order 24(1).
[197] Bradley and Ewing (n 2) 208.
[198] House of Commons Standing Order 14(2).
[199] House of Commons Library, *Opposition Day Debates Since 1997: Parliamentary Information List* (SN/PC/03190, 30 March 2012).

debated. Additionally, there are 35 days in each parliamentary session allocated to backbench business.[200]

Ultimately, the effective use of a variety of parliamentary mechanisms is required to keep the executive in check and avoid the accumulation of excessive power, and should be considered to be a benchmark required for constitutional optimization. Refinements to the role of Select Committees and scrutiny during the passage of legislation may be worthy of consideration. Operation of these mechanisms in isolation, however, cannot help to preserve the constitutional balance. As Bradley and Ewing conclude, ‘the problem remains one of government control, likely to continue so long as the electoral system delivers large parliamentary majorities to well-disciplined parties, and so long as the Standing Orders of the House of Commons unequivocally give the government priority over any other business’.[201] In order to achieve constitutional optimization, judicial control over executive action also requires some analysis.

Executive and judiciary

Judicial independence from the executive is a doctrine that is well established throughout the UK constitution, formerly by constitutional convention but recently given statutory affirmation: there is a duty on ministers to ensure the judiciary’s ‘continued independence’.[202] The guarantee of independence stems also from the protection of the right to a fair trial provided by Article 6 ECHR. There is a constitutional convention that the government do not criticize the decisions taken by the judiciary, though some erosion of this principle has occurred in recent years.[203] A distinction should be drawn between criticism of the judiciary in England

[200] House of Commons Standing Order 14(3A).
[201] Bradley and Ewing (n 2) 212.
[202] s. 3 Constitutional Reform Act 2005.
[203] Bradley and Ewing (n 2) 370.

and Wales and criticism of the ECtHR, from which ministers have certainly not abstained.[204]

For present purposes, the greatest overlap in control and function between the executive and judicial branches lies in the provision of Judicial Review: the role of the courts is to safeguard the rights of the individual from unlawful actions by the government or public bodies.[205] As the courts have stated:[206]

> 'the proper constitutional relationship of the executive with the courts is that the courts will respect all acts of the executive within its lawful province, and that the executive will respect all decisions of the courts as to what its lawful province is'.

Detailed consideration of the scope of Administrative law is much beyond the ambit of this thesis and entire textbooks have been dedicated to the subject.[207] The doctrine is nonetheless crucial since it provides the mechanism by which executive decisions are supervised and limited by the courts. Judicial review in this context is the purview of the High Court and the Special Immigration Appeals Commission (SIAC).[208]

Judicial review in terrorism-related cases

In theory, Parliament could exclude judicial review in certain instances. In practice, however, the courts are likely to take a dim view on such action

[204] See, for example, BBC News, 'Concept of human rights being distorted, warns Cameron' 25 January 2012 <http://www.bbc.co.uk/news/uk-politics-16708845>; Harvey Morris, 'Britain vs. the European Court of Human Rights' *New York Times* (New York, 19 April 2012) <http://rendezvous.blogs.nytimes.com/2012/04/19/britain-vs-the-european-court-of-human-rights/>.

[205] This protection is now provided for in ss. 6-7 Human Rights Act 1998.

[206] *M v Home Office* [1992] QB 2760, 314 (Nolan LJ).

[207] See e.g. HWR Wade and CF Forsyth, 'Administrative Law' (10th edn OUP, 2009); Peter Cane, 'Administrative Law' (5th edn OUP, 2011); Paul Craig, 'Administrative Law' (5th edn Sweet & Maxwell, 2008).

[208] The High Court is the appropriate venue for TPIM hearings: s. 30(1)(c) TPIM Act 2011. For removal cases, the jurisdiction and task of SIAC is to determine an appeal against a decision to make a deportation order under s. 5(1) of the Immigration Act 1971 when the Secretary of State has issued a certificate under s. 97 of the Nationality Immigration and Asylum Act 2002 (see s. 2(1)(a) Special Immigration Appeals Commission Act 1997 and s. 82(2)(j) of the 2002 Act).

and some members of the judiciary have cautioned against it.[209] As has been observed above, any State which respects the rule of law must ensure that there is judicial scrutiny of executive power.[210] It is almost unthinkable that judicial review would be excluded in the context of the present terrorism-related powers, not least since it would almost undoubtedly put the UK in breach of its obligations under Article 6 ECHR.[211]

Judicial review features extensively in each of the three executive measures analysed by the present investigation. The courts have examined decisions taken to certify an individual as a 'foreign terrorist suspect' in relation to the deployment of preventive detention;[212] judicial review is expressly embedded into the control order and TPIM regimes;[213] and decisions taken to deport an individual are also subject to similar scrutiny.[214]

A central premise of judicial review is that the courts examine whether the member of the executive has acted *intra vires*.[215] The courts may examine decisions to see if there have been irrelevant considerations,[216] if a power has been exercised for an improper purpose;[217] if an executive member has made a legal error in the exercise of his discretion;[218] if there has been unauthorized delegation of powers;[219] if discretion has been fettered

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[209] Above, p 70-71, and see *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147, 208.
[210] Above p 63.
[211] *Zander v Sweden* [1993] 18 EHRR 175; Bradley and Ewing (n 2) 722.
[212] See ch 3 p 159-160.
[213] See, in particular, ch 4 p 229, 245.
[214] See ch 5 p 262-264.
[215] Literally 'within the power': if a body acts beyond the powers that are conferred upon them, the courts can quash a particular decision.
[216] E.g. *R v Home Secertary, ex parte Venables* [1998] AC 407.
[217] E.g. *Congreve v Home Office* [1976] QB 629.
[218] *ex parte Venables* (above (n 216)).
[219] Not likely in a terrorism-related context: *Lavender & Son Ltd v Minister of Housing* [1970] 3 All ER 871.

by policy;[220] if a decision appears irrational (or *Wednesbury* unreasonable);[221] or if there has been a breach of natural justice[222] or procedural irregularity.[223] There are a variety of remedies available, of which a 'quashing order' is most likely to be sought in a terrorism-related context. A quashing order could be used to quash an entire control order, for example, or could be deployed to quash individual measures operating under a TPIM.[224] A ruling of this nature would not prevent the Home Secretary from imposing a further order on an individual.[225] The statutory regime for control orders and TPIMs also allows the court to direct that a particular order should be revoked or varied.[226] In the context of deportation proceedings, the function of the court is to objectively assess any factors that may impact on the decision to deport.[227]

Judicial review on the basis of proportionality is of particular relevance to the current terrorism-related paradigms.[228] The majority of challenges to the mechanisms of detention, control and deportation have their roots in this human rights doctrine. Since it requires a judicial assessment of the competing interests, it is necessary to consider the scope of judicial 'deference', particularly where the government has responded to a terrorism emergency. Detailed exposition of these concepts is provided below.

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[220] *British Oxygen Co v Board of Trade* [1971] AC 610.
[221] *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.
[222] See generally Bradley and Ewing (n 2) 687-697; Loveland (n 138) ch 15; Barnett (n 90) ch 25. Of more relevance to the present study are the ECHR principles, not least those under Article 6 ECHR (see below).
[223] Ibid. See, for example, *Ridge v Baldwin* [1964] AC 40.
[224] Below, ch 4 p 242.
[225] The judiciary will not substitute their own decision for that of the decision maker (*Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223).
[226] Respectively s. 9(5)(c)(i) and s. 9(5)(c)(ii) TPIM Act 2011.
[227] *R v Home Secretary, ex parte Khawaja* [1984] AC 74: see generally ch 5 below.
[228] s. 6(1) HRA 1998 makes it unlawful for a public body to act in a way which is incompatible with a ECHR right; and by s. 6(3)(1)(c) this includes any court or tribunal (thus requires SIAC, as well as the traditional courts, to take account of ECHR rights in the context of terrorism-related challenges). The ECHR basis of proportionality is examined below p 94-100.

Judiciary and legislature

Some progress has been made relatively recently in regard to the separation of the judiciary and the legislature, but for present purposes a full account of these developments is not necessary.[229] The *sub judice* rule in Parliament prevents issues awaiting judicial adjudication from being raised in Parliamentary debate.[230] This rule has posed problems for Ministers attempting to devise a strategy to allow for Parliamentary oversight of urgent extensions to the powers of pre-charge detention.[231] By far the biggest overlap in judicial and legislative function lies in the interpretation of legislation: it has been noted that there is tension between the judicial interpretation of statute and the creation of a new legal principle (which is a legislative function).[232] The mechanisms provided by the HRA 1998, and the dichotomy between them, are of fundamental importance here.[233]

The HRA 1998 and the ECHR

Lord Steyn has observed that the ECHR, 'incorporated' into law by the HRA 1998, 'created a new legal order'.[234] In this way, the United Kingdom 'assumes obligations to protect fundamental rights, not in relation to other states, but towards all individuals within its jurisdiction'.[235] The mechanisms by which this is achieved are primarily found in ss. 2, 3, 4 and 6 HRA 1998. Section 2 of the 1998 Act requires the courts to 'take

[229] The creation of the UKSC by virtue of the CRA 2005 removed the judiciary from the legislative business of the House of Lords. It should be noted that by constitutional convention their Lordships did not exercise their legislative powers in the Upper House: Erksine May (above n 142).
[230] *Matters sub judice*, Resolution 1 of 15 November 2001. The Speaker is given some discretion under this resolution although its scope is not entirely clear.
[231] Joint Committee on the Draft Detention of Terrorist Suspects (Tempoary Extension) Bills, (HL 161 HC 893, 2011) [167].
[232] Above, p 74.
[233] Also important in other areas of law is the impact of European Union law, by virtue of s. 2(1) European Communities Act 1972.
[234] Ibid 302-303 (Lord Steyn).
[235] Ibid.

into account' decisions of the ECtHR.[236] More significantly, s. 3 HRA 1998 requires the courts, when interpreting any statute, 'so far as it is possible to do so', to 'read and give effect in a way which is compatible with Convention rights'.[237] This is an expansive power that has been routinely deployed.[238] Where such an interpretation is not possible, the s. 4 mechanism enables the High Court or above to grant a discretionary 'declaration of incompatibility'.[239] The ingenuity comes in the fact that such a declaration 'does not affect the continuing validity' of an Act so declared, thereby preserving the sovereignty of Parliament.[240]

In reality, the use of both the ss. 3 and 4 HRA 1998 powers cause problems to the orthodox principles of Diceyean sovereignty.[241] Section 3 HRA requires the court to often 'strain' the legislative language so as to find an interpretation that is ECHR compliant, but on occasion it is clear that the power has been taken rather too far. Whole words (or even

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[236] 'It is true that section 2(1)(a) of the Human Rights Act 1998 requires us only to 'take into account' decisions of the ECtHR. As a matter of our domestic law, we could take the decision in *A v United Kingdom* into account but nevertheless prefer our own view. But the United Kingdom is bound by the Convention, as a matter of international law, to accept the decisions of the ECtHR on its interpretation. To reject such a decision would almost certainly put this country in breach of the international obligation which it accepted when it acceded to the Convention. I can see no advantage in your Lordships doing so' (*Secretary of State for the Home Department v F* [2009] UKHL 28, [69] (Lord Hoffmann). See generally Jane Wright, 'Interpreting section 2 of the Human Rights Act 1998: towards an indigenous jurisprudence of human rights' [2009] PL 595.

[237] There are four guiding principles, distilled from the judgment in *Ghaidan v Godin-Mendoza* [2004] 2AC 557 by Lord Bingham in *Sheldrake v Director of Public Prosecutions* [2005] 1AC 264, [28]: 'First, the interpretive obligation under section 3 is a very strong and far reaching one, and may require the court to depart from the legislative intention of Parliament. Secondly, a Convention-compliant interpretation under section 3 is the primary remedial measure and a declaration of incompatibility under section 4 an exceptional course. Thirdly, it is to be noted that during the passage of the Bill through Parliament the promoters of the Bill told both Houses that it was envisaged that the need for a declaration of incompatibility would rarely arise. Fourthly, there is a limit beyond which a Convention-compliant interpretation is not possible'. See generally Philip Sales, 'A comparison of the principle of legality and section 3 of the Human Rights Act 1998' [2009] 125 LQR 598.

[238] See generally Kavanagh (n 104).

[239] s. 4(2) HRA 1998.

[240] s. 4(6)(a) HRA 1998.

[241] This is notwithstanding the fact that, as noted above, the HRA 1998 is merely a 'constitutional' statute and can be expressly repealed by Parliament.

sentences) have been written into legislative provisions,[242] and Lord Irvine's warning that judges could take it 'upon them selves to rewrite legislation in order to render it consistent with the Convention, thereby excluding Parliament and the executive from the human rights enterprise'[243] has proven prescient. Similarly, the use of s. 4 HRA has significant political ramifications that have led it to be branded a 'de facto strike down power':[244] in every instance in which a declaration of incompatibility has been granted, remedial legislation has followed either through a full Act of Parliament or through the designated 'fast-track' procedure laid down in the 1998 Act.[245] It is misleading to pretend that sovereignty is completely unscathed.[246]

It has been made clear that the use of s. 3 is the prime remedial measure and that s. 4 is the last resort.[247] Nonetheless, both ss. 3 and 4 have been routinely deployed in a terrorism-related context.[248] The use of these powers is important *vis-à-vis* the protection of Human Rights in England and Wales. It is clear that the judiciary provide an essential check on the government: it is this oversight mechanism that provides the third benchmark required for constitutional optimization. Judicial controls are often contingent upon the doctrine of proportionality and the degree of deference to which executive decisions are subjected. These principles require further elucidation.

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[242] Philip Sales, 'A comparison of the principle of legality and section 3 of the Human Rights Act 1998' [2009] 125 LQR 598.
[243] Lord Irvine, *Human Rights, Constitutional Law and the Development of the English Legal System* (Hart 2003) 79.
[244] Fergal Davis, 'The Human Rights Act and Juridification: Saving Democracy from Law' (2010) Politics 30, 91; House of Lords Constitution Committee, *Professor Klug oral evidence*, 31 October 2006, Q2.
[245] s. 10(1)(a) HRA 1998.
[246] Lord Steyn summarized the point neatly in *Jackson* (n 74): 'The classic account given by Dicey of the doctrine of the supremacy of Parliament, pure and absolute as it was, can now be seen to be out of place in the modern United Kingdom'.
[247] *R v A* (No 2) [2001] UKHL 25 (Lord Steyn).
[248] See below, ch 3 p 160; ch 4 p 214, 218-220, 231.

IV. Proportionality in the protection of human rights as a benchmark of 'constitutional optimization'

It has been established in chapter 1 that in this thesis, 'human rights' refers to those rights that are positively guaranteed in the UK constitution. Human rights protection has been guaranteed by the ECHR, given further effect in law by virtue of the HRA 1998, and decisions of the ECtHR have been pervasive.[249] In discussion of these issues, it is conventional to adopt the rhetoric of balance: it is argued that the state must 'balance' the rights of the individual against the need to maintain national security and public safety.[250] Alternatively, the notion of 'balance' may be predicated on the basis of prevailing human rights concerns: the public have the basic liberty to go about their daily business free from terror, and so the state must balance the rights of the many against the rights of the few.[251] Competing interests stem from the protection of Article 2 ECHR, which protects individuals' right to life, but simultaneously imparts a positive obligation on the State to safeguard the lives of those in the jurisdiction.[252] There is, however, a 'perilous dichotomy' evident:[253] the threat of terrorism may lead to the defence of the security of some by sacrificing the liberty of others.[254] Inequalities result from such balancing; it is a minority of individuals who

[249] See, in particular, the role of the ECtHR in relation to the treatment of Abu Qatada (below ch 5 p 276-278, and see *Othman (Abu Qatada) v United Kingdom* (App no. 8139/09), ECtHR, 17th January 2012); the decision in *Chahal v UK* App no 22414/93 (ECtHR 15 November 1996); and the decision taken in relation to the use of preventive detention (below ch 3, and see *A v UK* App no 3455/05 (ECtHR, 19 February 2009).

[250] See Oren Gross, 'The Process of Balancing' (2011) 45 Tulsa Law Review 733; Ben Golder and George Williams, 'Balancing National Security and Human Rights: Assessing the Legal Response of Common Law Nations to the Threat of Terrorism' (2006) 8 Journal of Comparative Policy Analysis 43; Mary L Volcansek and John F Stack Jr (eds), *Courts and Terrorism: Nine Nations Balance Rights and Security* (Cambridge University Press 2011).

[251] HC Deb 14 September 2001, vol 372, col 604 (Tony Blair).

[252] *Osman v United Kingdom* [1998] EHRR 101 [115].

[253] Laura Donohue, *The Cost of Counter-Terrorism: Power, Politics and Liberty* (Cambridge University Press 2008) 1-38.

[254] Michael Ignatieff, *The Lesser Evil: Political Ethics in an Age of Terror* (Princeton University Press 2004) 44.

disproportionately suffer adverse consequences.[255] 'Balancing' rhetoric implies a straightforward trade, on equal terms, between one right and another; an achievement of a finite degree of security at the cost of a particular human right of a terrorist suspect.

It is preferable to recognize that security 'is a predicate for liberty, not an alternative to liberty'.[256] Although the balance metaphor continues to be used, it is adopted out of convenience and without prejudice to the concerns that may stem from over-simplification. It is more accurate to recognize that a state must make an assessment of anticipatory risk and formulate its legal response in a manner *proportionate* to that risk; the human rights doctrine of proportionality is central to the quest for constitutional optimization.[257]

The freedoms with which this thesis is primarily concerned include the prohibition on deprivation of liberty under Article 5 ECHR, the right to a fair hearing pursuant to Article 6 ECHR, and the prohibition of torture and ill-treatment, as is provided by Article 3 ECHR. Of all the rights-based issues discussed by the present study, only Article 3 ECHR is non-derogable: no exceptions are permitted, even in wartime.[258] Other ECHR rights[259] are subject to such restrictions as are 'prescribed by law and are necessary in a democratic society'.[260] Any restriction on these rights cannot be so

[255] Ibid. Thus, Ignatieff argues, disproportionately high numbers of young Muslim males are subjected to restrictions on their liberty; it is not society as a whole that suffers such restrictions.
[256] James E Baker, *In the Common Defense: National Security Law for Perilous Times* (Cambridge University Press 2007).
[257] C Walker, 'Keeping Control of Terrorists Without Losing Control of Constitutionalism' (2007) 59 Stanford Law Review 1395, 1402-1403.
[258] Since this right is relevant to the deportation of terrorist suspects, it follows that proportionality does not feature as heavily in the analysis of chapter 5 as it does elsewhere in the thesis.
[259] most notably Articles 8-11 ECHR.
[260] Articles 8(2), 9(2), 10(2) and 11(2) ECHR.

regarded unless it is *proportionate* to the aim pursued.[261] Restrictions on Article 5 and 6 ECHR must be 'in accordance with law' and subject to judicial oversight, in accordance with the ECHR's general protection for the rule of law: proportionality is also a feature of these determinations.[262]

For Article 5 ECHR, there is no 'bright line' that separates a deprivation of liberty from a mere restriction on freedom of movement.[263] Freedom of movement is protected by Article 2 of Protocol 4 ECHR, which has been signed but not ratified by the UK.[264] This ECHR right is likewise qualified, and only applies to those individuals who are lawfully on the territory of the concerned State.[265] Steps have been taken in order to restrict foreign travel of suspects in order to prevent engagement in terrorism-related activity abroad.[266] In such cases, the prohibition of foreign travel can be a legitimate and proportionate measure.[267]

Challenges to executive decision making, which are pervasive across the terrorism-treatment strategies with which this investigation is concerned, now require the UK judiciary to assess the proportionality of the action

[261] See generally Yutaka Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the jurisprudence of the ECHR* (Hart 2001). It may be that future challenges to TPIMS are predicated on the basis of Article 8 ECHR and Article 10 ECHR, but given the qualifications to these rights, successful challenges may be unlikely. See below ch 4 p 260.
[262] Article 5(1), 5(3), 5(4) ECHR; Article 6(1) ECHR. For proportionality in the context of Article 6 ECHR, see *Smith and Grady v UK* (1999) 29 EHRR 493.
[263] *Guzzardi v Italy* (1980) 3 EHRR 533; *SSHD v JJ and Others* [2007] UKHL 45, [17] (Lord Bingham).
[264] See generally *Pfeifer v Bulgaria* App no 24733/04 (ECtHR, 17 February 2011).
[265] It is therefore subject to the doctrine of proportionality: ibid [56-57].
[266] A challenge based on restrictions on freedom of movement, as applicable to Articles 5 and 8 ECHR, is pending before the Grand Chamber in *Nada v Switzerland App* 10593/08*,* and the UK has been granted permission to intervene as an interested party.
[267] From the perspective of the EU law, Directive 2004/38/EC Art. 17 provides that the right of exit and entry may be restricted where public security so requires. In the context of Football Banning Orders, for example, the High Court and ECHR have upheld that foreign travel bans are proportionate restrictions (for an excellent and detailed exposition of these issues, see *Gough & Smith v Chief Constable of Derbyshire* [2001] EWHC Admin 554 [65-81] (Laws LJ), upheld in *Lilley v DPP* [2002] EWCA Civ 351). From the perspective of control orders, see *SSHD v CE* [2011] EWHC 3159: it was argued in that case that a simple revocation of a passport in order to prevent foreign travel was the least restrictive measure, and the court upheld much more stringent conditions.

under s. 6(1) of the HRA 1998 where a decision is based on executive discretion. In *SSHD v Daley,*[268] the House of Lords imported proportionality as a test to replace the traditional judicial review criterion of reasonableness. The meaning of 'proportionality' has been the subject of much judicial dicta, and requires that:[269]

(i) the legislative objective is sufficiently important to justify limiting a fundamental right;

(ii) the measures designed to meet the legislative objective are rationally connected to it; and

(iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.

Alternatively, Elliot and Thomas have summarized the doctrine with reference to four questions:

(i) Has a protected interest been compromised by the decision in question?

(ii) Was the interest compromised in the pursuit of a legitimate aim?

(iii) Was it necessary to compromise the protected interest (to whatever extent it has been compromised) in order to achieve the legitimate aim?

(iv) Is there an adequate relationship of proportionality between the damage caused to the protected interest and the positive consequences that flow from achieving the legitimate aim?[270]

In order that a provision can be regarded as proportionate, there are a variety of guiding principles to consider. The ECtHR is opposed to fixed rules that preclude individual discretion: the 'blanket ban' on prisoners'

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[268] *SSHD v Daley* [2001] UKHL 26.
[269] *SSHD v Daley* [2001] UKHL 26 [2002] 2 AC 532, 547, citing *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69, 80.
[270] Elliot and Thomas (n 138) 522; and see *Huang v Secretary of State for the Home Department* [2007] UKHL 11.

voting rights received short shrift in Strasbourg.[271] Generally, the State should adopt the least restrictive measures necessary, in all of the circumstances of the case, to achieve a legitimate purpose; this is particularly true of the range of control order and TPIM conditions that may be imposed on an individual.[272] The access to independent and impartial tribunals, with a certain degree of procedural protection, is essential.[273] It is possible to limit the protection of certain rights provided their 'essence' is maintained:[274] this principle has been a recurring feature of control order jurisprudence.[275] The influence of the rule of law may be seen across all of these criteria.

The Margin of Appreciation and Subsidiarity

In an assessment of proportionality, the ECtHR has recognized that there will be some divergence in the protection of human rights across member States. The 'margin of appreciation' doctrine recognizes that states require a degree of latitude or discretion[276] as to how they apply rights under the ECHR,[277] particularly since ECHR rights cannot be applied uniformly across diverse legal systems. Use of the doctrine of margin of appreciation

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[271] *Hirst v UK,* App no 74025/01 (ECtHR, 30 March 2004).
[272] See *A & Others v SSHD* [2004] UKHL 56; *SSHD v F; E v SSHD; SSHD v N* [2009] UKHL 28.
[273] This is also a feature of the rule of law and is protected through principles of natural justice in relation to judicial review.
[274] See, for example, *Othman (Abu Qatada) v United Kingdom* (App no. 8139/09), ECtHR, 17th January 2012).
[275] In relation to Article 6 ECHR: see the discussion of *SSHD v F; E v SSHD; SSHD v N* [2009] UKHL 28 (below ch 4 p 229-230).
[276] Helen Fenwick and Gavin Phillipson, *Public Law and Human Rights* (Routledge 2011) 336.
[277] Also referred to as 'space for manoeuvre': S Greer, '*The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights'* (Council of Europe 2000) 5.

is open only to the ECtHR and not the judiciary of England and Wales,[278] and was propounded in *Handyside v UK:*[279]

> 'it is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals. The view taken by their respective laws of the requirements of morals varies from time to time and from place to place…By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements … it is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of "necessity" in this context.…Consequently, Article 10 para 2 leaves to the Contracting States a margin of appreciation.'

The doctrine is limited in its scope; the role of the ECtHR is to review whether the actions of the state fall within the appropriate margin. As the court itself has stated, '[t]he domestic margin of appreciation thus goes hand in hand with a European supervision.'[280]

Allied with the principle of margin of appreciation, the ECtHR has developed what is described as the principle of 'subsidiarity': 'the Court points out that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights … The Convention leaves to each Contracting State, in the first place, the task of securing the rights and liberties it enshrines'.[281] These principles have particular contemporary relevance to the investigation, since they play a fundamental role in assessing how the ECtHR responds to the limiting of rights in emergency terrorism situations.

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[278] R v *SSHD ex parte Kebilene* [2000] AC 326 (Lord Hope): (referring to the margin of appreciation) 'This technique is not available to the national courts when they are considering Convention issues arising within their own countries'.
[279] *Handyside v UK* App no 5493/72 (ECtHR, 7 December 1976) [48-49].
[280] Ibid [49].
[281] Ibid [48].

Proportionality therefore features as the fourth benchmark required for constitutional optimization.[282] This doctrine will be judicially assessed; ultimately it is a general benchmark that all counter-terrorism powers should be proportionate to the intended aim. It is therefore appropriate for the thesis to make recommendations for specific changes to the detention, control and deportation strategies if more proportionate alternatives appear to be available. Application of these diverse principles to the counter-terrorism laws is conducted below. Before this is attempted, however, it is necessary to consider the constitutional background of the United States, insofar as the American jurisdiction informs the analysis of the thesis.[283]

Section 2: Application of the theory

I. Applying the Benchmarks to the United States

The constitutional makeup of the US is very different to that of the UK; although much of the theory in relation to constitutional doctrine equally applies in the US, the practical manifestation of these doctrines varies considerably. The United States' Constitution, under the narrow definition discussed above, embodies a higher system of laws.[284] This has clear implications: as the Constitution is the highest law of the land, the legislative competence of Congress is limited. The separation of powers is more tightly defined than in the UK; specific roles for all three branches are provided by the Constitution. Executive power is vested in the

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[282] Note that proportionality is pervasive across all oversight mechanisms, since both Parliament and the courts will consider rights-based issues connected with a particular terrorism regime. It follows that reference to this benchmark will appear throughout the analysis.

[283] Since the adopted methodology is not traditionally comparative, detailed exposition of these principles is not provided here. For analysis of the US constitutional framework, see Emlin McClain, *Constitutional Law in the United States* (1910, reprint 2011, Lightning Source UK); Jacqueline Kanovitz, *Constitutional Law* (12th ed Lexisnexis, 2010); Lee Epstein and Thomas Walker, *Constitutional Law For a Changing America: Rights, Liberties and Justice* (7th ed CQ Press, 2010).

[284] US Constitution, Art VI.

President of the United States;[285] Legislative power is vested in Congress;[286] and Judicial power is vested in SCOTUS.[287] This has marked implications for the use of judicial review and the separation of powers.

(i) Legal certainty and the rule of law in the United States

As a broad political doctrine, the rule of law means the same in the US as it does in England and Wales. The rule of law in the United States is given effect by the Constitution itself, not least the due process clause, the implied provision of judicial review, and the constitutionally guaranteed rights of individuals.[288] The requirement for legal certainty is protected under the 'void for vagueness' principle,[289] though this doctrine has little relevance to the parameters of the current study.

(ii) Legislative oversight in the United States

The checks and balances that operate in the US Constitution are designed to ensure that one branch does not accumulate excessive power: the role of Congress in the oversight of executive action is as important in the US as it is in England and Wales, but the procedure is very different. Congressional Committees can scrutinize executive decisions and have a power of subpoena,[290] and Congress has the power to impeach the President.[291] Standing Committees will scrutinize legislation before it is passed, and

[285] US Constitution, Art II.
[286] US Constitution, Art I.
[287] US Constitution, Art III § 1.
[288] US Constitution, Am 5, Am 14 § 1. 'There can be no free society without law administered through an independent judiciary. If one man can be allowed to determine for himself what is law, every man can. That means first chaos, then tyranny' Justice Felix Frankfurter, *United States v United Mine Workers* 330 US 258, 312 (1947).
[289] US Constitution, Ams 5, 14. *Connally v General Construction Co*, 269 US 385, 391 (1926): '[a penal statute] must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties… and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law'.
[290] Failure to comply could result in Contempt of Congress proceedings: 2 USC §192.
[291] US Constitution, Art 1.

legislation requires the approval of both the House of Representatives and the Senate.[292] A Presidential veto cannot prevent a Bill from becoming law if Congress vote to pass it with a two-thirds majority.[293] During the passage of legislation, a timetable for debate is set in advance; in very urgent cases, stages of the legislative process may be sidelined.[294] As is the case in the UK, voting will take place along party lines[295] and so the ability of Congress to hold the executive to account, or the ability of the President to introduce a particular law, will depend on the constitution of Congress.

(iii) Judicial oversight in the United States

The power of SCOTUS to review legislation was judicially declared based on an interpretation of Article III of the Constitution, and is firmly established.[296] Thus SCOTUS enjoys far greater powers than the UKSC, and even the ECtHR: the court has the power to strike down offending legislation, and rulings as to the interpretation of Constitutional law are binding upon all parties, including the executive branch.[297] When determining the constitutionality of a particular provision, SCOTUS will usually set limits on its justiciability: if a constitutional question can be avoided, the court

[292] House Rule X, Senate Rule XXV.
[293] US Constitution, Art 1 § 7.
[294] This is particularly true of the passage of the USA PATRIOT Act: see below ch 3 p 147-148.
[295] Although the use of whipped voting occurs, its use is not as widespread as in the UK, and the consequences of defying the whip are generally not as severe. Nonetheless, members of Congress are directly elected and have more autonomy in terms of their fundraising and election bids than their UK counterparts.
[296] *Marbury v Madison*, 5 US 137 (1803), 176-177: 'an act of the Legislature repugnant to the Constitution is void'; Fletcher v Peck, 10 US 97 (1810).
[297] Indeed, SCOTUS can determine the boundaries of executive power under the constitution: *Youngstown Sheet & Tube Co v Sawyer*, 343 US 579 (1952); *United States v Nixon*, 418 US 683 (1974).

will do so.[298] With few exceptions, advisory opinions will not be issued.[299]

In an application for judicial review through a writ of *certiorari,* it is essential to establish whether the appropriate jurisdiction exists. All federal and state decisions are ultimately subject to the jurisdiction of SCOTUS. As will be seen in a terrorism-related context, this is significant to the jurisdictional questions that troubled the court with regard to the detention of terrorist suspects at Guantánamo Bay.[300] Under a legislative remit afforded by Congress, tribunals may carry out administrative reviews. This is the case in US Immigration law.[301]

Judicial independence features heavily in the US constitution: SCOTUS Justices are nominated by the President and subject to confirmation by the Senate.[302] The politicization of SCOTUS is

[298] Seven guiding principles were set out by the court in *Ashwander v Tennessee Valley Authority*, 297 US 288, 346–9 (1936), and since these inform the decision making process in a variety of detention-related cases, it is worth setting these out here: ' (i) The Court will not pass upon the constitutionality of legislation in a friendly, non-adversary, proceeding, declining because to decide such questions is legitimate only in the last resort, and as a necessity in the determination of real, earnest, and vital controversy between individuals ... (ii) The Court will not anticipate a question of constitutional law in advance of the necessity of deciding it. It is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case. (iii) The Court will not formulate a rule of constitutional law broader than required by the precise facts it applies to. (iv) The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of… If a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter. (v) The Court will not pass upon the validity of a statute upon complaint of one who fails to show that he is injured by its operation. (vi) The Court will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits. (vii) When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided'.

[299] US Constitution Art III limits the function of SCOTUS to the determination of 'cases and controversies'. Note, however, the decision in *Hamdi v Rumsfeld* 542 US 507 (2004) (discussed ch 3 p 166-167).

[300] The issue was settled in *Boumediene v Bush* 553 US 723 (2008): see below ch 3 p 193-197.

[301] See below, ch 5 p 289-290.

[302] US Constitution, Art III.

contentious: there is far more overt politicization of the judiciary than is the case in England and Wales.[303] Some Justices favour a strict and absolute interpretation of the Constitution; some adopt a purposive approach; others approach each question in light of the entire circumstances of the particular case.[304] Since SCOTUS does not have any formal power to enforce its judgments, it relies heavily on indoctrinated cultural ideals, such as respect for the rule of law and judicial authority.[305] Political realities constrain the court, just as they restrain the legislature: *Vox populi, vox Dei*. The restrictions placed on the court may manifest themselves through a distinction between an assertive or deferential form of judicial review, and have significant implications for the current investigation. Contextual analysis is provided below: it is necessary to consider the ways in which the judiciary are likely to respond to a terrorism 'emergency', together with a discussion of the 'deference' with which an executive decision may be treated.

(iv) Protection of human rights in the United States

As was noted in chapter 1, the US Bill of Rights imparts positive protection that may be deployed by SCOTUS to strike down offending legislation.[306] There is a marked difference between interference with a Constitutionally guaranteed right in the US, which may be declared unlawful by SCOTUS, and an assessment

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[303] See, for example, Adam Liptak, 'A Sign of the Court's polarization: Choice of Clerks' *New York Times* (New York, 6 September 2010) <http://www.nytimes.com/2010/09/07/us/politics/07clerks.html?_r=1&pagewanted=1&hpw>

[304] On a narrow interpretation, see the dicta of Justice David Brewer, *South Carolina v United States,* 199 US 437, 449 (1905). See generally Mark I Sutherland et al, *Judicial Tyranny: The New Kings of America?* (Amerisearch 2005).

[305] By way of an illustration, a constitutional crisis would undoubtedly be triggered if the President was to ignore a Supreme Court decision: see *United States v Nixon*, 418 US 683 (1974).

[306] *Muskarat v United States*, 219 US 346 (1911). To the extent that this principle has been observed (or indeed causes problems), see ch 3 p 170, 194.

of proportionality, as is carried out by the ECtHR and domestic courts of England and Wales, in accordance with the ECHR. That said, the doctrine of proportionality, albeit with a different name, may infuse judicial determinations, and there is school of thought that suggests that the doctrine should be more embedded within the US legal system.[307] When determining cases regarding interference with fundamental rights, SCOTUS adopts a 'strict scrutiny' test, which examines whether the provision is narrowly tailored to a compelling government interest by the least restrictive means.[308]

II. Contextualising the theory: constitutional responses to a terrorism 'emergency'

It is a long-established principle that the state is not only entitled, but *required* to take steps to ensure the safety and survival of itself and its citizens:[309] it is a basic right for citizens to go about their business free from terror.[310] Whether one prefers the much-cited view that after 9/11 'the gloves came off',[311] or the more tempered view that 'the calculus of risk … changed fundamentally',[312] it is clear that that the rhetoric reflects the emergency that was triggered by the atrocities of 9/11.

[307] Thomas Sullivan and Richard Frase, *Proportionality Principles in American Law: Controlling Excessive Government Actions* (OUP 2009); Stefan Sottiaux *Terrorism and the Limitation of Rights in the U.S. Constitution* (Hart 2008) 27-32.
[308] Indeed, it is this test which was deployed in the famous case of *Korematsu v United States* 323 US 214 (1944): see below ch 3 p 163. The outcome of this case was extremely controversial: see, for example, Eugene Rostow, 'The Japanese American Cases-A Disaster' (1945) 54 Yale Law Journal 489.
[309] Article 2 ECHR imposes an obligation on the state to take proactive steps to safeguard the lives of those within the jurisdiction (see *LCB v United Kingdom*, judgment of 9 June 1998, *Reports of Judgments and Decisions* 1998-III, p. 1403, § 36; *Osman v United Kingdom* [1998] EHRR 101 at [115-116]).
[310] Hansard, HC Deb 14 September 2001 vol 372 cc604-16 at 604.
[311] J. Cofer Black, Unclassified Testimony before the Senate Intelligence Committee, US Congress, 107th Congress, 2nd Session, September 26, 2002.
[312] Tony Blair giving evidence to the Chilcott Committee, 21 January 2011, BBC News. Video extract available from http://www.bbc.co.uk/news/uk-politics-12246410 .

Both the UK and US have implemented peacetime mechanisms designed to maintain the essential features of community life.[313] In the UK, the relevant legislation is the Civil Contingencies Act 2004, which provides a broad definition of emergency covering the threat of serious damage to human welfare, the environment, war or terrorism that threatens serious damage to the national security of the United Kingdom.[314] In the US, the power to declare an emergency is vested in the President, with the National Emergencies Act of 1976[315] providing that a period of emergency will last only for 2 years subject to Presidential renewal. In the United States such an emergency has been maintained for the last decade.[316]

The existence of an emergency has significant ramifications in terms of the legal machinery that is designed to operate. Following 9/11, the response of the UK government followed an emergency framework. Article 15 ECHR allows for a derogation from certain Convention rights where there is an emergency or war threatening the life of the nation,[317] and it is instructive that after 9/11 the UK government was the only European

[313] But note the observations of Ackerman that emergency measures during peacetime are likely to involve property and financial issues, as opposed to determinations of individual liberty, and therefore would be less objectionable from a civil liberties perspective (see B. Ackerman, 'The Emergency Constitution' (2004) 113 Yale Law Journal 1029, 1058).

[314] Respectively s. 19(1)(a), (b) and (c) Civil Contingencies Act 2004 (CCA). For a complete discussion of the Act, see C. Walker & J. Broderick, *The Civil Contingencies Act 2004: Risk, Resilience and the Law in the United Kingdom* (Oxford: OUP, 2006).

[315] 50 USC 1601-1651.

[316] President Obama implemented the latest renewal on September 14, 2010. *Letter from the President on the Continuation of the National Emergency with Respect to Certain Terrorist Attacks*, White House Press Office, September 10, 2010, available from http://www.whitehouse.gov/the-press-office/2010/09/10/letter-president-continuation-national-emergency-with-respect-certain-te.

[317] Article 15(1) ECHR provides, so far as is material here:
'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.' Art. 15(3) requires that the Secretary General of the Council of Europe should be kept appraised of any derogation and associated measures.

Government that found it necessary to implement the derogation mechanism.[318]

In terms of how this emergency was judicially treated, there is considerable ECtHR precedent that requires examination. In *Lawless v Ireland*,[319] the Strasbourg Court had held that its function was to determine whether the conditions stipulated in Article 15 had been fulfilled[320] and that Article 15 'referred to an exceptional situation of crisis or emergency which affected the whole population and constituted a threat to the organized life of the community.'[321] A clearer exposition of the scrutiny offered by the ECtHR came in *The Greek Case,*[322] in which it was held that such an emergency should have specific characteristics. In order to be upheld, an emergency must be actual or imminent;[323] its effects must involve the whole nation;[324] the continuance of the organized life of the community must be threatened;[325] and 'the crisis or danger must be exceptional, in that the normal measures or restrictions, permitted by the Convention for the maintenance of public safety, health and order, are plainly inadequate'.[326]

As will be seen, the ECtHR has not subjected the declaration of emergency by the UK government to intense scrutiny, preferring instead to award, through the margin of appreciation doctrine, deference to the UK executive in times of crisis.[327] Perhaps this was to be expected, given that real concerns were expressed during ratification of the ECHR regarding

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[318] As was observed by the European Court as 'striking': *A v United Kingdom* [2009] ECHR 301, at [180].
[319] *Lawless v Ireland* (1979-80) 1 EHRR 15
[320] *Lawless v Ireland* (1979-80) 1 EHRR 15, [20].
[321] ibid at [28].
[322] *Greek case* (1969) 12 YB 1 at 71-72
[323] *Greek case* (1969) 12 YB 1 at 71-72, [152-154]
[324] ibid.
[325] ibid.
[326] ibid.
[327] See ch 3 p 132-133, ch 4 p 229.

the control retained by the government in relation to the declaration and subsequent handling of emergencies.[328] Limitation of the role of the ECtHR in a judicial assessment as to the existence of an emergency is problematic;[329] the scrutiny to which the court subjects a declaration of emergency retains the potential to provide a substantial check on executive power, in accordance with the third benchmark identified above.

An emergency may be simply classified as 'a departure from normality';[330] if 'emergency measures pretend to aim at the achievement of future normality, they often in fact become a way of deferring normality. Or rather, they *become* normality'.[331] Emergency measures influence ordinary constitutional and criminal law norms where they perpetuate,[332] and may result in the application of emergency measures to non-emergency situations where society has become desensitized to their existence.[333] Following 9/11, under this analysis, 'the plea of emergency no longer makes sense... Emergencies are temporary departures from normal conditions. September 11 was an emergency. Daily life under long-term risk is not."[334] Emergencies inevitably become 'entrenched',[335] and therefore any derogation should be subject to strict temporal limits.[336]

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[328] A point made by S. Tierney, 'Determining the State of Exception: What role for Parliament and the Courts?' (2005) 68 Mod L Rev 668, 669.
[329] See the most recent Strasbourg challenge on detention grounds, *A v United Kingdom* [2009] ECHR 301, at [180-181], and specifically [190] in which the Court held that although there was a public emergency, the adopted measures were disproportionate in that they discriminated between nationals and non-nationals. For a more detailed discussion of this jurisprudence, see ch 4 p 229.
[330] S Marks, 'Civil Liberties at the Margin: the UK Derogation and the European Court of Human Rights' (1995) 15 Oxford Journal of Legal Studies 70,85.
[331] ibid 86. Original emphasis.
[332] ibid.
[333] Ibid 90.
[334] D Luban, 'Eight Fallacies About Liberty and Security', in R. Wilson (ed), *Human Rights in the 'War on Terror'* (New York: Cambridge University Press, 2005) 242-257.
[335] Oren Gross & F Aolain, 'From Discretion to Scrutiny: Revisiting the Application of the Margin of Appreciation Doctrine in the Context of Article 15 of the European Convention on Human Rights' (2001) 23 Human Rights Quarterly 625, 644.
[336] Ibid.

There has been prolific academic discourse regarding the appropriate ways in which to establish constitutional oversight over the existence of an emergency. Scheuerman has categorized theorists[337] as 'Constitutional relativists', who champion executive powers unfettered by constitutional or legislative guarantees; those whom espouse 'extralegal emergency powers', such as Gross[338] and Tushnet;[339] those favouring 'common law oversight', such as Vermeule;[340] and 'emergency legal formalists' who favour legislative models, such as those proposed by Ackerman.[341]

Vermeule offers an extensive account of emergencies in the United States, particularly in the context of judicial oversight.[342] Drawing on the decisions of SCOTUS Justice Holmes, Vermeule identifies several main elements of an emergency. First, the existence and duration of emergencies are a question of fact, and emergencies are 'intrinsically temporary' events.[343] Judges 'will give epistemic deference' to officials' claims, but will decide for themselves whether an emergency exists.[344] Second, during such an emergency, courts should not practice minimalism: they should reach out to declare an emergency as soon as possible and terminate it as quickly as possible.[345] Third, during emergencies, there are no nonderogable rights: the government can do anything required by the circumstances.[346] Fourth, and of particular

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[337] WE Scheuerman 'Emergency Powers' (2006) 2 Annual Review of Law and Social Science 257, 258.
[338] Oren Gross, 'Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?' (2003) 112 Yale Law Journal 1011.
[339] Mark Tushnet, 'Controlling Executive Power in the War on terrorism' (2005) 118 Harvard Law Review 2673.
[340] Aidrian Vermeule, 'Holmes on Emergencies' (2009) 61 Stanford Law Review 163.
[341] Bruce Ackerman, 'The Emergency Constitution' (2004) 113 Yale Law Journal 1029.
[342] Vermeule (n 340).
[343] Ibid 168-169.
[344] Ibid.
[345] Ibid 177.
[346] Ibid 183. Note that Vermeule does not consider the impact of *jus cogens* rights, such as the prohibition of torture, discussed in chapter 2. Vermeule's stance is therefore consistent with the conclusions in chapter 2 about the failure of states to fully engage with obligations under international law in this area. On the nature of American exceptionalism

significance to the current thesis, the main checks on government action come from legislative limitation on the emergency, or judicial involvement in 'ex post sunsetting'.[347]

These various contentions have obvious implications for the current thesis.[348] The extent to which the oversight of executive action can be achieved, not least through adherence to the doctrine of separation of powers, is fundamental: there is a discernible need for effective executive oversight through both parliamentary and juridicial mechanisms, as is clear from the identification of benchmarks 2 and 3, above. From a legislative perspective, temporal limitation is essential. From the perspective of judicial review, the scrutiny that will be directed at a particular executive decision may vary depending on the circumstances. It is therefore necessary to examine the meaning and impact of judicial 'deference' to executive decision making.

III. Judicial deference in the domestic courts

As Kavanagh states, 'judicial deference occurs when judges assign varying degrees of weight to the judgment of the elected branches, out of respect for their superior competence, expertise and/or democratic legitimacy'.[349] It has been said that there are therefore two types of deference: 'epistemic' and 'authority based' deference.[350] The former is defined as deference to expert judgment about a specific state of facts; the latter is described as 'deference to an agent empowered by some higher

generally, see H Koh, 'On American Exceptionalism' (2003) 55 Stanford Law Review 1479.

[347] Vermeule (n 340) 188.

[348] As to the nature of the 'quasi-emergency' that is said to exist, see the submissions of Liberty, Interights and the Committee on the Administration of Justice, in their intervention in *Brannigan and McBride v UK* (1994) 17 EHRR 539.

[349] Kavanagh (n 104) 167-168.

[350] Vermeule (n 340) 169.

source of law to choose a policy or establish a rule'.[351] In practice, judicial deference may mean that the courts could find an issue to be non-justiciable (which may be construed as complete deference).[352] It is also possible that the function of the courts has been circumscribed by legislation:[353] in the context of control orders, for example, the standard of judicial review is provided by statute.[354] For cases where judicial extensions to a permissible period of terrorism detention are sought, guidance has been provided as to the correct operation of the statutory framework and the role of the judiciary in individual cases.[355]

As was famously stated by Lord Pearce, 'the flame of individual right and justice must burn more palely when it is ringed by the more dramatic light of bombed buildings'.[356] When 'faced with a security threat, the judiciary will bend to the will of the executive and … will determine the executive action to be acceptable'.[357] On matters relating to national security, the position was that the courts would not interfere with determinations made by the government. Thus in *Hosenball*, Lord Denning was characteristically hawkish when he stated that:

> 'There is a conflict here between the interests of national security on the one hand and the freedom of the individual on the other. The

[351] Ibid.
[352] Ibid 172.
[353] For example, the control order regime specified the correct procedure for judicial review of the decisions of the Home Secretary (ch 4 p 210); SIAC has been established by Parliament as the appropriate closed tribunal to hear sensitive national security removal challenges (ch 5 p 305-306).
[354] See ch 4 p 210, 217; see s. 2(1)(a) Prevention of Terrorism Act 2005.
[355] See ch 6 p 359.
[356] *Conway v Rimmer* [1968] AC 910, 982.
[357] Fergal Davis, 'Extra-constitutionalism, Dr. Mohamed Haneef and controlling executive power in times of emergency', in N McGarrity et al (eds), *Counter-Terrorism and Beyond: The Culture of Law and Justice After 9/11* (Routledge 2010) 220.

> balance between these two is not for a court of law. It is for the Home Secretary. He is the person entrusted by Parliament with the task'. [358]

This stance was reiterated by the House of Lords in *Rehman*, with Lord Steyn holding that it was 'right that national courts must give great weight to the views of the executive on matters of national security'.[359] The post-*Rehman* jurisprudence has nonetheless leaned away from awarding complete deference to the government.[360] There are two diametrically opposed arguments in this debate. The first, somewhat optimistic view, is that the courts have been assertive in holding the executive to account, which is a welcome development. Alternatively, it may be argued that the courts have been unduly submissive in their judgments, and have given undue latitude to executive decision-making, which is clearly contrary to the rule of law.

Kavanagh describes deference post-9/11 as a 'flexible, contextual and nuanced doctrine'.[361] It is possible for courts to afford a degree of weight to a decision taken by a member of the executive, but this does not preclude the possibility of a ruling against it.[362] A review of an executive decision does not involve the judiciary striking down a decision where it is not agreed with, provided that the decision is one that a reasonable decision maker could be expected to arrive at.[363] Kavanagh concludes that there is room for 'legitimate constitutional deference' and suggests that the courts should approach such cases with a degree of deference

[358] *R v Secretary of State for Home Affairs, ex p Hosenball* [1977] 1 WLR 766, 783 (Lord Denning).
[359] *SSHD v Rehman* [2002] 1 All ER 123, [31].
[360] As is argued by Adam Tomkins, 'National security and the role of the court: a changed landscape' (2010) Law Quarterly Review 543, 566-567. Tomkins bases his conclusions on an analysis of control orders, proscribed organizations, and deprivation of citizenship challenges.
[361] Aileen Kavanagh, 'Defending deference in public law and constitutional theory' (2010) 126 Law Quarterly Review 222.
[362] Ibid 227-228.
[363] Known as 'Wednesbury unreasonableness', and established in the case of *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223.

appropriate to the particular circumstances of the case.[364] Kavanagh's argument is forceful: only excessive deference amounts to an abdication of judicial responsibility.[365]

The leading opponent of such a theory is Keith Ewing. Ewing's futility thesis[366] bemoans the fact that '[i]n times of crisis, the courts do not and will not protect the individual from the state'.[367] Under such arguments, judicial deference may be equated to judicial timidity:[368] decisions of the UK courts have been criticized for failing to robustly defend human rights in the face of post-9/11 executive activism.[369] Thus various judicial decisions have been both championed as a bulwark against excessive executive power and simultaneously castigated for failing to be more assertive.[370] These criticisms are categorized as an 'abdication of judicial responsibility in favour of reliance on the good faith or good sense or special expertise of public officials, whose judgments about the implications of rights in specific cases may well be wrong.'[371] Administrative decisions 'must be shown to be justified by the needs of the public interest, wherever they involve the curtailment of established rights'.[372] It has been shown that such scrutiny is a requirement in order to preserve the rule of law,[373] and it is concluded that 'a doctrine of deference

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[364] Ibid 249-250.
[365] Kavanagh, *Constitutional Review under the Human Rights Act* (n 104) 207.
[366] Aileen Kavanagh, 'Judging the judges under the Human Rights Act: deference, disillusionment and the "war on terror"' (2009) Public Law 287.
[367] KD Ewing, 'The Futility of the Human Rights Act' (2004) Public Law 829, 851.
[368] Kavanagh, *Constitutional Review under the Human Rights Act* (n 104) 197.
[369] See, for example, K Ewing and J Tham, 'The Continuing Futility of the Human Rights Act' (2008) Public Law 668, 693; David McKeever, 'The Human Rights Act and anti-terrorism in the UK: one great leap forward by Parliament, but are the courts able to slow the steady retreat that has followed?' (2010) Public Law 110.
[370] This is particularly true of the post 9/11 SCOTUS cases in the US and the control order jurisprudence in the UK. See also the decisions of SIAC in the context of removal proceedings (ch 5 p 307-308).
[371] TRS Allan, 'Human Rights and Judicial Review: A Critique of Due Deference' (2006) 65(3) Cambridge Law Journal 671, 695.
[372] Ibid 683.
[373] Ibid; and see above.

threatens to displace law and reason, strictly applied, by expediency and arbitrariness'.[374]

This thesis examines notable judicial victories for the rule of law: the courts have provided '*some* protection of Convention rights … though they have not (and cannot) meet the more absolute standards of success demanded by Keith Ewing'.[375] There have been cases since 9/11 in which the courts have afforded 'great weight' to the opinion of the executive but nonetheless have leaned away from awarding undue deference to their decisions.[376] The last decade has seen a substantial retreat from the position that national security issues are considered to be non-justiciable.[377]

The executive and the legislature, however, have tried 'to attenuate, if not completely eviscerate, the courts' ability to provide any meaningful review of either statutory provisions or Executive action'.[378] In several areas, the courts have exercised only the minimum of assertiveness. Some of the post-9/11 jurisprudence has seen the judiciary eschew outright confrontation with the executive; the courts could and should have gone further. Similarly, the weakness of outright reliance on legislative oversight mechanisms as a bulwark against executive power is demonstrated by the forthcoming analysis. The interplay between such competing oversight mechanisms is a recurring feature of this investigation. If the executive declares a terrorism-related emergency, the resulting measures should be

[374] Ibid 695.
[375] Kavanagh, 'Judging the judges under the Human Rights Act: deference, disillusionment and the "war on terror"' (n 366) 299. Original emphasis.
[376] *SSHD v Rehman* [2001] UKHL 47 [2003] 1 AC 153, [31] (Lord Steyn).
[377] As was declared by Lord Diplock in C*ouncil of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 HL, 412. For a post-HRA context, see the discussion of national security by Lord Woolf MR in *SSHD v Rehman* [2001] UKHL 47 [2003] 1 A.C. 153, [31]: 'while a national court must accord appropriate deference to the executive, it may have to address the questions: Does the interference serve a legitimate objective? Is it necessary in a democratic society?'
[378] Kavanagh, 'Judging the judges under the Human Rights Act: deference, disillusionment and the "war on terror"' (n 366) 303-304.

subject to judicial and legislative scrutiny. Through such scrutiny, strict temporal limits should be placed on the emergency. Judges may give some deference to the expert views of the executive, but any deference should not be excessive.

IV. Conclusion: four benchmarks for 'constitutional optimization'

Four constitutional benchmarks have been extrapolated from the amorphous doctrines in this chapter. It must be considered that in practical terms, just as in theory, there are considerable overlaps between these principles. First, counter-terrorism laws must be *sufficiently certain* in order to allow individuals to regulate their conduct. Where possible, this means the codification of terrorism powers in statute; it also requires that judicial adventurousness in the interpretation of statutes through the use of ss. 3 and 4 HRA 1998 should be kept to a minimum.

Second, improvements to existing *parliamentary oversight* mechanisms should be the aim. This umbrella term incorporates a range of requirements, including the need for effective pre-legislative and legislative scrutiny, the effective subjection of counter-terrorism legislation to review by Select Committees, the effective temporal limitation of emergency powers through the use of sunset clauses, and the responsibility of ministers to Parliament.

Third, refinements to the *judicial oversight* mechanism should be sought where possible. It is fundamental that executive decisions should be subject to judicial review: this requires the judiciary to carefully straddle the line between due deference and assertiveness. The thesis will assess the application of the use of ss. 3 and 4 HRA 1998 to the various terrorism regimes. In a broader context, this benchmark will also require some

analysis of the role of the ECtHR, particularly in relation to a judicial assessment of the existence of an emergency.

The fourth benchmark required for constitutional optimization is the proportionality of the specific measures imposed on an individual. This criterion will require suggestion of specific alternatives to the terrorism strategies of detention, control and removal and will, *inter alia,* reflect the jurisprudence that these regimes have amassed. Since the judiciary will usually determine the proportionality of executive powers, and since the benchmark infiltrates both the counter-terrorism detention and control regimes, this will be a recurring feature of the investigation.

This thesis will now apply each of these four principles to the strategies of terrorism-related detention (chapter 3), control (chapter 4) and removal (chapter 5). Across these four benchmarks, it is contended that a satisfactory approach will be achieved through a confluence of judicial and legislative oversight mechanisms, and through assertive judicial review as an integral element of the Separation of Powers.[379] Recommendations for change are made in chapter 6.

[379] Fiona De Londras & Fergal Davis, 'Controlling the executive in times of terrorism: competing perspectives on effective oversight mechanisms' OJLS 2010, 30(1), 19, 23; M Tushnet, above (n 339) 2673.

Chapter 3

Detaining terrorist suspects

The purpose of this chapter is to apply the four benchmarks of constitutional optimization to counter-terrorism detention strategies. Detention mechanisms have taken many forms in England and Wales, and this chapter considers the use of both internment and extended pre-charge detention. The analysis is structured in six parts.

Part I tracks the approach of England and Wales to counter-terrorism detention through the Northern Ireland Troubles. This analysis is essential since both internment and extended pre-charge detention were deployed fighting Northern Ireland-related terrorism, and these measures were later transposed into the terrorism regimes after 9/11. In part II, detention practices before the 9/11 attacks are examined, including discussion of the passage of the Terrorism Act 2000, and the comparative lack of coordinated provision in the USA.

This analysis paves the way for Part III, which considers the executive and legislative response to 9/11 in both the USA and in England and Wales. Part IV then examines four significant rulings that occurred in 2004 and provided judicial oversight of the responses to 9/11. As the governments responded to these judicial challenges and the ongoing terrorism threat, Part V explores the recent operation of pre-charge detention in England and Wales, including the impact of the Counter-Terrorism Review 2011. Finally, part VI considers the use of internment and prolonged detention at Guantánamo Bay in the United States, in order to establish whether any lessons may be learned.

In terms of the benchmarks of constitutional optimization, this chapter examines the extent to which detention regimes are statutorily established

and clear; the operation of legislative oversight mechanisms; the ways in which the judiciary have provided oversight and review of the powers; and, where appropriate, the proportionality of the detention measures. Patterns of judicial deference and assertiveness will be tracked through the analysis, and possible enhanced legislative oversight mechanisms will be identified.

Definitional considerations

It is necessary to differentiate between pre-charge detention and preventive detention, since both terms are often erroneously used synonymously.[1] Preventive detention may be defined as the executive internment (not incarceration)[2] of an individual on the basis of an analysis of anticipatory risk, without the need for any criminal charges to be brought. England and Wales have had provision for such detention in the past, but none currently exists.[3] The USA, by contrast, has permitted detention of individuals designated as 'enemy combatants', held for years without charge in Guantánamo Bay.[4] Other states adopt a hybrid approach.[5] Both the US and the UK have employed preventive detention,

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[1] It should also be noted that 'preventive' and 'preventative' may be used interchangeably. The former is used throughout this thesis. See generally Stella Elias, 'Rethinking "Preventive Detention" From a Comparative Perspective: Detaining Terrorist Suspects' (2009) 41 Columbia Human Rights Law Review 99.
[2] 'Internment' and 'incarceration', while both referring to detention, denote fundamentally different approaches. The former suggests lawful preventive detention, undertaken within the law, for example that undertaken during World War I and II. Its application to modern terrorism detention has been criticized as it may be argued that emergency detention in a terrorism context operates outwith ordinary criminal justice principles: see e.g. Roger Daniels, 'Words Do Matter: A Note on Inappropriate Terminology and the Incarceration of the Japanese Americans' in Louis Fiset and Gail Nomura, eds. *Nikkei in the Pacific Northwest: Japanese Americans and Japanese Canadians in the Twentieth Century* (University of Washington Press 2005).
[3] Following the repeal of Part IV of the Anti-Terrorism, Crime and Security Act 2001 by the Prevention of Terrorism Act 2005 and the ruling of the House of Lords in *A and Others* [2004] UKHL 56 (hereafter *Belmarsh*). See below p 159-163 for a relevant discussion of the case and its impact.
[4] Below p 148-150 and p 186-203.
[5] Australia, for example, allows short-term, preventive detention of up to 48 hours (Criminal Code Act 1995 §§ 100.1, 105.2), extendable to up to 14 days by augmenting state law (e.g. Terrorism (Police Powers) Act 2002 (NSW); Terrorism (Preventative Detention) Act 2005 (Qld); Terrorism (Preventative Detention) Act 2005 (SA)).

or internment, at various times during the last 100 years, most notably during World War I and II. Preventive detention also encompasses immigration detention, which is frequently used in the counter-terrorism strategies either side of the Atlantic. Pre-charge detention, by contrast, is usually subject to strict, judicially-reviewed limits, and is used in many countries.[6] The current limit for pre-charge detention of terrorist suspects in the UK is 14 days,[7] in contrast to 48 hours in the US.[8] Since preventive and pre-charge detention are legitimate measures interchangeably employed in the fight against terrorism, both of these terms will be explored in detail throughout this investigation.[9]

Habeas Corpus[10]

No meaningful analysis of detention would be complete without reference to the 'Great Writ,'[11] the judicial remedy for unlawful detention. The use of the writ dates back to the post-Magna Carta era,[12] and was provided for in the Petition of Right 1628 and the Habeas Corpus Act 1679. The writ allows for an examination of the lawfulness of a particular detention.[13] *Habeas corpus* has established roots in many other countries with the

[6] Elias (n 1) considers the detention regimes of some 32 states.
[7] para 36(3)(b)(ii), Sch 8 TACT. The amending provisions of s. 23(7) Terrorism Act 2006 were allowed to lapse in Janurary 2011, causing the 28 day detention period to revert back to the 2003 level of 14 days. See below p181-182.
[8] In *County of Riverside v McLaughlin* 500 US 44 (1991), the court held that detention for a period of time up to 48 hours did not violate fifth amendment guarantees, but this may be extended in an emergency.
[9] In the UK, for example, the state could clearly use the pre-charge detention powers for a short period of time if there was reasonable suspicion that the person was a terrorist. s. 41(1) TACT provides that 'a constable may arrest without a warrant a person whom he reasonably suspects to be a terrorist'. At this point the detention provisions under Sch 8 apply. Note that 'it would be inaccurate to suggest that there are unwavering bright line distinctions between the different frameworks and different countries involved,' Elias (n 1) 128-129. The use of the criminal justice system in this way should also not be encouraged, since it has the potential to distort the purpose of the criminal law (ibid 158). Obtaining a judicial extension of pre-charge detention in the absence of a criminal investigation would not be possible (see below p172).
[10] Literally (the court commands) 'that you have the body' (i.e. the person subject to detention). Its full title is (from the Latin) *habeas corpus ad subjiciendum.*
[11] *Blackstone Commentaries* (1768) vol 3, 129-137.
[12] Blackstone identified the first issue in 1305 (ibid).
[13] Ibid.

English legal tradition, and the US constitution incorporates its protection.[14] Indefinite detention is not prohibited by the writ, but there must be lawful authority for such detention. That such powers are not exercised arbitrarily is a principle of the rule of law generally,[15] and for *habeas corpus* not to issue there should be appropriate safeguards in place to ensure proportionality, scrutiny and accountability of any such detention.[16] *Habeas corpus* in the UK is becoming increasingly usurped by statutory provision for judicial review,[17] and many challenges to detention in the post- 9/11 epoch appear in such a forum.[18] *Habeas corpus* remains of relevance to many of the post-9/11 challenges to American counter-terrorism detention policies. [19]

I. Detention during the Northern Ireland troubles

Although some have cautioned against overreliance on lessons drawn from Northern Ireland, [20] the precedential authority of after-the-event decisions can provide important guidance as to the legal framework in the future.[21] There are sound reasons that support an analysis of the Northern

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[14] Article I, §9 of the Constitution provides, *inter alia:* 'The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it'. It is provided for by the *habeas* statute: 28 USC § 2241-2255 (1948).

[15] See ch 2 p 62-63.

[16] See Laura Donohue, *The Cost of Counterterrorism* (Cambridge University Press 2008) 36: Donohue cites Lord Falconer's comments in Parliament (HL Deb 26 March 2003, cols 851-854) in support of these principles. In the UK at least, it must be considered that this interpretation has its roots in the protection conferred by s. 6 HRA 1998 under Article 5 ECHR. See generally ch 2 above.

[17] See, for example, Fiona De Londras & Fergal Davis, 'Controlling the executive in times of terrorism: competing perspectives on effective oversight mechanisms' OJLS 2010, 30(1) 19.

[18] See ch 4 p 210-211 for the discussion of control orders in a UK context; for the use of judicial review in the context of deportation hearings, see ch 5 p 262-264.

[19] See below p 193-196 for a discussion of *Boumediene v Bush* 553 US 723 (2008).

[20] See S Greer, 'Human rights and the struggle against terrorism in the United Kingdom' (2008) 2 European Human Rights Law Review 163.

[21] David Cole, 'Symposium: Judging Judicial Review: Marbury in the Modern Era: Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis' (2003) 101 Michigan Law Review 2565, 2571-77.

Ireland experience *vis-à-vis* the post-9/11 terrorism paradigm.[22] As enunciated by Campbell,[23] the UK can share valuable lessons, particularly in light of a period of sustained threat or emergency, given its status as 'hegemon' in the field.[24]

The UK has had extensive experience of dealing with a threat posed by terrorism by means of special legislation: as the Jurists panel put it, Northern Ireland has not experienced a decade without 'special' or 'emergency' powers since the 1920s, and this may have had a 'negative impact of prolonged emergency law on public confidence in state institutions and the administration of justice'.[25] What follows is a contextual discussion of the key events, to allow for a relevant analysis of the executive, judicial and legislative attitudes to Northern Ireland detention strategies.[26]

Preventive Detention (Internment) in Northern Ireland

[22] See, for example, the opinion of Campbell that whilst 'Northern Ireland may offer some particularly important pointers, … the political contexts are quite different, and lumping the Iraqi conflict seamlessly with the rest of the 'war on terror' provides at best a questionable construction' Colm Campbell, '"Wars on terror" and vicarious hegemons: the UK, international law, and the Northern Ireland conflict' (2005) 54 International and Comparative Law Quarterly 321, 323.
[23] Campbell (n 22).
[24] Ibid 325-326.
[25] *Assessing Damage, Urging Action*: *Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights* (International Commission of Jurists 2010) <http://ejp.icj.org/IMG/EJP-Report.pdf> (Jurists Report) 41-42. It should be noted that the report does state that 'Despite serious levels of political violence, basic legal guarantees, a free media, a strong civil society, and political pluralism were all maintained. International oversight mechanisms, including the United Nations, and most importantly the European Court of Human Rights provided external safeguards'. This contention, however, does not detract from the fact that there are well-documented allegations of general human rights abuses during this period (see, for example, the judgment of the ECtHR in *Ireland v UK* (1978) 2 EHRR 25, where the court held that the UK had breached its obligations under Article 3 ECHR with respect to the inhuman and degrading treatment of Northern Ireland detainees).
[26] A fulsome account of counter-terrorism measures adopted during the Northern Ireland troubles lies beyond the ambit of this thesis and has been well-documented elsewhere. See, for example, C Walker, *Blackstone's Guide to the Anti-Terrorism Legislation*, (2nd edn, Oxford 2009) ch 1; G Hogan and C. Walker, *Political Violence and the Law in Ireland* (Manchester University Press 1989); Laura Donohue, *Counter-terrorism Law and Emergency Powers in the United Kingdom 1922-2000* (Irish Academic Press 2001); Donohue (n 18).

Broad legislative power was conferred by the Northern Ireland Parliament by the Civil Authorities (Special Powers) Act (Northern Ireland) 1922, which remained on the statute books until 1973.[27] Internment during the Troubles attracted vitriolic condemnation and has been widely criticized[28] as being largely counter-productive.[29] In particular, the practice was widely derided for its self-defeating consequence of garnering additional support for the atrocities and further isolation of the Nationalist community.[30] Under the sweeping authority of the 1922 Act, Regulations were promulgated which allowed indefinite detention without trial.[31] No avenue of appeal existed. Since the power of internment was clearly contrary to Article 5 ECHR, the government lodged a notice with the Council of Europe in 1952[32] that there existed a public emergency that threatened the life of the nation,[33] pursuant to Article 15 ECHR, and consequently derogated from the relevant provisions of the Convention.

Judicial reaction to internment during the 1970s did little to stem the flow of executive dominance, although there were some signs of recalcitrance. In *Re McElduff,*[34] the applicant applied for *habeas corpus* to the Queens Bench Division in Northern Ireland, since his previous application had

[27] The Northern Ireland (Emergency Provisions) Act 1973 repealed the 1922 Act.
[28] Internment was (in 1972) described as the 'most serious mistake [the] government has ever made': HL Deb 7 December 1972, vol 337, col 447. See generally Walker, *Blackstone's Guide* (n 26) ch 1.
[29] Paul Bew and Gordon Gillespie, *Northern Ireland: A Chronology of the Troubles 1968-1999* (Gill and Macmillan 1999) 37; See also the commentary provided by Michael O'Connor and Celia Rummann, 'Into the Fire: How to Avoid Getting Burned By the Same Mistakes Made Fighting Terrorism in Northern Ireland' (2002-2003) 24 Cardozo Law Review 1657, 1679-80.
[30] For a detailed analysis of the conflict and the associated policies with regard to internment, see Brice Dickson *The Detention of Suspected Terrorists in Northern Ireland and Great Britain* (2009) 43 Richmond Law Review 927, 935. The events of Bloody Sunday were as a result of an anti-internment march.
[31] Regulations 11(2) and 11(5) allowed for internment: Civil Authorities (Special Powers) Acts (Northern Ireland), 1956 /191. Para [23] of the Schedule to the Act contains the preceding provisions.
[32] Such a notice was held to be sufficient to amount to a valid derogation in *Lawless v Ireland* (1979-1980) 1 EHRR 15.
[33] Home Office, *Standing Advisory Commission on Human Rights*, *The Protection of Human Rights by law in Northern Ireland* (Cmd 7009, 1977).
[34] *Re McElduff* [1972] NI 1; 1972 WL 37585.

been unsuccessful[35] on the basis of lack of jurisdiction.[36] Donohue describes the subsequent decision as demonstrating that 'the court had an important role to play in monitoring the exercise of executive powers. Yet, it also shows how incredibly narrow that power was'.[37] Although the detention was contested on narrow grounds, the court subjected the decision to intense scrutiny and concluded that a failure to provide the grounds for arrest had rendered it unlawful. The government's arguments were rejected; this decision was to be one of several minor interventions in which overarching deference to the executive can be seen to ebb away,[38] and the rule of law was asserted.

As a result of such decisions, the UK government rushed a new Bill through Parliament, and a new Detention Order was promulgated in 1972.[39] The 1972 Detention Order recognized some right to appeal, but even this 'real advance'[40] was strictly limited: an order granting indefinite detention could issue following an oral hearing, and an appeal lay only to a Detention Appeal Tribunal.[41] As critics have stated,[42] this still fell far below the standards required of a competent tribunal, leaving as it did all effective control in the hands of the executive.[43] In this way, the modest intervention of the courts provoked an immediate response from the British government, which immediately sought to introduce similar powers in order to head off further judicial challenges. Donohue notes the similarities between this strategy and that of the US government post-9/11,[44] and it

[35] *Re Keenan* [1972] 1 QB 533; [1971] 3 WLR 844.
[36] Donohue notes the similarities between the jurisdictional arguments advanced by the applicant in this case and that presented by the SCOTUS appeals in the post-9/11 epoch: Donohue, *The Cost of Counterterrorism* (n 16) 39.
[37] Ibid 40.
[38] Ibid 42. See also the case of *Kelly v Faulkner and Others* [1973] NI 31.
[39] Detention of Terrorists (Northern Ireland) Order 1972, SI 1972/1632.
[40] HL Deb 07 December 1972, vol 337, col 438.
[41] Detention of Terrorists (Northern Ireland) Order 1972, SI 1972/1632.
[42] Dickson (n 30) 932.
[43] Donohue, *The Cost of Counterterrorism* (n 16) 42.
[44] Ibid.

could also be observed that the Northern Ireland measures have a ring of consonance with the UK's post-9/11 approach.[45] The ECtHR, however, was more supportive of the government than the lower courts had been.[46]

The approach of the ECtHR in making an assessment as to the existence of a state of emergency was established during this time in the afore-mentioned *Greek Case*[47] and *Lawless v Ireland*.[48] Further exposition of these principles occurred in *Ireland v UK*,[49] where the ECtHR ruled that the UK was 'reasonably entitled to consider that normal legislation offered insufficient resources for the campaign against terrorism and that recourse to measures outside the scope of the ordinary law, in the shape of extrajudicial deprivation of liberty, was called for.'[50] It was 'perfectly clear' that a public emergency existed on the facts;[51] the court would not substitute for the British Government's assessment 'any other assessment of what might have been the most prudent or expedient policy to combat terrorism'.[52] The court was eager to stress the possibility of Article 15 being used as part of a progressive strategy towards regime change,[53] and Strasbourg elected to uphold the derogation at a time when it was not operationally required, given that two years had elapsed since the last internee was released.[54]

Following the case of *Ireland*, the judiciary were reluctant to retrospectively overturn a decision made by the executive in a time of genuine need. There were clearly other factors that prevented the court from finding a

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[45] See below p 159-163 for the discussion of *A and Others* [2004] UKHL 56; for the government's response see ch 4 p 209.
[46] See below p 128-129; See also the approach of SIAC in removal proceedings (see ch 5 p 307-311).
[47] *Greek case* (1969) 12 YB 1, 71-72.
[48] *Lawless v Ireland* (1979-80) 1 EHRR 15.
[49] *Ireland v UK* (1978) 2 EHRR 25.
[50] Ibid [93-94].
[51] Ibid [205].
[52] Ibid [214].
[53] Ibid [220].
[54] For criticism from this perspective, see Dickson (n 30) 935.

violation of Articles 5 and 15 ECHR taken together,[55] even though it was more assertive elsewhere.[56] It could be argued that the ECtHR was more deferential to executive judgment than the domestic courts; or perhaps the significance of the ruling on Article 3 ECHR grounds overshadowed the challenge under Articles 5 and 15.[57]

Nonetheless, internment proved as politically unpalatable as it was ineffectual [58] and the Gardiner Committee, [59] established by the government in order to examine which powers were required to deal with terrorism in Northern Ireland, concluded that it could not continue in the long-term. [60] The report stopped short of recommending immediate abolition. Instead, it preferred to leave the decision to the government,[61] concluding that it had acted legitimately and consistently with ECHR obligations in restricting certain fundamental liberties.[62] Internment was abandoned as a practice in 1975[63] yet remained on the statute books until 1998. [64] In place of internment came a system of longer pre-charge

[55] For a discussion of which, see Susan Marks, 'Civil Liberties at the Margin: the UK Derogation and the European Court of Human Rights' (1995) 15 Oxford Journal of Legal Studies 70, 75. Note also that the Strasbourg Court would have found a violation of Article 5 taken alone; but the Court accepted the derogation and therefore found no violation of the Articles taken together.
[56] See the discussion as to the violation of Article 3 ECHR: ch 5 p 269.
[57] Although note the reasoning: 'the Court emphasizes… that Articles 3 and 5 embody quite separate obligations' *Ireland* (n 49) [221].
[58] See, for example, the discussion in Parliament during the passage of the Northern Ireland (Emergency Provisions) Bill: HC Deb 09 July 1974, vol 876, cols 1285-89. Note also the observations of Philip Heymann, 'Civil Liberties and Human Rights in the Aftermath of September 11' (2002) 25 Harvard Journal of Law and Public Policy 441, 449: internment always had the effect of alienating a much larger group than were originally sympathetic to the terrorists.
[59] *Report of a Committee to consider, in the context of civil liberties and human rights, measures to deal with terrorism in Northern Ireland* (HMSO January 1975) (Gardiner Report).
[60] Ibid 148-149.
[61] Ibid.
[62] Ibid 6.
[63] *Conflict and Politics in Northern Ireland: Internment - A Chronology of the Main Events* (CAIN, University of Ulster).
[64] The designated derogation from Article 5 ECHR was withdrawn with the passage of TACT.

detention.[65] Further exploration is warranted as to the ways in which constitutional oversight of this regime operated.

Pre-charge detention in Northern Ireland

The 'Troubles' in Northern Ireland saw an increasing need for extended periods of pre-charge detention, reflected in a variety of statutory provisions that conveyed extended powers of detention on the Secretary of State.[66] The Prevention of Terrorism (Temporary Provisions) Act 1974 was enacted in response to the Birmingham bombings that caused major loss of life in England.[67] The scrutiny with which the Act was passed was poor: in 8 days of debate, virtually no amendments were made to the legislation,[68] and indeed it has been shown that much of the drafting of the powers occurred secretly the previous year.[69]

The 1974 Act reflects the perception that the powers were extraordinary; an annual sunset clause was included in the legislation, but in practice it was continually renewed on an annual basis and changed very little.[70] The passage of this statute reflects the potential ineffectiveness of the sunset clause mechanism at ensuring speedy termination of the emergency powers; the political will existed for continuous renewal of the

[65] The significance of Diplock courts and their commensurate impact on the Northern Ireland situation should not be underestimated, but such a discussion is beyond the ambit of this investigation and can be left to other sources (for a summary of the history, use, advantages and disadvantages of Diplock Courts, see Donohue (n 16) 42-47).
[66] Chronologically s. 7 of the Prevention of Terrorism (Temporary Provisions) Act 1974; s. 12 of the Prevention of Terrorism (Temporary Provisions) Act 1976; and s. 12 of the Prevention of Terrorism (Temporary Provisions) Act 1984. For a comprehensive discussion of the relevant provisions, see C Walker, 'The detention of suspected terrorists in the British Islands' (1992) 12 Legal Studies 178-194.
[67] The bombings were carried out on 21st November 1974; Royal Assent was received on 29th November (HL Deb 29 November 1974, vol 354, col 1574). Such a speedy passage, which required an urgent recall of Parliament, has been identified as a cause for concern and has particular significance given the pre-charge detention measures currently before Parliament.
[68] See, for example, Hansard HC Deb 25 November 1974, col. 35.
[69] Clive Walker, *The Prevention of Terrorism in British Law* (Manchester University Press 1992).
[70] Indeed, the legislation was continually renewed until 1989.

extraordinary powers of detention.[71] As has been suggested, perhaps too much confidence was placed in the legislative oversight mechanism.[72] There was overwhelming support in Parliament for continual renewal.[73]

Under the 1974 Act, an individual whom a constable had reasonable grounds of suspecting to be (*inter alia*) involved in terrorism in Northern Ireland, could be detained for up to 48 hours, extendable by another period of 5 days by the Secretary of State.[74] Although provided by statute, this power clearly left a great deal of discretion to the Secretary of State, and the potential for arbitrariness should not be overlooked. The state of emergency still existed; there were no successful challenges to the new detention powers until 1984, when the government introduced new legislation[75] and correspondingly withdrew the derogation notice.[76]

With such a paradigm shift in the detention strategies used in Northern Ireland, it may be thought that an epoch of judicial assertiveness would be forthcoming. The courts did not have this opportunity. The reason for the withdrawal of the derogation notice, the UK government stressed, was not that the period of emergency no longer existed,[77] but rather that alternative powers of pre-charge detention were introduced; the derogation was therefore no longer required. Analogous powers of arrest based on 'suspicion' as opposed to the Convention-compliant 'reasonable suspicion' had been truncated by the 1984 Act;[78] it was believed that the 7 days

[71] Walker, above (n 26).
[72] Ibid 574.
[73] For a detailed discussion of which, see Walker (n 69) 532.
[74] s. 12 Prevention of Terrorism (Temporary Provisions) Act 1984.
[75] Prevention of Terrorism (Temporary Provisions) Act 1984.
[76] See 14 Yearbook 32, 16 Yearbook 26–28, 18 Yearbook 18 and 21 Yearbook 22, Communications giving notice of derogation and 21 Information Bulletin on Legal Activities with the Council of Europe and in member states (July 1985) 2, for the withdrawal.
[77] See the Government's arguments in *Brannigan and McBride v United Kingdom* (1994) 17 EHRR 539 (discussed below).
[78] See ss. 10-12 Northern Ireland (Emergency Provisions) Act 1973.

potential detention would be compliant with Article 5 ECHR.[79]

This pre-charge detention regime came under intense judicial scrutiny throughout the 1980s. In *Brogan v UK*,[80] the applicants had been detained for various short periods of time up to four days but had not been charged or brought before competent judicial authority. The ECtHR considered that the detention violated Article 5(3) since there had been no 'prompt' judicial involvement,[81] yet simultaneously recognized that 'subject to the existence of adequate safeguards, the context of terrorism in Northern Ireland had the effect of prolonging the period during which the authorities may keep a person suspected of terrorist offences in custody before bringing him before a judge or other judicial officer'.[82] Campbell opines that such 'permissive contextualization of *Brogan* is indicative of a trend also manifest in the derogation cases: the relatively uncritical approach taken during the conflict by the organs of the European Convention,'[83] and is of the view that 'terrorism was taken to be a privileged context in which Convention provisions are to be reinterpreted in a manner deferential to the state'.[84] Although the ruling was against the UK government, the court was keen to identify the exceptional nature of the terrorism threat.

The court in *Brogan* had sent a shot across the bows of the UK government, prompting a response in the form of another tried-and-tested derogation from Article 5 ECHR.[85] Following such affirmation, the pre-

[79] See Marks (n 55) 78-79.
[80] *Brogan v UK* (1989) 11 EHRR 117.
[81] Ibid [61-62].
[82] Ibid [60].
[83] Campbell (n 22) 341.
[84] Ibid.
[85] On 23 December 1988, the Government declared to the Security General of the Council of Europe that a public emergency within the meaning of Article 15(1) ECHR existed in the UK, and gave notice of a designated derogation from the Convention with respect to this mechanism of extended detention. See s. 13(1) and Sch 2 HRA.

charge detention regime was reenacted in 1989.[86] The rigour and scrutiny present in the debate proved to be marginally more robust than that seen in 1974, but the ring of 'emergency' rhetoric was omnipresent.[87] Indeed, a number of counter-terrorism statutes, often reactive in nature, were promulgated in the next decade that were specifically aimed at Northern Ireland,[88] and the Parliamentary debates are often couched heavily in 'emergency' rhetoric.[89] Further challenge to Strasbourg was made in *Brannigan and McBride v UK.*[90] Upon rendering judgment, the court once again gave a deferential nod in the direction of the Article 5 derogation, concluding that a public emergency undoubtedly existed[91] and that the derogation was a genuine response to that emergency.[92]

The court held that in such circumstances there was a wide, though not unlimited, margin of appreciation open to states,[93] and that the derogation was within that margin.[94] The court's deferentialism reflects that observed in *Ireland* some 15 years previously. The decision has been criticized as it sits 'uneasily with the exceptionally important role of international supervision in emergency situations,' and allows national sovereignty to prevail over international supervision.[95] Despite political progress being

[86] s. 14 and Sch 5 para 6. Prevention of Terrorism (Temporary Provisions) Act 1989 made similar provision and came into force on 22 March 1989.
[87] See House of Commons Library Research Note 424 on the *Prevention of Terrorism (Temporary Provisions) Bill [Bill 2 of 1988/89].*
[88] Northern Ireland (Emergency Provisions) Act 1991; Northern Ireland (Emergency Provisions) Act 1996; there were also amendments made to the PTA 1989 (see, e.g. Prevention of Terrorism (Exclusion Orders) Regulations 1996 SI No 892.
[89] For a discussion of the myriad attacks in this period, see C Walker, 'The Bombs in Omagh and their Aftermath: The Criminal Justice (Terrorism and Conspiracy) Act 1998' (1999) 62 Modern Law Review 879.
[90] *Brannigan and McBride v UK* (1994) 17 EHRR 539.
[91] Ibid [47].
[92] Ibid [51].
[93] Ibid [43].
[94] Ibid [60].
[95] Marks (n 55) 94. There is undoubtedly some force in this argument, but it should concordantly be noted that the UK domestic courts have since been more reticent to afford the executive similar latitude in a post-9/11 context.

made towards the Belfast agreement,[96] however, terrorist attacks were ubiquitous. The IRA renounced the ceasefire on 9 February, the same day as the Docklands bomb caused two fatalities and some £85 million damage.[97] On 15th June 1996, an IRA bomb exploded in Manchester, injuring over 200 people and causing some £1bn damage.[98] The attack was immediately condemned[99] but remained the driving force behind substantial new augmentation of the terrorism rubric in Northern Ireland by the Northern Ireland (Emergency Provisions) Act 1996.[100] Although this statute preserved the internment regime, no resort was made to it, in common with the practice of the previous years.

A further Strasbourg challenge was forthcoming in 1997,[101] and the political background between 1996-1998 may have helped this challenge, if it were not for another outbreak of violence. The Omagh bombing in 1998[102] catalyzed yet another legislative reaction. Parliament was recalled from the summer recess and passed legislation within two days that substantially renewed the 1996 'emergency' powers whilst repealing the provision for internment. The polemics had been reignited[103] but were quickly dampened in Parliament and the government resisted any

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[96] The Good Friday Agreement was signed on 10th April 1998. On the agreement, see A Morgan *The Belfast Agreement - a practical legal analysis* (Belfast Press 2000).
[97] John Mullin et al, 'IRA smash ceasefire' *The Guardian* (London, 10 February 1996) <http://www.guardian.co.uk/uk/1996/feb/10/northernireland.davidpallister.> accessed 1 February 2010. See also the discussion of these attacks by Walker (n 26).
[98] David Sharrock et al, 'Ultimatums follow blast which blew wreckage half a mile into the air' *The Guardian* (London, 17 June 1996) <http://www.guardian.co.uk/uk/1996/jun/17/northernireland.christopherelliott> accessed 1 February 2010.
[99] The Secretary of State for Northern Ireland expressed 'outraged condemnation' for the attacks and this was echoed by the opposition (HC Deb 19th June 1996, cols 938-943).
[100] For a comprehensive account of the Northern Ireland provisions, see e.g. Walker (n 26).
[101] *Marshall v UK*, App No 41571/98 (ECtHR, 10 July 2001). The ECtHR declared the application inadmissible, by which time the derogation notice had been removed.
[102] Henry Macdonald, 'Ulster carnage as bomb blast targets shoppers' *The Guardian* (London, 16 August 1998) <http://www.guardian.co.uk/uk/1998/aug/16/northernireland.henrymcdonald1> accessed 12 May 2010.
[103] HC Deb 18 Nov 1997, col 182.

reintroduction of internment:

> 'we cannot envisage any circumstances in which we would seek to deprive an individual of his or her liberty without trial and without the normal safeguards that the law provides for the protection of suspects. Such action would surely run counter to the rule of law as it is understood internationally.'[104]

The year 1998 marked a significant milestone of the formal repeal of internment in relation to Northern Ireland[105] and also saw a departure from the emergency rhetoric of its predecessor. The 1998 Act was passed as a permanent statute, although it should be noted that, by this point, a new codified terrorism regime was imminent, and so for practical purposes the Act had a limited shelf-life.[106]

The tide of deference was turning in Strasbourg. Although the ECtHR declared the 1997 challenge to the derogation order to be inadmissible, challenges in non-detention related contexts were becoming increasingly prevalent.[107] The government saw fit to withdraw the derogation in 2001,[108] replacing the provisions with the broader, judicially reviewable powers of pre-charge detention under the TACT.[109] This is likely to have obviated the need for the courts to take a stand against executive detention in the tumultuous political period in which the Troubles were clearly abating.

[104] HL Deb 3 September 1998, vol 583, cols 889-890.
[105] s. 3 Northern Ireland (Emergency Provisions) Act 1998.
[106] Lord Lloyd's 1996 review was used to inform the content of the Terrorism Bill 2000 (Lord Lloyd, *Inquiry into legislation against terrorism* (Cmd 3420, 1996)).
[107] As Campbell (n 22) notes, a plethora of violations were found between 1994 and 2003. It is, however, important to note that these were not in a detention-related context; nor did they subject the designated derogation to further scrutiny.
[108] The Human Rights Act (Amendment) Order 2001 (SI 2001/1216) repealed the 1988 derogation on 1st April 2001.
[109] s. 41(2) TACT gives effect to Sch 8, which contains the relevant detention provisions.

Application of the benchmarks to Northern Ireland detention

Of principal interest is the attitude of the ECtHR, which repeatedly refused to interfere with the declaration of emergency proffered by the government. The ECtHR does provide one judicial avenue for restraint[110] of emergency measures, but the deference given to the UK government's assessment as to the existence of an emergency suggests that this mechanism does not appear to be effective in ensuring that a period of emergency is adequately curtailed.[111] Gross and Aolain argue that the ECtHR should afford a narrow margin of appreciation to states,[112] suggesting that governments are not better placed than the court to determine the existence of a state of emergency, and that a critical approach should be taken,[113] especially where the emergency has become entrenched.[114]

Ireland, Brannigan and *Marshall* are testament to this analysis: periods of emergency have too easily been allowed to perpetuate.[115] There is also an evident time lag between initial application and the delivery of the final judgment by Strasbourg.[116] Even in the mid 1990s, when the ECtHR was becoming more assertive in other circumstances, a period of emergency could still have lasted for several years before judicial intervention. In

[110] As will be seen, the UK domestic courts have proven to be rather more assertive in some respects (see below p 159-163 for the discussion of *A and Others* [2004] UKHL 56).
[111] For a detailed discussion from the perspective of the Northern Ireland judiciary, see Brice Dickson, 'Northern Ireland's Troubles and the Judges' in B Hadfield (ed), *Northern Ireland: Politics and the Constitution* (Open University Press 1992).
[112] Oren Gross and Fionnuala Aolain, 'From Discretion to Scrutiny: Revisiting the Application of the Margin of Appreciation Doctrine in the Context of Article 15 of the European Convention on Human Rights' (2001) 23 Human Rights Quarterly 625, 634.
[113] Ibid.
[114] Ibid 647.
[115] During passage of the 1984 Act, the Bill attracted criticism due to the renewed extension for the tenth consecutive year of what were originally intended to be temporary six-month measures (HC Deb 25 January 1984, vol 52, cols 1013-1014).
[116] See, for example, the 4 year lag from application to judgment in *Brannigan and McBride v UK* and *Brogan v UK;* the 7 year delay in *Ireland v UK;* and the 3 year period before the case of *Marshall v UK* was declared inadmissible.

order to address this problem, a twin-track strategy is needed. It is necessary to encourage greater judicial intervention (or a rejection of judicial minimalism),[117] together with the implementation of more effective legislative oversight. Ackerman proposes such a 'carefully limited' statutory system that is 'always on the path toward termination'.[118] These principles are explored throughout the investigation.

Allied to the concerns regarding the perpetual period of emergency, it has been observed that the emergency or special measures themselves are often inimical to the rule of law.[119] According to the Jurists report, experience of the Northern Ireland conflict should demonstrate the importance of requiring international standards in order to time-limit emergency or special measures.[120] This analysis shows immediate support for such a contention. In the late 1990s, there was a new threat posed by international terrorism, but the old detention powers remained. When the 'emergency' rhetoric was abandoned, together with internment, many of the other measures inevitably became normalized: temporary emergency measures acquired a degree of permanence.[121] This residual detention power has been transposed from the Northern Ireland-related terrorism to the post-9/11 paradigm. If lessons are to be learned from Northern Ireland, the danger of such normalization must be realized.

Several of the key statutes in relation to Northern Ireland share the

[117] Aidrian Vermeule, 'Holmes on Emergencies' (2009) 61 Stanford Law Review 163.
[118] Bruce Ackerman, 'The Emergency Constitution' (2004) 113 Yale Law Journal 1029, 1076.
[119] For a contextual discussion, see ch 2 p 57-64, and for an excellent and contemporary outlook on the doctrine, see Tom Bingham, *The Rule of Law* (Penguin 2011).
[120] Jurists Report (n 25) 42.
[121] Laura Donohue, 'Civil Liberties, Terrorism, and Liberal Democracy: Lessons from the United Kingdom,' (BCSIA Discussion Paper 2000-05, ESDP Discussion Paper ESDP-2000-01) 5; see also Donohue (n 16) ch 1, where Donohue observes that the Special Powers Act 1922 was initially intended as a temporary measure, but was more permanently codified in 1933.

undesirable attribute of a swift Parliamentary passage.[122] Some of these provisions had been previously canvassed.[123] Nonetheless, inadequate oversight inevitably results from the considerable political turbulence witnessed in the immediate aftermath of an attack. Though there may be little that can be done to prevent this from reoccurring, there are two methods by which this risk may be reduced. The first is to enact comprehensive legislation to deal with future emergencies in a proactive way; the second is to draft Bills ready to be introduced should an emergency arise. Neither of these options are perfect, but it is argued that the former is preferable to the latter, notwithstanding the constitutional obstacles that lie in the way of its implementation. These principles will be explored later in the chapter.[124]

A further point derived from the Northern Ireland jurisprudence is that the executive forced remedial legislation through Parliament even in the wake of judicial intervention. This is not a significant cause for concern. The executive is best placed to make an assessment as to the scale of the emergency, while the legislature has the power to accept or reject executive proposals. What it does demonstrate, however, is that significant responsibility lies with Parliament to subject executive determinations to intense scrutiny. This exposes a potential weakness of

[122] Walker (n 89) 881.

[123] Walker points out that such legislation is 'rarely drafted on the hoof' (ibid) but 9/11 did see some hastily drafted legislation in the form of the Anti-Terrorism, Crime and Security Act 2001. See below for a discussion of such measures, but note the conclusions regarding drafting emergency legislation and the absence of adequate Parliamentary scrutiny. For a (now dated) contextual analysis in relation to New Zealand, see Kiron Reid and Clive Walker 'Military Aid in Civil Emergencies: Lessons from New Zealand' (1998) 27 Anglo American Law Review 133.

[124] In the most recent context, see the operation of the TPIM regime: ch 4 p 254-255. Two further specific examples may be given: the Labour proposal, following a Parliamentary defeat to extend the period of pre-charge detention to 42 days, which was drafted as a one page bill and retained in the Parliamentary library; and the more recent proposals suggested by the Home Secretary, following the lapse of the 28 day limit and return to 14 days, which is to be accompanied by draft legislation to allow for this period to be extended in if required by a terrorist situation (Home Office, *Review of Counter-Terrorism and Security Powers: Review Findings and Recommendations* (Cmd 8004, 2011) 14, para 9) (Counter-Terrorism Review).

the constitutional framework and further underscores the importance of an effective legislative oversight mechanism.[125]

II. Detention measures before 9/11

The measures adopted on either side of the Atlantic to deal with terrorism were very different, principally due to the UK's experience of fighting Northern-Ireland related terrorism. Before analysis is conducted of the paradigm-shifting events of 9/11, it is necessary to examine the approaches to terrorism-detention during the pre-9/11 period. Some of these provisions provided a baseline upon which the post-9/11 measures would build.

(i) *England and Wales*

In view of an emerging threat posed by international terrorism, together with the political situation in Northern Ireland, the UK had commissioned a wholesale review of counter-terrorism legislation in 1996,[126] which began at the time in which the ECtHR was considering the Murray case.[127] The 1996 inquiry into terrorism legislation, headed by Lord Lloyd, identified the changing political landscape and multifaceted nature of the threat posed by both domestic and international terrorism. The report concluded that the threat posed by international terrorism was likely to increase, even as talks signified the move towards the peace process in Northern Ireland.[128] Sweeping recommendations were made, including the abolition of internment[129] and the Diplock courts, and the codification of previous temporary terrorism legislation into one permanent statute. Lord Lloyd observed four principles of fundamental importance when legislating

[125] See generally ch 2 above, and for specific recommendations see ch 6 p 342-357.
[126] Lord Lloyd, *Inquiry into legislation against terrorism* (Cmd 3420, 1996) (Lloyd Inquiry).
[127] *John Murray v United Kingdom*, App no 18731/91 (ECtHR, 8 February 1996).
[128] Lloyd Inquiry (n 126) 5.
[129] Ibid.

against terrorism:

(i) 'Legislation against terrorism should approximate as closely as possible to the ordinary criminal law and procedure;

(ii) Additional statutory offences and powers may be justified, but only if they are necessary to meet the anticipated threat. They must then strike the right balance between the needs of security and the rights and liberties of the individual;

(iii) The need for additional safeguards should be considered alongside any additional powers; and

(iv) The law should comply with the UK's obligations in international law.'[130]

These generic recommendations are indicative of the dichotomy between the (preferred) criminal justice model and a model that entwines emergency executive-based measures. The ethos of these principles is familiar: the rejection of over-reliance on emergency provisions and a requirement for the provision of appropriate safeguards, together with an assessment as to the proportionality of terrorism-related measures. Following a substantial consultation period of three years,[131] the Terrorism Bill was introduced to Parliament in the transitional period between the passage of the HRA and its entry into force.[132] On 20th July 2000, just over one year before the 9/11 attacks, the Bill received Royal Assent. TACT was a comprehensive statute containing many proactive powers and a number of distinct offences.[133] These provisions were interlinked by the

[130] Ibid para 3.1.
[131] HC Deb 14 December 1999, vol 341, col 154.
[132] The impact of TACT upon the HRA was canvassed during Parliamentary passage; this was addressed by the then Home Secretary (ibid cols 161-162).
[133] 'The main purpose of the Bill is not to extend the criminal code, but to give the police special powers to enable them to prevent and investigate that special category of crime. Those powers include an enhanced power to arrest and detain suspects, and powers to set up cordons, to stop and search vehicles and pedestrians, to investigate terrorist finances and to examine people passing through ports' HC Deb 14 December 1999, vol 341, col 162.

broad definition of terrorism provided by s. 1 and modelled on the recommendations of the Lloyd inquiry.[134]

Of particular importance to TACT was the codification of an existing power of detention, the likes of which had been tried and tested in relation to the Northern Ireland troubles. Detention under s. 41 TACT was originally extendable by review and judicial warrant for a period of up to 7 days from the time of arrest.[135] In light of contemporary political discourse, seven days' detention now appears to be a conservative provision; yet this was three days more than Lord Lloyd had originally recommended.[136] Despite the formative investigatory experience in relation to Northern Ireland terrorism, it was not until after 9/11 that extension to this period of detention was sought. Since 9/11, however, extensions to the detention period have been the subject of considerable vitriol.[137]

(ii) United States

The threat posed by international terrorism, together with its implications for domestic terrorism law, was realized throughout the 1990s. There was a gradual yet marked increase in isolated terrorist incidents allied to the 'rise' of Al-Q'aida.[138] A number of terrorist atrocities and attempted attacks underlined the shift away from domestic terrorism and the emergence of a new international terrorism paradigm. These include the 1993 bombing of the World Trade Centre; the 1995 Manila air plot to blow up airliners over

[134] s. 1 TACT. For a discussion of the relevant definitional considerations, see ch 1 p 6-13.
[135] para 29(3) Sch 8 TACT.
[136] Lord Lloyd recommended that the initial 48 hours' detention could be extended by judicial warrant by a further two days, making a total of 4 days (Lloyd Inquiry (n 126) 45). It was the Labour government which pressed for the extended period, in light of the (now familiar) argument that terrorism investigations were becoming increasingly complex and terrorist plots increasingly sophisticated (see the Government response, Home Office, *Legislation against Terrorism: A consultation paper* (Cmd 4178, 1998) 36).
[137] See below p 172-186 for detailed analysis of pre-charge detention.
[138] For a comprehensive account of the pre-9/11 terrorist paradigm in the USA, see *The 9/11 Commission Report,* Final Report of the National Commission on Terrorist Attacks Upon the United States, <http://www.gpoaccess.gov/911/pdf/fullreport.pdf> accessed 15 January 2010 (Commission Report).

the Pacific; Vehicle Borne Improvised Explosive Devices detonating in a variety of places through the mid 1990s; and an attempt to gain access to weapons-grade uranium.[139] Religious decrees, or fatwa,[140] were issued by Osama Bin Laden in 1992 and 1996, with the latter calling for the murder of any American as the 'individual duty for every Muslim'.[141]

Although the threat posed by Al-Q'aida affiliated groups was increasing, the response from the US legislature was in its embryonic stages. The 1993 bombing of the World Trade Centre caused emphasis to be placed on counter-terrorism in the 1995 State of the Union: the President promised to submit to Congress 'comprehensive legislation to strengthen our hand in combating terrorists, whether they strike at home or abroad' and a 'renewed fervor in a global effort to combat terrorism'.[142] The product of this political rhetoric was partly evidenced later by a new direction in the US Policy on Counter-terrorism,[143] which classified terrorism as both a crime and a national security threat.[144] This change saw funding increases to the relevant government departments. In addition, executive orders were promulgated[145] to freeze terrorist assets and to increase sanctions on the Taliban, seen to be harboring Al-Qa'ida, and a counter-terrorism strategy was left with the incoming Bush administration.[146]

[139] For a full account of these atrocities, see *Commission Report* (n 138) 60-62, 72-80.
[140] Though note that fatwa are usually decrees by a respected Islamic authority, and Bin Laden was not such a scholar (ibid).
[141] 'Text of World Islamic Front's Statement Urging Jihad Against Jews and Crusaders' Al Quds al Arabi, Feb 23 1998, cited in the Commission Report (n 138) 47.
[142] President William J Clinton, 'Address Before a Joint Session of Congress on the State of the Union,' 24 January 1995, Vol 1, 83.
[143] Presidential Decision Directive NSC-39, 'US Policy on Counter-terrorism,' June 21, 1995 (unclassified).
[144] Ibid.
[145] *Prohibiting Transactions With Terrorists Who Threaten To Disrupt the Middle East Peace Process*, Executive Order 13099 of August 20, 1998; *Blocking Property and Prohibiting Transactions With the Taliban*, Executive Order 13129 of 4 July 1999.
[146] The specifics of this contention were contested by the Bush administration: see B Knowlton, 'Bush Makes Public Parts of Report on Terrorism' *New York Times* (New York,

Notwithstanding these executive measures taken in the 1990s, little had been done in the US by way of new legislation to deal with terrorist suspects. The substantive federal law consisted of the Omnibus Diplomatic Security and Anti-Terrorism Act of 1986[147] and the Anti-Terrorism Act of 1987.[148] The former statute granted extra-territorial jurisdiction to the US courts where foreign nationals were prosecuted for international acts of terrorism upon an American national, and indicates the recognized shift towards the threat posed by international terrorism.[149] The federal legislation on counter-terrorism was piecemeal, with the prevailing orthodoxy centred upon denying entry to the US at ports.

Terrorism deportation proceedings, and hence use of immigration detention, were very much in their infancy and few records are available.[150] In the mid-1990s the Clinton administration acknowledged this deficiency and proposed legislation designed to fortify the counter-terrorism armory in the way of, *inter alia,* jurisdictional changes, preventing fund raising, and expediting deportation procedures for alien terrorists 'without risking the disclosure of national security information or techniques'.[151] During this period of escalating threat, however, the Oklahoma City bombing took place.[152] Almost inevitably, some of the

26 September 2006). A report has since been declassified: White House, Memorandum for the Vice President, US Policy on Counter-Terrorism (21 June 1995) <http://www.fas.org/irp/offdocs/pdd39.htm> accessed 30 May 2011.

[147] Omnibus Diplomatic Security and Anti-Terrorism Act of 1986, Pub L No 99-399, 100 Stat 855.

[148] Anti-Terrorism Act of 1987, 22 USC §§ 5201-5203 (1987).

[149] By contrast, the 1987 Act was largely a reactive piece of legislation in response to a specific threat posed by the Palestinian Liberation Organization, effectively proscribing the organization, and was subjected to a number of court challenges (*US v Palestine Liberation Organization*, 695 F Supp 1456 (SDNY 1988); *Mendelsohn v Meese*, 695 F Supp 1474 (SDNY 1988)).

[150] *Foreign Terrorists in America: Five Years after the World Trade Center*, Hearing Before the Sub-Committee on Technology, Terrorism and Government Information, 24 February 1998, prepared statement of Walter D Cadman, 57.

[151] *Omnibus Counterterrorism Act of 1995- Message from the President of the United States* (H Doc No 104-31, House of Representatives, 9 February 1995).

[152] The attack caused the greatest loss of life from an act of terrorism on US soil prior to 9/11. See *The Oklahoma Department of Civil Emergency Management After Action*

legislative proposals toughened, and a package of compromise measures, after lengthy congressional delay, was finally passed in the Anti-Terrorism and Effective Death Penalty Act 1996 (AEDPA).[153]

AEDPA was a significant milestone for US counter-terrorism both for what it did and did not do. The statute, *inter alia,* limited the writ of *habeas corpus* in the US, although it should be noted that subsequent SCOTUS challenges[154] to this limitation did not find it to be unlawful under the suspension clause of the Constitution.[155] The AEDPA did not deliver on the promises to significantly facilitate deportation of terrorists.[156] Unsurprisingly, fierce criticism was forthcoming from a constitutional perspective.[157] Changes were made to the Immigration and Nationality Act 1988[158] that imposed mandatory detention for aliens who were subject to deportation on terrorist grounds.[159]

Report, Alfred P. Murrah Federal Building Bombing, 19 April 1995, in Oklahoma City, Oklahoma, <http://www.ok.gov/OEM/documents/Bombing%20After%20Action%20Report.pdf.> accessed 8 September 2010.

[153] Pub L No 104-132, 110 Stat 1214 (AEDPA). For a full discussion of the passage of the Act and the considerable political difficulties that beset the Bill, see Roberta Smith, 'America Tries To Come To Terms With Terrorism: The United States Anti-Terrorism And Effective Death Penalty Act of 1996 v British Anti-Terrorism Law and International Response' (1997) 5 Cardozo Journal of International and Comparative Law 249. It should be observed that many of the proposals that were introduced in the period following the Oklahoma bomb were ultimately dropped from the Bill.

[154] *Felker v Turpin* 518 US 651 (1997). For a discussion of other judicial challenges to AEDPA, specifically as they relate to *habeas corpus* petitions, see Editorial, 'Current Developments in the law: A Survey of Cases Affecting the Anti-terrorism and Effective Death Penalty Act of 1996' (1996-97) 6 Boston University Public Interest Law Journal 371.

[155] US Const art I, § 9.

[156] See S Labaton, 'House Passes Narrow Counterterrorism Bill Unlike Senate's' *New York Times*, (New York, 15 March 1996) < http://www.nytimes.com/1996/03/15/us/house-passes-narrow-counterterrorism-bill-unlike-senate-s.html.> accessed 21 March 2010. The AEDPA did, however, provide myriad other powers needed to combat terrorism, including increased powers of proscription, limit finance, and limiting access to explosive materials (see respectively §302, 8 USC 1189; §321, 18 USC 2332d; §501 & §§603-4).

[157] For analysis of the removal strategies, see ch 6.

[158] Immigration and Nationality Act (INA) 8 USC § 1101.

[159] INA §236(c)(1)(d), 8 USC §1226(c)(1)(d). For a critique of the mandatory detention regime, see Stephen Legomsky, 'The Detention of Aliens: Theories, Rules, and Discretion' (1999) 30 University of Miami Inter-American Law Review 531. Legomsky opines that mandatory detention rules should not be relied on to the detriment of case-by-case decisions allowing the sensible use of discretion, which would save costs.

The Clinton administration was dissatisfied with diluted powers, and promised strengthened legislation.[160] As some have argued, the principles established in AEDPA imposed 'serious constitutional restrictions on civil liberties … [but] … these measures were harbingers of what was to come in the wake of 9/11'.[161] The years immediately preceding 9/11 showed some judicial intervention into the AEDPA; the rejection of secret evidence caused a number of cases to collapse and led to the eventual release of several suspects.[162] Detention provisions had also been challenged in a variety of other contexts. In *United States v Salerno,*[163] the SCOTUS rejected that the denial of bail[164] by a judge based on an assessment of dangerousness would violate the First Amendment.[165] This paved the way for an analysis of the risk posed by an individual even where no criminal liability had been established by a court.[166] In reaching this decision the court was nonetheless keen to stress that '[i]n our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception'.[167] Elsewhere, the court stressed that the law permitted 'only narrow exceptions and … incarcerates only those who are proved beyond

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[160] 'I intend to keep urging the Congress to give our law enforcement officials all the tools they need and deserve to carry on the fight against international and domestic terrorism. This is no time to give the criminals a break' *Statement on Signing the Antiterrorism and Effective Death Penalty Act of 1996*, 24 April 1996
< http://www.presidency.ucsb.edu/ws/index.php?pid=52713. Accessed 18/10/2010.> accessed 20 November 2010.
[161] Cole and Dempsey (n 21) 170.
[162] For a discussion of several of these detainees, see Cole and Dempsey (n 26) 148-170. In particular, see the cases of *American-Arab Anti-Discrimination Commission v Reno* 70 F 3d 1045 (9th Circuit 1995); *Al Najjar v Reno*, 97 F Supp 2d 1329.
[163] 481 US 739 (1987).
[164] The Bail Reform Act of 1984 contained the relevant provisions: 18 USC §§3141-3150.
[165] US Const am 1 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievance'.
[166] For a discussion of which, see John Howard, 'The Trial of Pretrial Dangerousness: Preventive Detention after *United States v Salerno*' (1996) 75 *Virginia Law Review* 639.
[167] *United States v Salerno* 481 US 739, 755 (1987). A challenge on alternative grounds was made in *Foucha v Louisiana,* 504 US 71, 77-78 (1992) (Justice White), in which the court held that an individual found not guilty by reason of insanity could not be detained in a mental institution based solely on an assessment of the danger that he would pose to the community once he had recovered from his mental illness.

reasonable doubt to have violated a criminal law'.[168] These peacetime precedents should be viewed in context: during World War II, the judiciary did not seek to assert such ideals, and indeed SCOTUS had been rather more capricious in its stance.[169]

Application of the benchmarks to the pre-9/11 period

The UK arguably had considerably more experience fighting domestic terrorism as a result of the Northern Ireland conflict, yet there was recognition within both governments of the emergence of a new international terrorism paradigm. The UK and the US had both taken steps to codify existing counter-terrorism powers, but the UK legislation was more comprehensive than its American counterpart, having codified a pre-charge detention strategy in TACT. In comparison to previous (Northern Ireland-related) terrorism legislation, TACT was well considered, scrutinized and informed by wide consultation. While the definition of terrorism itself was broad,[170] the scope of detention powers was clearly statutorily limited.

There was limited judicial oversight of the new powers during this period. Increases in detention powers were incremental and insubstantial, although it should be noted that the baseline for terrorism-related detention in England and Wales had been normalized at 7 days, which was the period originally contained in the 'temporary' Northern Ireland-related provisions. There was transatlantic recognition of the need to balance security with the rights of the individual. In England and Wales, TACT was drafted to be compliant with the HRA 1998, in a manner that respected the ECHR- imposed test of proportionality. In both the US and

[168] Ibid 83.
[169] See, for example, *Ex parte Endo* 323 US 283, 298-302 (1944).
[170] Above ch 1 p 6-13.

England and Wales, however, short-term reactionary legislation had been introduced in the wake of terrorism incidents. Not all of these reactionary powers were removed through legislative dialogue and judicial challenges; some key provisions remained. These powers were to provide a baseline upon which new, reactive provisions would build.

III. Detention responses to 9/11

On September 11th 2001, four commercial airline flights were hijacked. At 8:46 a.m., American Airlines Flight 11 crashed into the World Trade Centre's North Tower. Seventeen minutes later, United Airlines Flight 175 hit the South Tower. At 9:37 a.m., American Airlines 77 was flown into the Pentagon. United Airlines Flight 93 crashed outside Pennsylvania at 10:03 a.m., as a result of passenger resistance that has since been extensively documented.[171] All on board the flights were killed, with thousands more perishing on the ground. The final death toll was 2973.[172]

(i) United States

The terrorist atrocities provoked international outrage. President Bush, in a televised statement, declared that 'the United States would hunt down and punish those responsible for [the] cowardly acts'[173] and was equally uncompromising to anyone giving refuge to the terrorists.[174] From the beginning of the security briefings the President set the tone for the nature

[171] FAA memo, *Full Transcription; Air Traffic Control System Command Center, National Traffic Management Officer, East Position; September 11, 2001*, (2003) 24-27.
[172] Commission Report (n 138) 552. Excludes terrorist deaths.
[173] CNN, 'Bush: US military on 'high alert'' (12 September 2001) <http://archives.cnn.com/2001/US/09/11/bush.second.statement/> accessed 28 July 2010.
[174] 'We will make no distinction between the terrorists who committed these acts and those who harbor them.' White House, *Statement by the President in His Address to the Nation*, (DOD, 11 Septeber 2001) <http://www.defense.gov/news/newsarticle.aspx?id=44910> accessed 28 July 2010.

of the legal regime that was to follow: '[w]e're at war'.[175] Although Osama Bin Laden initially denied responsibility for the attacks,[176] the perpetrators' links to Al-Qaeda were quickly established.[177] Those seen to be harbouring Al-Qaeda- the Taliban in Afghanistan- were to be the first target of the 'war on terrorism'.[178]

The approach of the USA to the atrocities of 9/11 was evocative of a wartime response that prevailed for much of George W. Bush's Presidency:

> 'I know that some people question whether America is really in a war at all. They view terrorism more as a crime, a problem to be sorted mainly with law enforcement and indictments… [A]fter the chaos and the carnage of September the 11th, it is not enough to serve our enemies with legal papers. The terrorists and their supporters declared war on the United States. And war is what they got.'[179]

It became quickly apparent that the existing US legal framework was not fit to deal with the new terrorism paradigm. The Authorization for Use of

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[175] White House, *Rice interview with Bob Woodward of the Washington Post*, (24 October 2001) 367 as quoted in the Commission Report (n 138) 326. For an account of the decision to go to war in Iraq, see Bob Woodward, *Plan of Attack* (Simon & Schuster 2006).

[176] For a report on the initial denial, see CNN, 'Bin Laden says he wasn't behind attacks' (16 September 2001) <http://articles.cnn.com/2001-09-16/us/inv.binladen.denial_1_bin-laden-taliban-supreme-leader-mullah-mohammed-omar?_s=PM:US.> accessed 28 July 2010. For subsequent claims to culpability, see e.g. Maria Newman, 'Bin Laden Takes Responsibility for 9/11 Attacks in New Tape' *New York Times* (New York, 29 October 2004). For the UK findings, see National Archives, 'September 11 attacks- culpability document' (15 May 2003) <Number10.gov.uk> accessed 29 July 2010.

[177] The FBI held that there was 'clear and irrefutable' evidence of Al-Qaeda involvement through Osama Bin Laden: 'The Terrorist Threat Confronting the United States', FBI, *Testimony of Dale L. Watson, Executive Assistant Director, Counterterrorism / Counterintelligence Division, FBI, Before the Senate Select Committee on Intelligence* (6 February 2002) <http://www2.fbi.gov/congress/congress02/watson020602.htm.> accessed 29 July 2010.

[178] See the President's statement about the launch of operation Enduring Freedom, 'Full text: President Bush's address' *Guardian* (London, 7 October 2001) <http://www.guardian.co.uk/world/2001/oct/07/afghanistan.terrorism8.> accessed 1 October 2010.

[179] President George W Bush, *State of the Union*, 20th January 2004.

Military Force[180] (AUMF) was passed by Congress on September 14th 2001 and signed into law four days later by the President. In conjunction with the War Powers Resolution of 1973,[181] the resolution authorized the President 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 harbored such organizations or persons'.[182]

The AUMF provides the root for the executive powers that have since been exercised by the US, including counter-terrorism detention, removal and prosecution strategies. The Office of Homeland Security, reporting directly to the President, was quickly established[183] and declared to be responsible for coordinating cross-agency issues of Defence and Security. The ambit of the agency was also intended to 'coordinate a comprehensive national strategy to safeguard …[the]… country against terrorism, and respond to any attacks that may come.'[184]

A series of executive orders followed[185] that authorized the Secretary of State to detain any non-citizen whom the President had reason to believe: (i) is or was a member of Al Q'aida; (ii) had engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or corresponding preparatory acts; or (iii) had knowingly harboured such individuals.[186] These individuals were designated 'enemy combatants', a reference that

[180] PL 107-40, 115 Stat 224 (2001) [SJ Res 23].
[181] PL 93-148. The Resolution has been subject to much controversy; it effectively curtails the executive power of the President and has been declared unconstitutional by successive administrations (House of Commons Research Paper, *11th September 2001: the response* (01/72, 2001))
[182] SJ Res 23; HJ Res 64.
[183] *Establishing the Office of Homeland Security and the Homeland Security Council,* Executive Order 13228, October 8, 2001.
[184] Ibid.
[185] Military Order of 13 Nov 2001, 66 Fed Reg 57, 831; Military Order of 13 Nov (2001), 66 Fed Reg 57, 833 (2001).
[186] Sec 2(a)(1); Military Order of Nov. 13 (2001), 66 Fed Reg 57,833 at 57, 834.

began in the wartime case of *ex parte Quirin.*[187] The Guantánamo Bay detention camp was chosen as a primary base for such detainees on the grounds that SCOTUS had previously ruled that the US courts had no jurisdiction to hear *habeas corpus* petitions of aliens held outside of the US.[188] The approach of the executive was to attempt to deny detainees prisoner of war status.[189] Adopting such a stance has been subject to much criticism,[190] and is well illustrated with reference to an *amicus curae* brief in a subsequent court challenge:

> 'The extreme nature of the government's position … is reminiscent of its positions in past episodes, in which the United States too quickly sacrificed civil liberties in the rush to accommodate overbroad claims of military necessity.'[191]

The US government deliberately attempted to circumvent its own constitutional guarantees. It is arguable that the nature of the emergency warranted such an extreme approach; the preexisting constitutional arrangements may have been considered to hinder the adoption of necessary executive measures. The use of Guantánamo Bay in this way also acted as a delaying tactic, since it would take several years before

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[187] *Ex parte Quirin,* 317 US 1, 32 (1942). An enemy combatant is he 'who without uniform comes secretly [over enemy] lines for the purpose of waging war by destruction of life or property. [Such individuals] are familiar exceptions of belligerents who are generally deemed not to be entitled to the status of war, but to be offenders against the law or war subject to trial and punishment by military tribunals'.

[188] 'We hold that the Constitution does not confer a right of personal security or an immunity from military trial and punishment upon an alien enemy engaged in the hostile service of a government at war with the United States' *Johnson v Eisentrager* 339 US 763, 768-777 70 S Ct 936 (1950).

[189] Geneva Convention Relative to the Treatment of Prisoners of War, 6 UST 3316, 75 UNTS.

[190] Although this strategy could legitimately be applied to Al-Qaeda- a stateless entity- there was no logic into applying it to captured members of the Taliban, or *ex concessis* other detainees who could be directly linked to Al-Qaeda. Judge Daryl Hecht, 'Controlling the Executive's Power to Detain Aliens Offshore: What Process Is Due the Guantánamo Prisoners?' (2005) 50 South Dakota Law Review 78, 96-98.

[191] Brief of Amicus Curiae Fred Korematsu in Support of Petitioners, *Rasul and others v Bush* Nos. 03-334, 03-343 <http://korematsuinstitute.org/wp-content/uploads/2010/09/Amicus-Brief-2003-Rasul-Odah.pdf. > accessed 10 October 2010.

the domestic courts would be able to hear *habeas* petitions, following intervention by SCOTUS.[192]

From a counter-terrorism detention perspective, further paradigm-shifting strategies were afoot. Just over a month after the attacks of 9/11, Bills were proceeding through the House of Representatives and the Senate,[193] and subsequently combined to form the USA PATRIOT Act.[194] PATRIOT has since attracted voracious criticism, not least for the haste with which it was passed[195] and its breadth.[196] The executive took the opportunity to implement measures that had been politically unpalatable in the pre-9/11 period,[197] a feature that appears reminiscent of the stance taken by the UK government some six years after 9/11.[198] By 'erring on the side of over-inclusiveness,'[199] Congress *inter alia* authorized an enhanced system of immigration detention, potentially indefinite in duration, to be applied to foreign nationals.

[192] See the discussion of *Rasul v Bush*, 542 US 466 (2004), below p164-165.
[193] Uniting and Strengthening America (USA) Act (HR 2975); USA Act of 2002 (S 1510). The final Bill also contained many provisions of the Financial Anti-Terrorism Act HR 3004.
[194] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act, Pub L 107–56, signed into law on October 26, 2001, 115 Stat 272 (2001).
[195] On such haste, see Gia Fenoglio, 'Jumping the Gun on Terrorism?' (2001) 33 National Law Journal 2450. The Bill was introduced in the House as HR 3162 on 23 October 2001, and passed the House the following day with a majority of 291. It passed the Senate the following day with only one Nay vote, and was signed into law by the President on October 26th 2001. The Conference committee stage was completely bypassed to allow for expedited passage: no doubt this significantly impaired the ability of Congress to subject the Bill to proper scrutiny.
[196] See the various arguments discussed by Michael McCarthy, 'Recent Developments: USA PATRIOT Act' (2002) 39 Harvard Journal on Legislation 435.
[197] McCarthy does not necessarily agree this to be the case, stating that broad powers may legitimately have been needed given the deficiencies experienced by the executive branch and intelligence services in the run up to 9/11, but concludes that USA PATRIOT itself does not cause civil libertarian issues; it merely empowers the executive to act in a certain way which may cause civil libertarian issues (ibid).
[198] See ch 2 p 83, ch 3 p 184-185, ch 4 p 254-255 for a discussion of the proposals by the (former) Labour government and (current) Coalition government in which draft legislation has been published to lie dormant, on file, until the exigencies of the situation require it.
[199] McCarthy (n 196) 451.

It has been stated that Congress modified the Administration's proposals so as to allow for continued judicial oversight by the courts.[200] Although this may be true, the debates at the inception of PATRIOT singularly failed to heed the lessons of rushed emergency powers, as mandated by *Korematsu*.[201] To the Bush Administration's request for a power enabling the indefinite detention of foreign citizens, Congress' response was an amendment that required judicial oversight within 7 days of detention.[202] This limitation may hardly be viewed as a coup for civil libertarians,[203] particularly when one considers the likelihood of a court ordering release immediately following the 9/11 attacks.

And the detention powers conferred by PATRIOT had more concerning implications. It has been seen that AEDPA established a mandatory detention regime for foreign nationals who had committed crimes; it also allowed for detention where deportation was not possible.[204] Most significantly, the Attorney General under PATRIOT had the power to certify the detention of any non-national whom he had *reasonable grounds to suspect* to be a terrorist or engaged in any other activity that endangered the national security of the US.[205] There was no need for the Attorney General to prove any connection or allegation or even adduce evidence, and simultaneously the definition of terrorism itself was

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[200] Ibid 436.

[201] McCarthy, while recognizing that Congress did obtain some important concessions, states that Congress did to appear to be acting as a 'rubber stamp' for the proposals (ibid). Yet McCarthy's observation that the authority was 'tempered with congressional and judicial oversight' and the implication that legislators had been mindful of the *Korematsu* precedent (ibid) do not appear to be commensurate with (for example) the broad powers of detention, allied to internment, that beset the US regime in previous years.

[202] Pub L No 107-56, §412, 115 Stat 272, 351. See 8 USC § 1226 (a) (2001).

[203] See Catalina Jools Vergara, 'Trading Liberty for Security in the Wake of September Eleventh: Congress' Expansion of Preventive Detention of Non-Citizens' (2003) 17 Georgetown Immigration Law Journal 115, 117. Vergara acknowledges the fact that the final version of PATRIOT was an 'improvement' but that it did not address all of the concerns raised by civil libertarians.

[204] See ch 5 p284.

[205] sec 412, §236 A, 115 Stat 272 added a new power of detention to the Immigration and Nationality Act, 8 USC §§ 1101-1537 (2001).

substantially amended, expanding the nexus of activities that would be captured.[206] The Attorney General was mandated to take a certified person into custody for up to 7 days, after which the individual would be charged, released, or 'removal proceedings' would be commenced.[207] At the heart of this lay a fundamental contradiction: following this seven day period, detention would be maintained either until removal or until the Attorney General determined that the alien was no longer worthy of certification. The detention power was effectively indefinite,[208] irrespective of whether relief from removal was granted.[209] It is difficult to see how these powers in any way could be thought to be consistent with the rule of law.

If deportation was unlikely in the 'foreseeable future', continued detention would be authorized for 'additional periods of up to six months only if the release of the alien will threaten the national security of the United States or the safety of the community or any person,'[210] yet this required the individual to show that he was not such a danger, a very difficult task given the undisclosed nature of the intelligence that may have informed his certification.[211] If it had been determined that deportation was not possible, there was provision for the detention to end.[212] This provision, however, was incongruous with the preceding section that authorized continuous detention. The legal position was unclear.[213] Significant power was vested in the Attorney General, with the sensible exercise of discretion one of only two safeguards.[214] The only meaningful safeguard was potential

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[206] USA PATRIOT sec 411 (A)(1)(F).
[207] USA PATRIOT sec 412, § 236 (A) (a) (5).
[208] Vergara (n 203) 121.
[209] USA PATRIOT sec 412 § 236 (A) (a) (2).
[210] USA PATRIOT sec 412 § 236 (A) (a) (6).
[211] 8 CFR § 241 (4) (d) (1) (2001).
[212] USA PATRIOT sec 412 § 236 (A) (a) (2).
[213] As to the US removal strategy generally, see ch 5 below.
[214] USA PATRIOT sec 412, § 236 (A) (a) (7). From a UK perspective, the sensible use of prosecutorial discretion by the DPP remains a safeguard common to many of the

recourse to a court through a writ of *habeas corpus*.[215] In this context, AEDPA had already made significant inroads into the availability of the writ.

The first related SCOTUS challenge came in the context of immigration detention in *Zadvydas v Davis,*[216] a case that sent a warning shot across the bows of the US government. *Zadvydas* concerned a deportation order on two permanent residents of the US who had been involved in criminal activity. Despite deportation being unlikely in both cases, both were detained and requested release on parole, which was subsequently denied by the Immigration and Naturalization Service. SCOTUS in a 5-4 majority held that the applicants were entitled to the due process guarantees of the constitution since they had been legal residents of the US, yet stopped short of declaring the indefinite detention provisions unconstitutional, instead preferring to read into the statute that detention for six months would be limited to a 'reasonable time'.[217] Although the applicants were therefore entitled to parole, the case did not definitively settle the constitutional issues in relation to indefinite detention, despite the opinion of some commentators.[218] The decision is a prime example of judicial minimalism and provides evidence of judicial deference to the detention strategy of the executive branch.[219] It would take several years before SCOTUS would rule on the due process rights of enemy combatants.

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offences under TACT (see ch 1 p12). As was established in chapter 2, excessive discretion is contrary to the rule of law.

[215] USA PATRIOT sec 412 § 236 (A) (b).

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

[217] *Zadvydas v Davis* 533 US 678, 701 (2001).

[218] Vergara (n 203) 131. Vergara opines that since the preventive detention regime following the AUMF is broader than detention in an immigration context, it follows, from the dicta in *Zadvydas*, that the former regime must be unconstitutional.

[219] For discussion of judicial deference generally, see above ch 2 p110-115.

The US implemented a bipartite strategy to contain the threat posed by terrorist suspects. Either immigration detention (by which various constitutional guarantees could be circumvented) or designation as an ‘enemy combatant’ (by which an attempt was made to circumvent *all* constitutional guarantees) was sought. ‘[T]he government … aggressively used immigration authority to implement a broad strategy of preventive detention where other civil or criminal law would permit no custody.’[220] This restriction on due process guarantees is concerning, but it is particularly troubling that immigration detention was used after the 11th September to detain individuals for a period of some months, pending their ‘clearance’ by the FBI and other authorities, in the absence of probable cause to believe a connection with terrorism-related activity.[221] The use of such broadly drafted and indiscriminately deployed detention demonstrates the necessity for effective oversight of executive action in the wake of a terrorism incident.[222] It captures the very arbitrariness that, as has been seen, is the antithesis of the rule of law.

That is not to say that powers of detention were not required. In the aftermath of an emergency on the scale of 9/11, there is an identifiable need to take measures, casting the net widely, to ensure that the immediate risk is contained.[223] One of many concerning aspects of the approach taken by the US is that the emergency measures were

[220] David Cole, ‘In aid of Removal: Due Process Limits on Immigration Detention’ (2002) 41 Emory Law Journal 1003, 1004.
[221] Ibid.
[222] See David Cole, ‘Enemy Aliens’, (2002) 54 Stanford Law Review 953, 960. As a conservative estimate, and in the absence of official statistics, Cole suggests that between 1500 and 2000 individuals were arrested and detained after September 11th, no one was charged. All were released after being cleared by the FBI.
[223] That is not to support the practice of detaining all such individuals as enemy combatants without access to counsel as may have occurred at Guantánamo Bay- these ‘victims of circumstance’ should be afforded due process rights and/or prisoner of war status. See Katharine Seelye, ‘A Nation Challenged: Captives; An Uneasy Routine at Cuba Prison Camp’ *New York Times* (New York, 16 March 2002) A8. See also the opinion of Ackerman that ‘the grant of carte blanche…may well be a plausible response when confronting an existential threat’ (Ackerman (n 128) 1057).

inadequately limited, both temporally and in scope. A sunset clause contained in the PATRIOT Act required congressional reauthorization by 2005[224] but did not apply to the immigration powers. More significantly, the emergency detention of designated 'enemy combatants' in Guantánamo Bay did not have an expiry date and sought to circumvent any constitutional guarantees. For both of these provisions it would take decisive action by SCOTUS to fuel political pressure before detention regime change would come. Given the perpetual 'wartime' rhetoric, change was never likely to be swift; judicial challenges were not keeping pace with executive action.

(ii) England and Wales

On the basis of TACT, it may be thought that the UK was well equipped to deal with the emergent threat without resort to the genus of measures used across the Atlantic. This was not a view that was shared by the Blair government. The response of the UK Parliament was to enact, with just under 3 weeks of Parliamentary scrutiny,[225] ATCSA, a comprehensive statute that provided, *inter alia,* for emergency detention powers. ATCSA was enacted three months after 9/11[226] and has remained highly controversial since its inception.[227] A state of emergency was declared by the Government, which duly resulted in derogation under Article 15 ECHR.[228] Echoing the rhetoric seen during the Northern Ireland conflict,

[224] USA PATRIOT § 224. The provisions that sunset in December 2005 were largely related to surveillance and wiretapping.
[225] The Bill was introduced on 19th November 2001 and received Royal Assent on 14th December 2001. Note that the Home Secretary did not consider the period of some ten weeks following the attacks to be 'hurried', but this timeframe was nonetheless criticized during Parliamentary passage (HC Deb 19 Nov 2001, cols 23-24).
[226] Receiving Royal Assent on 14th December 2001.
[227] The Human Rights implications of the Act have resulted in it being described as the 'most draconian legislation Parliament has passed in peacetime in over a century' Adam Tomkins, 'Legislating Against Terror: the Anti-Terrorism, Crime and Security Act 2001' (2002) Public Law 205, 205.
[228] Under s. 1(2) HRA, the relevant rights under the Convention are given further effect subject to any applicable derogation or reservation (ss. 14-15 HRA).

the government was keen to stress the need for such draconian measures in Parliament.[229]

Partially in response to a judgment by of the ECtHR in *Chahal v UK,*[230] the government attempted to devise a new detention regime, together with an appropriate range of safeguards,[231] to be applied to non-national terrorist suspects. Part IV ATCSA permitted the indefinite detention of foreign nationals provided that (a) the Home Secretary reasonably believed that the person's presence in the UK was a risk to national security or (b) that the Home Secretary reasonably suspected that the individual was a terrorist.[232] Section 30 allowed for the derogation to be made from Article 5 ECHR, since the powers were clearly incompatible with the right to liberty and security under the ECHR, and the derogation mechanism duly followed by Statutory Instrument.[233] Doubts were expressed over the effectiveness of the derogation,[234] but nonetheless some 17 individuals were certified under the provisions, 16 of whom were correspondingly

[229] See, for example, the comments of the (then) Home Secretary David Blunkett, who drew on an article in The Times just 3 days after 9/11 in which it was argued that measures had to be taken to protect the public (HC Deb 19 Nov 2001, cols 23-24).
[230] *Chahal v UK* (1996) (70/1995/576/662) (ECtHR).
[231] For a discussion of the implications for the government's deportation strategy, see below ch 5.
[232] s. 21(1) ATCSA. It should be noted that para (a) has a lower standard of proof attributed to it than para (b), but either may apply to suspected terrorists.
[233] Statutory Instrument 2001 No 3644, The Human Rights Act 1998 (Designated Derogation) Order 2001; Statutory Instrument 2001 No 4032; The Human Rights Act 1998 (Amendment No 2) Order 2001. The period of the derogation would expire within 5 years subject to affirmative resolution of both Houses of Parliament: s. 16 HRA.
[234] See generally the commentary of VH Henning, 'Anti-Terrorism, Crime and Security Act 2001: Has the United Kingdom made a valid derogation from the European Convention on Human Rights?' (2002) 17 American University Law Review 1264. See also the opinion of the European Commissioner for Human Rights of the Council of Europe, who warned that other European states faced with the same threat had not deemed a derogation to be necessary, and that even if an emergency was considered to exist, it was questionable whether the provisions themselves were required by the exigencies of the situation. The Commissioner also highlighted that non-derogating measures may undermine the need for the derogation, and the potential incongruity that an endangerer, despite the identifiable risk posed, could choose to depart to a safe country (*opinion of the Commissioner for Human Rights, Mr. Alvaro Gil-Robles, on certain aspects of the United Kingdom 2001 derogation from Article 5 par 1 of the European Convention on Human Rights* (Comm DH(2002) 28 August 2002). These opinions were despite the fact that the ECtHR in *Ireland v UK* had demonstrated broad support for derogation in that context.

detained.[235] The indefinite detention regime was subject to a number of safeguards, including appeal to SIAC against the certification that the individual was a terrorist[236] followed by a periodic review.[237]

Application of the benchmarks to 9/11 detention measures

The adopted detention provisions in England and Wales were analogous to those in the US in several respects, and there are also synergies in terms of the remit of the powers, their scope and reliance on executive discretion, and the role that the respective legislatures played in ensuring oversight of the new regimes. First, England and Wales permitted indefinite detention of foreign nationals, subject to certain safeguards; these powers were similar to those potentially available in an immigration context following PATRIOT. Both regimes placed significant reliance on the sensible exercise of discretion by senior members of the executive: the Attorney General[238] and Home Secretary. The relatively low standard of proof applicable before detention was authorized was also a common factor to the two regimes: the US required reasonable grounds for suspicion, which arguably was a lower standard than the reasonable belief requirement in England and Wales.[239] The US Attorney General was not required to disclose the basis for his suspicion, thus rendering preferable the approach of England and Wales, which incorporated SIAC safeguards.

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[235] One individual was detained under other powers: see HL Deb 19 November 2003, vol 654, col 297WA (Baroness Scotland).
[236] s. 25(1)-(2) ATCSA.
[237] s. 26(1) ATCSA.
[238] By Presidential mandate following the AUMF (see above).
[239] For a discussion of which, including the lower court's discussion of the 'some evidence' standard, see Michael Maurer, 'Desperate Times, Desperate Measures: The Need for Consistent Standards in the Treatment of US Citizens Designated "Enemy Combatants"' (2005) 5 Barry Law Review 153. Note that the effect of the 2004 trilogy of cases is that the president requires 'some evidence' to designate as an enemy combatant. See the discussion of *Rasul v Bush*, p 164-165 below. Note also the 'reasonable belief' test incorporated into the TPIM regime: ch 5 p243-244.

Second, the legislative oversight, and therefore shelf-life, of the emergency provisions themselves was inadequate. There was an inevitable time lag between implementation of the measures and the subsequent judicial challenges. Challenges in the highest courts took several years to come to fruition,[240] as is usual for the relatively slowly moving system of common law. In this intervening period, legislative controls must step up to fill the void. There *were* some important limits imposed on ATCSA during its Parliamentary passage by the House of Lords in a non-detention context, and Fenwick observes the valuable role of the higher chamber in evaluating emergency provisions, since the House of Lords' power of delay means that significant concessions may have to be made.[241] Certainly the legislative scrutiny of ATCSA, while falling far short of an ideal standard, was greater than that seen across the Atlantic with the passage of PATRIOT. But the only substantial safeguard to limit the use of the ATCSA detention regime was the inclusion of a sunset clause,[242] which rendered expiration of the regime within 15 months unless Parliamentary renewal was forthcoming. This safeguard did little to assuage the myriad human rights concerns caused by the offending legislation, since the renewals easily passed the Commons. At the first renewal the motion passed without division after 90 minutes debate.[243] At the second, the renewal passed with a significant majority, with many MPs who were opposed to the regime at its inception subsequently voting in its favour.[244] Nonetheless, the provisions of Part IV

[240] Recognizing that the decision in *A & Others* and the declaration of incompatibility had no affect on the continuing validity of Part IV ATCSA.
[241] The Parliament Acts 1911 & 1949 impart a power of delay of 12 months for non-money Bills; thus the House of Commons can force legislation through Parliament without Lords' approval, but this is not a realistic option where emergency legislation is proposed.
[242] s. 29 Anti-Terrorism, Crime and Security Act 2001.
[243] HC Deb 3 March 2003, cols 585-608.
[244] HC Deb 3 March 2004, cols 1027-1030. Note that a challenge to the Part IV powers was lodged but the applicants were unsuccessful in the Special Immigration Appeals Commission (SIAC) and Court of Appeal (see respectively *A v SSHD* [2002] HRLR 45;

of ATCSA attracted fierce public criticism, and it is instructive that a source of this criticism was the Newton Committee that was established by the statute itself[245] and the highly influential JCHR.[246]

On the other side of the Atlantic, several Bills were proposed in the years following 9/11 designed to limit the PATRIOT Act and restore essential safeguards. The Benjamin Franklin True Patriot Act[247] would have imposed a 90-day expiration period on various provisions, requiring further confirmation by Congress at the behest of the President after this period.[248] The PATRIOT Oversight Restoration Act of 2003[249] was designed to make further provision with regard to the Sunset clauses in PATRIOT.[250] Unfortunately, Congress rejected both Bills.[251]

As a third similarity, the measures adopted by both states were criticised on the grounds that they incorporated non-terrorism related provisions that were not strictly required. It could be argued that their inclusion here offends against the principle that emergency measures should be narrowly tailored to the exigencies of the situation: in other words, the measures sought should be proportionate to their intended aim. There were several areas in which legislative change was tabled that possessed little, if any,

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[2002] EWCA Civ 1502). As to the significance of the House of Lords' judgment, see below p 159-163.

[245] Privy Counsellor Review Committee, *Anti-Terrorism, Crime and Security Act 2001 Review: Report* (HC 100, 2003) presented pursuant to s. 122(4) ATCSA 2001.

[246] JCHR, *Continuance in force of sections 21 to 23 of the Anti-Terrorism, Crime and Security Act 2001* (HC 462 HL 59, 2003).

[247] HR 3171, 108th Cong (2003).

[248] HR 3171, 108th Cong (2003), §3.

[249] S1695, 108th Cong (2003).

[250] The Bill would have introduced a December 31 sunset for various powers, *inter alia,* in relation to surveillance, search warrants, and the domestic definition of terrorism.

[251] It is unfortunate that this was the case: Congress had the opportunity to rein in the executive regime of the Bush administration but missed the opportunity. Marked parallels may be drawn between this failure and the more recent reluctance of Congress to appropriate funds in order to secure the closure of Guantánamo Bay (see below p 199-203).

resemblance to the September 11 attacks;[252] ATCSA contains comprehensive measures, consisting originally of 129 sections[253] and 8 Schedules that were enacted with little over ten days debate in both Houses.[254] As one author notes, if ATCSA was necessarily rushed through Parliament with little debate, why must it incorporate provisions that bear little resemblance to remedying problems identified by 9/11?[255] Fenwick suggests that '11 September appears to have provided the government with an excuse for introducing coercive, illiberal provisions reaching well beyond those who have … connections [with Al-Qaeda]'[256] and that 'a range of illiberal measures that had been kept on file, awaiting their chance, were rapidly accepted by a supine Commons.'[257] These measures incorporated a range of criminal provisions alongside those aimed at terrorism since enhanced criminal offences were a prerequisite of successful terrorism detention. ATCSA measures were not only directed at terrorists.[258] The corollary of these arguments is that ATCSA went far beyond its emergency mandate;[259] the same could also be said of USA PATRIOT.

A fourth synergy between the regimes relates to the lack of adequate provisions to deal with the threat posed by resident, and in some cases indigenous, terrorists. It is this underlying paradox that would ultimately prove fatal to the regime in England and Wales.[260] Indeed, there was no

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[252] Editorial 'Anti-Terrorism, Crime and Security Act 2001' (2002) 43 Criminal Law Review 159-160 and see Tomkins (n 227) 206.
[253] In 14 parts; parts 13 -14 contain miscellaneous provisions and will be given little consideration here.
[254] Tomkins (n 227) 205.
[255] Ibid.
[256] Helen Fenwick, 'The Anti-Terrorism, Crime and Security Act 2001: A Proportionate Response to 11 September?' (2002) 65 Modern Law Review 725.
[257] Ibid 729.
[258] Ibid.
[259] Above ch 2; and see, for example, Michael Gordon, 'The Conceptual Foundations of Parliamentary Sovereignty: Reconsidering Jennings and Wade' (2009) Public Law 519.
[260] See the discussion of *Belmarsh,* below p159.

statutory acknowledgement (by means of the implementation of a detention strategy) of the threat posed by UK nationals.[261] The US, by contrast, chose to implement a strategy that circumvented constitutional guarantees in favour of potentially indefinite detention following designation as an 'enemy combatant'. Although the designation also could apply to US nationals, by adopting this bipartite approach, the US government cast a shroud of complexity and uncertainty over the detention regime.[262] This was compounded by the indiscriminate deployment of immigration detention and material witness warrants,[263] which resulted in many people being held for months without any terrorism connection.[264]

The constitutional implications of these developments are clear. Both the US and the UK responded to the events of 9/11 with rights-limiting provisions with little thought given to the long-term consequences: the UK sought a derogation from its obligations under the ECHR, only a year after its longstanding derogation with regard to Northern Ireland ended, and the USA adopted a war-based rhetoric that attempted to circumvent constitutional guarantees. Political checks through Parliamentary debate

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[261] See the report of the Newton Committee, which when assessing whether the threat was solely propagated by foreign nationals, stressed that there was 'accumulating evidence that this is not now the case. The British suicide bombers who attacked Tel Aviv in May 2003, Richard Reid ('the Shoe Bomber'), and recent arrests suggest that the threat from UK citizens is real. Almost 30% of Terrorism Act 2000 suspects in the past year have been British. We have been told that, of the people of interest to the authorities because of their suspected involvement in international terrorism, nearly half are British nationals' Privy Counsellor Review Committee, *Anti-terrorism, Crime and Security Act 2001 Review* (HC 2003–04, 100).
[262] See, for example, the comments of Meredith Osborn, '*Rasul v Bush:* Federal Courts Have Jurisdiction over Habeas Challenges and Other Claims Brought by Guantánamo Detainees' (2005) 40 Harvard Civil Rights and Civil Liberties Law Review 265, 272.
[263] See Human Rights Watch, 'Witness to Abuse Human Rights Abuses under the Material Witness Law since September 11' (June 2005) <http://www.aclu.org/FilesPDFs/materialwitnessreport.pdf.> accessed 30 October 2010.
[264] See above p 151.

did little to help, and sunset clauses either did not exist or did not operate satisfactorily to limit the powers.[265]

IV. Beyond 9/11: four judicial challenges

(i) England and Wales: Belmarsh as an assertive minimum

The House of Lords in the UK resoundingly drove a coach and horses through the government's counter-terrorism strategy in 2004 with its decision in *A & Others v SSHD.*[266] Following the enactment of Part IV ATCSA, nine individuals were certified and detained, with the number of those subject to detention under the provision subsequently increasing to the (still) relatively modest number of 17 by 2004.[267] None were charged with a criminal offence. All challenged the basis for their detention in SIAC in the first instance, which was the designated tribunal under the 2001 Act.[268] In resisting the application, the Attorney General contended that the period of emergency was not subject to strict temporal limits, citing as precedent, *inter alia,* the duration of the period of emergency that perpetuated throughout the Northern Ireland troubles.

All of the applicants were successful in their initial SIAC action: the Commission held that the provisions were disproportionate and discriminatory against non-nationals, although found that the government could lawfully derogate from Article 5(1)(f) ECHR.[269] The European Commissioner identified the real paradox at issue: part IV of ATCSA was both overly inclusive and under inclusive, since it permitted the detention of those who posed no threat to the UK whilst simultaneously allowing for

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[265] As for specific recommendations in this context, see ch 6 p 350-352.
[266] *A (FC) and others v Secretary of State for the Home Department; X (FC) and others v Secretary of State for the Home Department* [2004] UKHL 56 (Belmarsh).
[267] Ibid [208] (Lord Walker).
[268] ss. 25(1), 27 ATCSA. Note that SIAC was established as a Superior Court of Record: s. 35 ATCSA.
[269] *A & Others v SSHD*, SIAC No SC/1-7/2002.

the release of those that might, following their departure from the UK.[270] The Court of Appeal reversed the decision of the Commission and gave leave to appeal to the House of Lords.[271] Resisting the appeal, the Attorney General argued, *inter alia,* that the judgment in question was one that fell to the discretion of the Secretary of State and Parliament; the response was not disproportionate and that the decision should not be subject to judicial review.

The House of Lords' decision is arguably one of the most celebrated judicial interventions in recent history.[272] Their Lordships allowed the detainees' appeal, quashed the derogation order and declared under s. 4 HRA that s. 23 of ATCSA was incompatible with Articles 5 and 14 of the ECHR. Strong arguments were raised in which the existence of a state of emergency was questioned,[273] including those relating to an assessment by the JCHR that the Government was suggesting that the UK faced a 'near-permanent emergency.'[274] Their Lordships fell short of declaring there was no emergency, citing the wide margin of appreciation with which the ECtHR treated such matters. Lord Bingham was keen to stress that he

[270] European Commissioner for Human Rights (Opinion 1/2002, 28 August 2002) para 32. To use language adopted by other commentators, this effectively meant that Part IV of ATCSA was ineffective at combating so-called 'neighbour' terrorism (see further C Walker 'Keeping Control of Terrorists Without Losing Control of Constitutionalism' (2007) 59 Stanford Law Review 1395, 1405-06).
[271] *A & Others v SSHD* (2002) EWCA Civ 1502.
[272] Ironically, perhaps the most famous and celebrated dicta is that of Lord Hoffmann, who dissented on the issue of whether an emergency existed, stating that '[w]hether we would survive Hitler hung in the balance, but there is no doubt that we shall survive Al-Qaeda… The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these' [96-97]. See also the comments of Feldman that the decision was a benchmark and 'perhaps the most powerful judicial defence of liberty since *Leach v Money* (1765) 3 Burr 1692 and *Somersett v Stewart* (1772) 20 St Tr 1': David Feldman, 'Proportionality and Discrimination in Anti-Terrorism Legislation' (2005) 64 Cambridge Law Journal 271, 273.
[273] Including the opinion of the JCHR that insufficient evidence had been presented to Parliament to assess whether the derogation was strictly required by the exigencies of the situation (JCHR, *Sixth Report of Session 2003-4*, (HL Paper 38, HC 381, 2004) para 34, and the fact that none of the other European states had found it necessary to derogate from Article 5 ECHR, including states such as Spain which had long histories of dealing with threats posed by terrorism [24] (Lord Bingham).
[274] JCHR, *18th Report of Session 2003-4*, (HL paper 158, HC713, 2004) para 4.

did not fully accept the Attorney General's submission regarding the court's deference to the executive. Nonetheless, citing 'relative institutional competence,' his Lordship declared the issue to be at the political end of the legal-political spectrum,[275] and therefore best left to the executive to determine. [276] Others expressed significant doubts regarding the emergency yet ultimately deferred to the Secretary of State.[277] On the discrimination and proportionality issue, the court was more forceful, stating that a high standard of review was required[278] and that an assessment as to the existence of the emergency was legitimately a role for SIAC and the appellate courts.[279] Despite these assertions, there are three issues that beget caution against enthusiastic celebration of the *Belmarsh* judgment.

First, the significance placed by domestic courts on the margin of appreciation doctrine caused some problems. Although it may be argued that the ECtHR is not best placed to make such determinations,[280] the transposition of the doctrine into the domestic courts' reasoning, including the specialist tribunals whose function it is to make an accurate assessment of the prevailing risk, left the door to excessive deference firmly ajar. As Lord Rodger stated, the 'considerable deference which the European Court of Human Rights shows to the views of the national

[275] See *Belmarsh* (n 266) [29] (Lord Bingham). There was also no evidence to show that SIAC and the Court of Appeal had misdirected themselves on this issue.
[276] It is significant that Lord Walker, dissenting, would have afforded even greater deference to the needs of the executive- declaring a 'high degree of respect for the Secretary of State's appreciation' to be appropriate, albeit at the same time subjecting 'very close scrutiny [to] the practical effect which derogating measures have on individual human rights, the importance of the rights affected, and the robustness of any safeguards intended to minimize the impact of the derogating measures on individual human rights' ibid [196].
[277] See, for example, the *ratio* of Lord Scott [154] and Lord Rodger [175].
[278] Ibid [44] (Lord Bingham).
[279] Ibid [42] (Lord Bingham).
[280] Although note that the contrary has been argued: Oren Gross and Fionnuala Aolain, 'From Discretion to Scrutiny: Revisiting the Application of the Margin of Appreciation Doctrine in the Context of Article 15 of the European Convention on Human Rights' (2001) 23 Human Rights Quarterly 625.

authorities in such matters really presupposes that the national courts will police those limits'.[281] That Lord Bingham gave so much weight to the ECtHR stance on Article 15 derogations has been described as 'backward reasoning';[282] it casts into sharp focus the difficulties inherent in placing an overreliance on the judiciary as a means to keep a vigilant executive in check in times of crisis. Although it could be suggested that this issue was negated in the *Belmarsh* case because of the finding on discrimination grounds, the judgment could have gone further.[283]

The second (related) issue is that the s. 4 declaration did not result in the release of the detainees.[284] Ewing bemoans that the court's rhetoric fails to deliver on its central premise by allowing a similarly objectionable system to replace the indefinite detention regime.[285] The court provided considerable oversight in the landmark ruling, and its role was limited by Parliament. It is nonetheless clear from these arguments that the checks and balances that operate with regard to a declaration of emergency should be closely defined in domestic law.[286]

A third cautionary missive against premature celebration of such judicial assertiveness comes from the court itself. As UKSC Justice Hale has stated, drawing on the observations of Lord Bingham and Lord Brown,[287]

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[281] *Belmarsh* (n 266) [176] (Lord Rodger). See the decision of the ECtHR in *Handyside v United Kingdom* (1976) 1 EHRR 737, para 48: 'The Court points out that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights'.
[282] Tom Hickman, 'Between Human Rights and the Rule of Law: Indefinite Detention and the Derogation Model of Constitutionalism' (2005) 68 Modern Law Review 655, 663.
[283] A further concern, as has been highlighted by Hickman, is that in deciding the emergency issue, Lord Bingham applied the standard of proportionality, rather than the higher standard, as enunciated by the ECtHR in respect to the margin of appreciation, of being 'strictly required' by the exigencies of the situation (ibid 664-665).
[284] A point reflective of Ewing's futility thesis. See KD Ewing, *Bonfire of the Liberties: New Labour, Human Rights, and the Rule of Law* (OUP 2010) 238.
[285] Ibid. See ch 4 for analysis of the control order regime / TPIM regimes.
[286] For suggestions in this context, see ch 6 p344-348.
[287] *R (on the application of Ullah) v Special Adjudicator* [2004] UKHL 26, [2005] 2 AC 323, [20], [24]; *R (on the application of Al-Skeini) v Secretary of State for Defence* [2007] UKHL 26, [2007] 3 WLR 33, [106].

their Lordships are aware that if they 'go further than Strasbourg would go, the Government has no right to take the case to Strasbourg; whereas if [they] do not go for enough, the victim can always do so. So [they] are cautious in … findings of incompatibility.'[288] Although this factor would not apply to the assessment as to whether an emergency was in existence, it raises palpable concerns. The issue regarding latency periods rears its head: an individual may face a period of several years before the ECtHR may hear a challenge. Additionally, the *Belmarsh* decision is indicative of a court adopting only minimal assertiveness. It is tempting to recommend increased access to the ECtHR, in order to enable the Government to appeal adverse decisions and potentially encourage the UKSC to be less deferential. Unfortunately, practicalities preclude this possibility.[289]

(ii) United States: the Supreme Court trilogy and a recalcitrant judiciary

As a direct challenge to the regime implemented in the US, a plethora of judicial confrontations were forthcoming. Since the basis of these challenges has been varied and complex, this thesis does not intend to examine the minutiae of each decision. That can be left to alternative sources, of which there are many.[290] Instead, what follows is a thematic

[288] Baroness Hale of Richmond, 'Human Rights in the Age of Terrorism: the Democratic Dialogue in Action' (2008) 39 Georgetown Journal of International Law 383, 388-389.

[289] 'By the end of 2009, the court will have received almost 57,000 new applications, an increase of 14%. On the side of output, the court will have rendered judgment in more than 2,000 cases, an increase of more than 20% compared to 2008. But the backlog has reached almost 120,000, with a deficit of 1,800 applications every month.' Parliamentary Assembly, *Committee on Legal Affairs and Human Rights, Conclusions of the Chairperson of the Hearing Held in Paris on 16 December 2009*, Declassified 21 January 2010, <http://www.europarl.europa.eu/meetdocs/2009_2014/documents/libe/dv/daublergmelin/daublergmelinen.pdf> para 8.

[290] See, for example, J Jubler, 'U.S. Citizens as Enemy Combatants; Indictation of a Roll-Back of Civil Liberties Or a Sign of our Jurisprudential Evolution?' (2004) 18 St John's Journal of Legal Commentary 631; Arthur Garrison, 'Hamdi, Padilla and Rasul: The War on Terrorism on the Judicial Front' (2004) 27 American Journal of Trial Advocacy 99; Sarah Whalin, 'National Security Versus Due Process: *Korematsu* Raises Its Ugly Head Sixty Years Later In *Hamdi* and *Padilla*' (2006) 22 Georgia State University Law Review 711. For context of the decisions, see Jordan Paust, 'Judicial Power to Determine the Status and Rights of Persons Detained Without Trial' (2003) 44 Harvard International

analysis of how the US judiciary responded to the executive demands for deference through an attempt to circumvent constitutional guarantees. Although it could be said that the initial response to the executive regime enacted following 9/11 was to ''subvert' the network of checks and balances essential to [the] separation of powers doctrine,… the degree to which the judgments… discounted the role of the courts… is remarkable'.[291] Judicial support for the detention regime and designation as enemy combatant began to erode.[292] The key cases that require examination are *Rasul,*[293] *Hamdi,*[294] and *Padilla.*[295] *Rasul* comprised a test to the detention regime for foreign nationals captured in Afghanistan; *Hamdi* was an American national captured in Afghanistan who challenged the legality of his detention; and *Padilla* was an American national captured on home soil who sought judicial relief.

Rasul is arguably the most significant case in the combatant trilogy, since it lies at the heart of the myriad of criticisms that have beset the 9/11 detention regime. Rasul was one of several who petitioned a District Court in the US for *habeas corpus.* In common with the decision in *Eisentrager,* the District Court held that the petition lacked jurisdiction since Guantánamo was outside of the geographical territory of the US.[296] This decision was upheld on appeal to the Court of Appeals.[297] Before SCOTUS rendered judgment, Rasul and two others were released back to the UK. The decision, reversing the judgment of the Court of Appeals by a

Law Journal 503; Michael Beattie & Lisa Stevens, 'An Open Debate on United States Citizens Designated As Enemy Combatants: Where do we go from here?' (2003) 62 Maryland Law Review 975.

[291] Diane Amann, 'Guantánamo' (2004) 42 Columbia Journal of Transnational Law 263, 295.

[292] Jubler (n 290) 646.

[293] *Rasul v Bush* 542 US 466 (2004).

[294] *Hamdi v Rumsfeld* 542 US 507 (2004).

[295] *Rumsfeld v Padilla* 542 US 426 (2004).

[296] 215 F Supp 2d 55, 68 (DC 2002).

[297] 321 F 3d 1134.

6:3 majority,[298] held that the US courts retained the authority to decide whether the detention was lawful.[299] In reaching the decision, SCOTUS held that the District Court had jurisdiction under the habeas statute:[300] such jurisdiction extends to aliens held in a territory over which the US has plenary and exclusive jurisdiction, even in the absence of 'ultimate sovereignty'.[301] *Eisentrager* was distinguished[302] and the court highlighted the fact that the justification for the precedent had been largely overruled in a subsequent case.[303]

Although the long-term consequences of *Rasul* were significant in terms of a marked extension of the geographical reach of *habeas corpus,[304]* in the short-term the petitioners were required to resubmit their petitions in the District Court so that a hearing could take place in light of the decision. *Rasul* has been both applauded and criticised for ruling against executive power.[305] The decision was undoubtedly a setback for the Bush administration, yet it concomitantly failed to recognize that the refusal of the executive to treat captured Taliban soldiers as prisoners of war was a violation of international law.[306] Further criticism has stemmed from the fact that SCOTUS failed to address the issue of Prisoners' rights under the

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[298] Justice Stevens delivered the majority opinion joined by O'Connor, Souter, Ginsburg, and Breyer; Kennedy concurred. Justice Scalia dissented, joined by Rehnquist and Thomas.
[299] *Rasul* (n 293) 15-16 (Justice Stevens).
[300] 28 USC §2241.
[301] *Rasul* (n 293) 4-16 (Justice Stevens).
[302] Not without criticism: see the commentary by T Lim (2005) 11 Washington and Lee Race & Ethnic Ancestry Law Journal 241, 249-250.
[303] *Rasul* (n 293) 11 (Justice Stevens). Note that this likewise has been subject to criticism: J D'Agostino, 'Victory For Enemy Aliens As Emergency Enemy Power Is Seized', 20 St John's Journal of Legal Commentary 385, 411.
[304] See the dissenting dicta of Justice Scalia, describing the modification as a bold extension of *habeas corpus* 'to the four ends of the world' *Rasul* (n 293) 11 (Justice Scalia).
[305] Sameh Mobarek, 'Rasul v Bush: A Courageous Decision But a Missed Opportunity' (2006) 3 Loyola University Chicago International Law Review 41, 85. See, conversely, from the perspective of former Associate Counsel to President George Bush, Bradford Berenson, 'The Uncertain Legacy of Rasul v Bush' (2005) 12 Tulsa Journal of Comparative and International Law 39.
[306] GH Aldrich, 'Has the US Executive Gone Too Far?' (2004) 2 *Journal of International Criminal Justice* 967, 972.

constitution: the detainees were left in 'legal limbo' until the President chose to act, which had the potential to create confusion amongst the lower courts.[307] Several commentators seized on this criticism from the perspective of national security.[308]

In *Hamdi*, it was argued that AUMF did not constitute congressional approval for detention, contrary to the Non-Detention Act of 1971.[309] Although there was not complete consensus on the issue,[310] the majority of the court, led by the plurality judgment of Justice O'Connor, held that AUMF did not fall foul of the Non-Detention statute.[311] There was no real assessment as to the meaning of the classification as an 'enemy combatant.'[312] The Justices did, however, categorically reject the US government's assertion that the role of the judiciary should be circumscribed by the demands of the executive.[313] Due process required an enemy combatant to have a meaningful opportunity to contest the factual basis for their detention before a neutral decision maker,[314] even

[307] Mobarek (n 305) 70.
[308] Berenson (n 305) 52. Berenson is concerned about some of the 'really perverse and dangerous pratical consequences' that could follow from such uncertainty in the lower courts. See also J D'Agostino, 'Victory For Enemy Aliens As Emergency Enemy Power Is Seized' 20 St. John's Journal of Legal Commentary, 385; Adam Gentile, 'Exhausted With the Judiciary: Deferential Oversight and the Need for Certainty in an Uncertain Time' (2005) 30 University of Dayton Law Review 357, 357-367 where Gentile suggests that the court should have deferred to executive decision making by providing a diminished standard of review and argues that all other remedies in international law before successfully petitioning for *habeas* relief; Capt C Schumann, 'Bring it on: The Supreme Court Opens the Floodgates with Rasul v Bush' (2004) 55 Air Force Law Review 349, 367-368, where Schumann argues that SCOTUS has added to the military burden, risked clogging the courts with habeas petitions, and provided legal ambiguity that would have been better resolved with legislative intervention by Congress.
[309] 18 USC §4001(a).
[310] the decision has been described as 'fractured': J Martinez, 'International Decisions' (2004) 98 American Journal of International Law 782.
[311] *Hamdi* (n 294) 9 (Justice O'Connor, giving the plurality opinion).
[312] *Hamdi* (n 294) 8 (Justice O'Connor).
[313] 'the position that the courts must forgo any examination of the individual case and focus exclusively on the legality of the broader detention scheme cannot be mandated by any reasonable view of separation of powers, as this approach serves only to condense power into a single branch of government. We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens' ibid 29.
[314] Ibid 26.

though the plurality considered that an appropriately constituted military tribunal could satisfy this requirement.[315] The case is notable and has attracted substantial attention for the 'colourful' dissent of Justice Scalia.[316]

In terms of limiting the potential period for which enemy combatant detention could last, *Hamdi* exposes two revealing principles. First, it implicitly limited the length of such detention by establishing an umbilical link between the war in Afghanistan and the detention powers.[317] The nexus between lawful enemy combatant detention and the elusive 'war on terror' was not substantiated.[318] Next, it did not provide the ringing endorsement of the strategy used by the government that the US administration may have liked. Instead, the court required and suggested a framework by which substantive due process could be afforded a detainee, and even went so far as to declare a presumption in favour of the government, provided the detainee was given a fair opportunity for rebuttal in the enemy combatant proceedings.[319] The decision in *Hamdi* did not fully establish the exact nature of the due process requirements yet certainly was more supportive of civil liberties than could have been predicted in light of previous patterns of judicial deference to executive decision-making.[320] This point becomes rather more pronounced when

[315] Ibid 27-28.
[316] Justice Scalia held that the plurality were taking 'an approach that reflects what might be called a Mr. Fix-it Mentality. The plurality seems to view it as its mission to Make Everything Come Out Right, rather than merely to decree the consequences, as far as individual rights are concerned, of the other two branches' actions and omissions' ibid 25. For a relevant discussion of the case, see Patricia Wald, 'The Supreme Court Goes To War', in P Berkowitz (ed) *Terrorism, the Laws of War, and the Constitution* (Hoover Institution Press 1995).
[317] 'The United States may detain, for the duration of these hostilities, individuals legitimately determined to be Taliban combatants who 'engaged in an armed conflict against the United States'. If the record establishes that US troops are still involved in active combat in Afghanistan, those detentions are part of the exercise of 'necessary and appropriate force,' and therefore are authorized by the AUMF' ibid 14.
[318] See generally Curtis Bradley and Jack Goldsmith, 'Congressional Authorization and the War On Terrorism' (2005) 118 Harvard Law Review 2048.
[319] *Hamdi* (n 294) 27 (Justice O'Connor).
[320] For a discussion of the direct consequences to *Hamdi* following the decision, see Abigail Lauer, 'The Easy Way Out? The Yaser Hamdi Release Agreement and the United

one considers the political backdrop for the decisions: the media saw the decision largely as a defeat for the Bush administration's war on terrorism and it was given a cautious welcome by civil libertarians.[321]

SCOTUS had further opportunity to address the legality of a designated 'enemy combatant' in *Padilla,*[322] in which an American citizen captured on American soil sought *habeas* relief. While the Court of Appeals for the Second Circuit held that the President did not have the power to militarily detain such captured citizens,[323] SCOTUS overturned the decision on the grounds of a technicality: *Padilla* had filed the *habeas* petition incorrectly.[324] Because of this technicality, the court (in a 5:4 majority) avoided making a decision on the substantive merits of the case.[325] Once again there was a spirited (albeit criticized)[326] dissent, this time from Justice Stevens, who held that:

> 'At stake in this case is nothing less than the essence of a free society. Even more important than the method of selecting the people's rulers and their successors is the character of the constraints

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States' Treatment of the Citizen Enemy Combatant Dilemma' (2006) 91 Cornell Law Review 927.

[321] See, for example, Anthony Lewis, 'The Court v Bush', *New York Times*, (New York, 29 June 2004) <http://www.nytimes.com/2004/06/29/opinion/the-court-v-bush.html?ref=yaseresamhamdi> accessed 1 November 2010; Editorial, 'Reaffirming the rule of law', *New York Times* (New York, 29 June 2004); Fred Barbash, 'Supreme Court Backs Civil Liberties in Terror Cases' *Washington Post* (Washington, 29 June 2004) <http://www.washingtonpost.com/wp-dyn/articles/A11657-2004Jun28_2.html> accessed 1 November 2010; D Rennie, 'Guantánamo Britons Given Rights to Appeal', *Telegraph* (London, 29 June 2004) <http://www.telegraph.co.uk/news/worldnews/northamerica/usa/1465754/Guantánamo-Britons-given-right-to-appeal.html.> accessed 30 June 2010. See also the discussion of *Hamdi* by Allison Elgart, '*Hamdi v Rumsfeld:* Due Process Requires That Detainees Receive Notice and Opportunity To Contest Basis for Detention' (2005) 40 Harvard Civil Rights and Civil Liberties Law Review 239.

[322] Padilla (n 295).

[323] 352 F 3d 695 (2003).

[324] The court held that Padilla should have filed for *habeas corpus* against the commander of the detention centre, rather than Rumsfeld (Padilla (n 188) 13 (Chief Justice Rehnquist)), and that the petition had been filed in the incorrect jurisdiction, pursuant to 28 USC §2241(a) (ibid).

[325] *Padilla* (n 295) 1 (Chief Justice Rehnquist). Note that the District Court and Court of Appeals found appropriate jurisdiction; the court could potentially have ruled on the merits of the detention if it had so wished (Whalin (n 290) 731).

[326] *Padilla* (n 295) 21-23 (Chief Justice Rehnquist).

imposed on the Executive by the rule of law. Unconstrained Executive detention for the purpose of investigating and preventing subversive activity is the hallmark of the Star Chamber'.[327]

Given the technical finding of the majority, *Padilla* represented very much a missed opportunity to subject the executive regime to judicial scrutiny. This decision must be considered in context of the 2004 combatant trilogy: the decisions in *Hamdi* and *Rasul* were much more protective of civil liberties in the face of executive action, yet they should serve as caution against an over-enthusiastic interpretation of the dicta of Justice Stevens.[328]

Application of the benchmarks to the four judicial challenges

There is real tension evident in terms of the constitutional limitations placed on the judiciary on either side of the Atlantic. British judges are empowered by the mechanism of s. 4 HRA.[329] Although their Lordships could have strenuously attempted to deploy s. 3 HRA,[330] a power that has since been used with great capriciousness in a control order context,[331] a s. 4 declaration was the only realistic ruling given the discriminate use of internment. In reaching this verdict, the House of Lords provided the impetus for Parliament to legislate for an alternative mechanism, the control order regime, which would prove to be almost as objectionable from a human rights perspective. The detention powers remained until

[327] *Padilla* (n 295) 11 (Justice Stevens).
[328] see Donna Newman, 'The Jose Padilla Habeas Case: A Modern Day Struggle to Preserve the Great Writ' (2007) 10 New York City Law Review 333. Newman was the attorney acting on behalf of Padilla and gives an account of his detention and circumstances. See also S Pitts-Kiefer, 'Jose Padilla: Enemy Combatant or Common Criminal? (2003) 28 Villanova Law Review 875.
[329] s. 4(6)(a) HRA.
[330] s. 3(1) HRA provides that 'So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights'.
[331] See generally R Clayton, 'Judicial deference and "democratic dialogue": the legitimacy of judicial intervention under the Human Rights Act 1998' [2004] Public Law 33; AW Bradley, 'Judicial independence under attack' [2003] Public Law 397, and see ch 4 p 219-222.

their replacement, in the form of control orders under the Prevention of Terrorism Act 2005 (PTA), could be introduced.[332]

This evidence of judicial capriciousness was evidenced on both sides of the Atlantic. *Rasul* held that enemy combatants were entitled to a review of their detention by petitioning US courts, and *Hamdi* held that American citizens were entitled to due process, with access to a lawyer and a fair hearing. These conditions were relatively straightforward for the US government to implement. Yet while the case represented a victory in terms of adherence to the rule of law, it did not render the detention strategy unconstitutional *per se.* Indeed, the result of the judgments was that the President, in times of war, could detain individuals as enemy combatants so long as 'some evidence' could be provided to support such a designation.

SCOTUS could have effectively ruled the entire detention regime unlawful simply by ruling that the AUMF did not amount to congressional authorization of detention, but it chose not to do so. Instead, the approach of the plurality in *Hamdi* was to take the (rather extraordinary) step of suggesting ways in which the US administration could provide adequate due process to the detainees.[333] Although this may have been an attempt to take a nuanced approach between deference to the executive and protection of individual rights, the balance was not properly struck. There is surely some force in Justice Scalia's arguments that it is not a role for the judiciary to suggest alternative measures that would be rights-

[332] Although note that in practice none of the *Belmarsh* detainees were in ATCSA detention at the time the judgment was delivered; they had been released on restrictive immigration Bail conditions. For a discussion of the control order regime and an analysis of the myriad legal challenges in this area, see ch 4 below.
[333] Above, text to n 294.

compliant, even though in difficult circumstances, the temptation must be great.[334]

Despite such judicial assertiveness, a further area of commonality across the four cases relates to the opportunities that were missed. In the US cases, the definition of enemy combatant was sidestepped,[335] together with the specific due process requirements of a detention hearing. As has been noted elsewhere,[336] there was a failure to really engage with some of the international humanitarian legal principles, including elucidation of the impact that the Geneva Conventions should have on the detainees. In the UK, *Belmarsh* stopped short of challenging the existence of an emergency, and it has been argued that enhanced scrutiny is to be preferred, particularly given the submissiveness shown by the ECtHR.[337] There are some residual strands of judicial minimalism evident; the courts in many instances managed to sidestep the broader constitutional questions at issue.[338] It would take another two years before the Supreme Courts were a little more assertive in the act of *ex post* sunsetting the emergency.[339]

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[334] For an Anglo perspective, see eg the dicta of Lord Brown, *Secretary of State for the Home Department v JJ and others* [2007] UKHL 45*,* ruling on the acceptable duration of a control order curfew: ' I would go further and, rather than leave the Secretary of State guessing as to the precise point at which control orders will be held vulnerable to article 5 challenges, state that for my part I would regard the acceptable limit to be 16 hours, leaving the suspect with 8 hours (admittedly in various respects controlled) liberty a day' [105].

[335] *Hamdi* (n 294) 8 (Justice O'Connor): 'There is some debate as to the proper scope of [the]… term [enemy combatant], and the Government has never provided any court with the full criteria that it uses in classifying individuals as such'.

[336] David Caron, 'International Decisions: Hamdi v Rumsfeld' (2004) 98 American Journal of International Law 765, 786.

[337] Above p 128-129; ch 5 p229-230.

[338] Vermeule (n 117).

[339] Ibid 192. See the case of *Hamdan v Rumsfeld*, 548 US 557 (2006), below p188-189.

V. Beyond the 2004 judgments

(i) Oversight of pre-charge detention in England and Wales

With the abolition of detention without trial, a new regime of control orders was created to plug the gap.[340] Where intelligence suggested that an individual was involved in terrorism-related activity, and pending a criminal investigation, prosecution or imposition of a control order, pre-charge detention could also be used. Pre-charge detention after an initial 4 days is incrementally extended by application to a court, and is available where there are reasonable grounds to believe that continued detention is necessary and the investigation is proceeding diligently and expediently.[341] Only if this is the case will detention for the maximum period be permissible, and, as the House of Lords has stated, '[t]he longer the period during which an extension is permitted, the more important it is that the grounds for the application are carefully and diligently scrutinized:'[342] thus the test shares many of its characteristics with an assessment of proportionality. A former DPP has opined that applying for subsequent extensions is often a 'tough business'.[343] Lord Carlile has stated that the actual finite limit should be a political decision as opposed to a legal calculation.[344] Arguments in support of an increase in such a limit tend to centre on the increasing complexity of terrorism investigations and the use of sophisticated techniques used by terrorists,[345] together with

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[340] Detailed discussion of this regime, and the constitutional oversight mechanisms, is below, ch 4.
[341] s. 41 & Sch 8 TACT. Specifically, para 31 (a) and (b) Sch 8 contain the relevant provisions. Note that extensions can only be made for 7 days at a time.
[342] *Ward v Police Service of Northern Ireland* [2007] UKHL 50 para 27 (appellate committee).
[343] Joint Committee on the Draft Detention of Terrorist Suspects (Temporary Extension) Bills, *Lord Macdonald Uncorrected Transcript of Oral Evidence* (HC 893-I, 22 March 2011) 5.
[344] Lord Carlile of Berriew, *Report on Proposed Measures for Inclusion in a Counter-Terrorism Bill* (Cmd 7262, 2007) 45.
[345] House of Commons Home Affairs Committee, *Terrorism Detention Powers: Fourth Report of Session* (HC 910-I, 2005) para 90.

the identified need for early intervention in order to avert a potential terrorist attack.[346]

The permissible period of pre-charge detention for terrorist suspects was originally limited to a period of 7 days by TACT.[347] After 9/11, an extension of this maximum period from 7 to 14 days was agreed by Parliament.[348] The power was introduced at a late stage in the passage of the Criminal Justice Act 2003, and although there was some unease evident at the 'draconian' nature of the extension,[349] Lord Carlile did not object to the proposals; there was therefore little by way of meaningful opposition.[350] A principal difficulty in overreliance on the legislature to check extensions of pre-charge detention is evident from the 2003 debates. Due to timescales, the provision was not given detailed Committee consideration.[351] Yet the background to this extension should be considered: the 14-day increase was tabled as the courts were hearing challenges to the indefinite detention without trial regime under Part IV of ATCSA. In the end, the clause authorizing the extension was added to the Bill without division in the Commons.[352]

[346] Home Office, *Government Reply to the Nineteenth Report from the JCHR* 2006-07, Counter-Terrorism Policy and Human Rights: 28 Days, Intercept and Post-Charge Questioning (Cmd 7215, 2007).
[347] para 36 sch 8 TACT.
[348] para 36(3A) sch 8 TACT inserted by s. 306(1)(4) Criminal Justice Act 2003 and came into force in January 2004.
[349] HC Deb 20 May 2003, col 948 (Dominic Grieve MP).
[350] See, for example, the comments of Dominic Grieve MP for the Official Opposition, HC Deb 20 May 2003, col 949: 'If the provision goes into the statute book, I very much hope that it is kept under constant review… with a view to its removal from the statute book as soon as possible … The Minister alluded to some of the reasons for her view. She mentioned chemical, biological and radiological weaponry and the need to carry out tests. Those are grave matters and we shall take them seriously into account. We shall certainly not oppose the new clause at this stage'. Similarly, the Liberal Democrats tabled an amendment allowing for up to 10 days detention without trial (ibid 952).
[351] HC Deb 20 May 2003, cols 951-952 (Simon Hughes MP).
[352] Hansard HC Deb, 20 May 2003, col 954.

Although some continue to argue that 14 days' detention goes too far and should not be considered a normative ideal,[353] the power remained on the statute books for several years. But on the 7th July 2005, a coordinated series of bomb attacks took place on the London transportation system, resulting in significant loss of life and destruction.[354] There was an immediate international response to the attacks,[355] and at the UK governmental level, meetings were held to establish which lessons could be learned.[356] In terms of legal amendments, the response was more measured. The government introduced the Terrorism Bill 2006 on the 12th October 2005, some 3 months after the attacks. Royal Assent was not granted until 30th March 2006,[357] providing an example of a period of comparatively effective multi-partisan legislative scrutiny.

Following 7/7, the government aggressively pursued further extension to the period of pre-charge detention. Acting on the advice of the police, the government sought a 90-day limit.[358] Despite apparent public support for the measure[359] and a three-line whip imposed by the government, the House of Commons rejected 90 days' detention at the report stage,

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[353] Clive Walker, evidence to the *Joint Committee on the Draft Detention of Terrorist Suspects (Temporary Extension) Bills, 4th April 2011*. <http://www.parliament.uk/business/committees/committees-a-z/joint-select/joint-committee-on-the-draft-detention-of-terrorist-suspects-temporary-extension-bills/news/committee-to-hear-from-home-secretaries-and-lord-goldsmith/.> accessed live 4th April 2011.

[354] 56 people were killed and some 700 injured: Home Office, *Report of the Official Account of the Bombings in London on 7th July 2005* (HC 1087, 11 May 2006) 2 (7/7 Report).

[355] The attacks were condemned by leaders of the G8, who were at Gleneagles with the Prime Minister. A UN resolution swiftly followed (*United Nations Security Council Resolution 1611*, 7 July 2005).

[356] 7/7 Report (n 354).

[357] Respectively HC Deb 12 October 2005, vol 436, col 295; HC Deb 30 March 2006, vol 444 col 1061.

[358] See, for example, Patrick Wintour, 'Police support Blair on terror detentions' *The Guardian* (London, 7 November 2005) <http://www.guardian.co.uk/politics/2005/nov/07/terrorism.uksecurity> accessed 30 August 2010.

[359] A YouGov poll for Sky News identified 72% public support for 90 days pre-charge detention (ibid).

culminating in Tony Blair's first Commons defeat.[360] Some 49 Labour MPs rebelled against the whip, and Parliament subsequently voted through an amendment to extend the period of pre-charge detention to 28 days.[361] Tony Blair was critical of Parliament's decision,[362] saying that the power was necessary and that there was a 'worrying gap between parts of Parliament and the reality of the terrorist threat and public opinion'.[363]

NGOs and other opponents of the extension likened such a period of pre-charge detention to the reintroduction of internment,[364] the comparisons to which were described as 'unhelpful'.[365] Although the 28-day power became law, Labour's support for a further increase did not fade. Gordon Brown advocated further extension to 56 days during the passage of the Counter-Terrorism Bill 2008.[366] As a result of political pressure, the measure was abandoned in favour of a 42-day compromise. This time, the House of Lords intervened to overwhelmingly reject the proposal,[367] to the anger of the Prime Minister.[368] Baroness Manning-Buller, former Director

[360] HC Deb 9 November 2005, cols 325-378.
[361] 'If 28 days proves inadequate in due course, new primary legislation to extend the maximum pre-charge detention period is likely also to be very divisive' House of Commons Home Affairs Committee, *Terrorism Detention Powers, Fourth Report of Session 2005-6* (HC 910-I, 2006) 46. The power is contained in s. 23 Terrorism Act 2006.
[362] BBC News, 'Blair Says MPs are out of touch' (London 10 November 2005) <http://news.bbc.co.uk/1/hi/uk_politics/4423678.stm> accessed 2 February 2011.
[363] Ibid.
[364] Amnesty International, 'United Kingdom: Don't play politics with right to liberty' (5 November 2005) <http://www.amnesty.org.au/news/comments/458/> accessed 2 February 2011.
[365] M Todd (The Chief Constable of Greater Manchester Police), 'Who can we trust in the fight against terrorism?' Sunday Times (London, 7 November 2005) <http://www.timesonline.co.uk/tol/comment/letters/article587365.ece> accessed 2 February 2011.
[366] Nigel Morris, 'MPs reject Brown call for 56-day detention' *The Independent* (London, 30 July 2007) <http://www.independent.co.uk/news/uk/politics/mps-reject-brown-call-for-56day-detention-459548.html> accessed 31 July 2007.
[367] Gordon Brown's government introduced the Counter-Terrorism Bill 2008, which added para 4 to Sch 8 of TACT, extending the maximum detention period up to 42 days (though the provision was time-limited to expire after 60 days). The provision was defeated by 191 votes in the House of Lords and was correspondingly dropped (HL Deb 13 October 2008, cols 541-544).
[368] Nicholas Watt, 'Gordon Brown: I am very angry with Lords over 42 days' *Guardian (London,* 15th October 2008) < http://www.guardian.co.uk/politics/2008/oct/15/terrorism-uksecurity1> accessed 20 February 2011.

General of the Security Service, became a figurehead of the resistance, stating that '[t]errorists want to undermine our freedoms and way of life by provoking the state into putting in place repressive measures… [w]e therefore risk, in effect, doing their job for them.'[369] As a result of the Lords' intervention, the Home Secretary correspondingly dropped the provision.[370]

If the developments in 2003 provided an example of the potential weakness of Parliamentary scrutiny, the ensuing debates on the relevant clause of the Terrorism Bill 2006 reinforce that Parliament has the potential to act as bulwark against excessive executive demands for power. There are, however, some important limitations to this observation. First, it should be noted that Parliament still supported the doubling of the permissible period of pre-charge detention, albeit with safeguards that would enable a significant degree of judicial oversight of the process. As the JCHR has highlighted, the danger of such increases is that over time, the cumulative effect of these can be substantial.[371] Put another way, the creep of the normalization of enhanced security powers should be resisted.[372] In order to prevent such normalization, a thoroughfare review of the necessity for, and proportionality of, each power should be conducted. Yet it is important not to begin such a review from the platform of the regime that is currently in force; it is in this way that an original

[369] HL Deb 8 July 2008, col 636.
[370] HC Deb 13 October 2008, cols 624-625.
[371] As was to be attempted in the after the enactment of the Terrorism Act 2006 by the CTA.
[372] HL Deb 19th July 2010, col 859: 'It is important that renewal does not become routine and that the reasons for renewal are not merely a parroting of what has gone before. The measures taken over the past few years have too often been knee-jerk' (Baroness Hamwee) and ibid at col 857, 'I have been somewhat depressed… by the drift during the intervening period towards continued erosion of civil liberties' (Lord Newton).

detention period of 4 days was gradually augmented to 14 days following normalization of the Northern Ireland-related powers.[373]

Once enacted, the avenues for Parliamentary restraint were few and far between. The pre-charge detention power inserted by the Terrorism Act 2006 would sunset unless renewed annually by Parliament. Crucially, the renewal debates on this mechanism required only secondary legislation to be approved by Parliamentary affirmative resolution.[374] Although the point of the annual renewal was to ensure that there was a continuing need for the powers and to allow full Parliamentary debate of the issue,[375] this was not realized in practice, with the lack of effective scrutiny being bemoaned by the JCHR.[376] The Committee concluded that the government simply had not provided enough information in a timely manner so as to allow for a meaningful assessment of whether the power of detention continued to be necessary.[377] In particular, the Independent Reviewer's report on the subject was not available in time so as to allow it to fully inform the debate.[378] The 28-day power was renewed by Parliament in July 2007,[379] 2008,[380] 2009,[381] and for another six months in 2010.[382] Although there was some opposition to the renewals,[383] there was clearly room for more

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[373] Walker has suggested that a 'rights audit' would be a suitable starting point: C Walker, 'Constitutional governance and special powers against terrorism' (1997) 35 *Columbia Journal of Transnational Law* 1; C Walker, 'Terrorism and Criminal Justice: Past, Present and Future' (2004) Criminal Law Review 311, 315.
[374] Section 25(6) Terrorism Act 2006. Renewals of the control order regime operated under a similar mechanism: ch 4 p 225, 234, 238.
[375] JCHR, *Nineteenth Report of Session 2006-07, Counter-Terrorism Policy and Human Rights: 28 days, intercept and post-charge questioning* (HL 157 HC 394, 2007) para 32.
[376] JCHR, *Twenty Fifth Report: Annual Renewal of 28 days, Session 2007-2008* (HL 132/HC 825, 2007).
[377] Ibid 17. The Committee repeated these conclusions in subsequent years (JCHR, *Counter-Terrorism Policy and Human Rights (Fifteenth Report): Annual Renewal of 28 Days* (HL 119 HC 726, 2009) 25.
[378] Ibid.
[379] Terrorism Act 2006 (Disapplication of Section 25) Order 2007 (SI 2007/2181).
[380] Terrorism Act 2006 (Disapplication of Section 25) Order 2008 (SI 2008/1745).
[381] Terrorism Act 2006 (Disapplication of Section 25) Order 2009 (SI 2009/1883).
[382] Terrorism Act 2006 (Disapplication of Section 25) Order 2010 (SI 2010/1909).
[383] To add salience to the myriad criticisms that were directed to 28 days' detention, there were also two instances before 2007 in which the maximum period of detention was used

substantial debate on the issue. Sunset clauses reversed by the operation of a statutory instrument are better than no safeguards at all; it may be that, over time, political pressure can result in the abrogation of excessive powers. This was not achieved by the renewal debates.[384] A requirement for full statutory approval following each sunset could strengthen such a legislative oversight mechanism.[385]

A further issue that requires some attention relates to the role of the judiciary as micro-adjudicators rather than macro-adjudicators in this context. The courts have a vital role in making a periodic detailed assessment of the provision for extended detention on an individual basis,[386] but have not yet chosen to examine the rights compatibility of the regime generally.[387] The JCHR did suggest that further extension beyond 28 days would set the government on a collision course with the ECtHR, since an individual would not be promptly informed of the charge against them.[388] Even with the appropriate safeguards, it has been suggested that further extension beyond 28 days should only be possible where a designated derogation from Article 5 ECHR had been made.[389] The government has rejected these claims, stating that the availability of judicial review meets the *habeas corpus* requirements of Article 5

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but the trial collapsed or prosecution was not pursued Lord Macdonald, *Review of Counter-Terrorism and Security Powers: A Report by Lord Macdonald of River Glaven QC* (Cmd 8003, 2011) 4 (Macdonald Report).

[384] In a control order context, this point will be revisited in chapter 4.

[385] As to a suitable mechanism for such sunset clauses, see ch 6 p 350.

[386] While the 28-day power lasted on the statute books until January 2011, it should be observed that the power was, in fact, used infrequently: 11 individuals have been held in detention longer than 14 days, all of which were before 2007. 6 of these 11 were held in detention up until the maximum period, HM Government, *Review of Counter-Terrorism and Security Powers: Review Findings and Recommendations* (Cmd 8004, 2011) (Counter- Terrorism Review) 8.

[387] In *Ward* (n 342) [30], the Appellate Committee declined to answer the questions in relation to whether a detainee and his solicitor could be excluded from the hearing in which extended detention was authorized.

[388] House of Lords Select Committee on the Constitution, *Tenth Report, Counter-Terrorism Bill: The Role of Ministers, Parliament and the Judiciary* (HL 167, 2007) 43.

[389] JCHR *Ninth Report, Counter-Terrorism Policy and Human Rights (Eighth Report): Counter-Terrorism Bill* (HL 50 HC 199, 2007) 13.

ECHR.[390] Nonetheless, the fact remains that there has, to date, been no substantial litigation as to the human rights compatibility of the pre-charge detention limitation under Schedule 8 generally. On the contrary, early signs appear to suggest that the measures are considered to be rights-compliant.[391] The absence of judicial opposition here highlights both the weakness of over-reliance on the judiciary to keep the demands of the executive in check and also the importance of further Parliamentary oversight.

Alternatives for legislative oversight mechanisms?

While it was advocating a 'reserve' pre-charge detention power of 42 days, the Labour government had proposed unparalleled safeguards, albeit through an 'extraordinarily complex' mechanism.[392] Attention was given to these issues in the counter-terrorism review.[393] Under the provisions of the Bill, the power to extend detention would be activated by order of the Home Secretary; the order would be debated in Parliament and agreed or declined; the judiciary would oversee extensions in 7 day increments in the usual way;[394] the independent reviewer would report on every use of the extended power; and in light of the report, Parliament would debate on whether the power was appropriately used.[395] There was to be a requirement for the Secretary of State to consult with both the DPP and an independent legal counsel. In particular, the latter was required to assess whether a grave exceptional terrorist threat had occurred or was occurring; whether the reserve power was needed; whether or not the need was

[390] House of Lords Select Committee on the Constitution, *Tenth Report, Counter-Terrorism Bill: The Role of Ministers, Parliament and the Judiciary* (HL 167, 2007) 47.
[391] In *Sher v Chief Constable of Greater Manchester* [2010] EWHC 1859, the High Court held at [121] that in light of *Ward* (n 8), Sch 8 was compatible with the relevant Convention rights (Coulson J). In *Re Duffy (No 2)* [2011] NIQB 16, the UKSC refused permission to appeal on the basis of such a challenge in November 2011.
[392] Lord Macdonald (n 383) 7.
[393] Counter-Terrorism Review (n 124).
[394] See p 172.
[395] Counter-terrorism HL Bill (2008) 5, cl 31.

urgent and whether or not the provisions were ECHR compatible.[396] The court would also be required to address these criteria when authorizing detention past 28 days.[397] The order and legal advice would be presented to Parliament, together with notification of the JCHR and other Select Committees to facilitate inclusion within the ensuing debate.[398] The order would lapse (sunset) after 7 days if not approved by Parliament, with renewal possible by affirmative resolution of both Houses.[399] If approved, the order would lapse after 30 days.

Although the headline 42-day figure was *prima facie* concerning, this battery of legislative safeguards far exceeded those that had been previously attached to previous UK detention regimes, especially those in relation to Northern Ireland.[400] In response to the defeat on the proposal, the UK government drafted a three-page Bill that was designed to remain on file and be introduced if the exigencies of the situation required it.[401] This Bill was significantly more objectionable in terms of the discretionary powers it conferred and the subsequent lack of safeguards than the rejected proposals: it purported to amend Schedule 8 to allow for extensions of detention up to a period of 42 days, and there was no reserve procedure.[402] A full sunset clause, as opposed to a clause renewable by affirmative resolution, was set at 60 days.[403] Consent of

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[396] Ibid cl 22, 25 and 27.
[397] Ibid cl 27.
[398] House of Lords Select Committee on the Constitution, *10th Report of Session 2007–08: Counter-Terrorism Bill: The Role of Ministers, Parliament and the Judiciary* (HL 167, 2007) 167.
[399] Counter-terrorism HL Bill (2008) 5, cl 27.
[400] Above p 131-132.
[401] Counter-Terrorism (Temporary Provisions) HC Bill (2008). See generally Rosa Prince, 'Jacqui Smith creates 'emergency bill' after 42-day detention defeat' *Telegraph* (London, 14 October 2008) <http://www.telegraph.co.uk/news/uknews/law-and-order/3192152/Jacqui-Smith-creates-emergency-bill-after-42-day-detention-defeat.html.> accessed 15 October 2008.
[402] Ibid cl 1(2).
[403] Ibid cl 1(6).

senior prosecutors was required[404] and the Independent Reviewer was again charged with reporting on every use of the power within 6 months.[405] The Bill was never introduced to Parliament; the power was to be retained on file and used if needed.[406]

By 2010, the political tide had turned and the incoming Coalition government had committed to a Counter-Terrorism Review that would examine the need for an extended period of pre-charge detention. The 'rolling back' rhetoric of the review[407] resulted in the limit on pre-charge detention being quickly identified as a suitable target. The new independent reviewer, Lord Macdonald, supported the recommendations of the review in this respect.[408] The Counter-Terrorism Review observed that the full 28-day period had not been utilized since 2007, is not routinely required and that 14 days should be the norm.[409] This development *per se* is very welcome. Yet the way in which the change is to be implemented merits closer scrutiny. In many respects, changes were coming anyway by virtue of the fact that the extended powers of pre-charge detention were subject to annual renewal in Parliament[410] and were renewed for another 6 months in July 2010.[411]

The review considered a number of options, including allowing the 28-day power to lapse while making provision for its reintroduction if required. In the event, the 28-day power lapsed two days before its publication, much

[404] Ibid cl 1(3) and 1(4).
[405] Ibid cl 2(2), 2(2) and 2(3).
[406] HC Deb 13 October 2008, col 620: 'I have prepared a new Bill to enable the police and prosecutors to do their work – should the worst happen, and should a terrorist plot overtake us and threaten our current investigatory capabilities ... The Counter-Terrorism (Temporary Provisions) Bill now stands ready to be introduced if and when the need arises' (Jacqui Smith MP).
[407] Home Office Press Release, 'Rapid review of counter-terrorism powers' (13 July 2010) <http://www.homeoffice.gov.uk/media-centre/press-releases/counter-powers.> accessed 13 July 2010.
[408] Macdonald Report (n 383) 4 paras 1-7.
[409] Counter-Terrorism Review (n 124) 11 para 20.
[410] s. 25 Terrorism Act 2006.
[411] Terrorism Act 2006 (Disapplication of Section 25) Order 2010 (SI 2010/1909).

to the consternation of the shadow Home Secretary.[412] Effective means of reintroducing the measure were canvassed, either by pre-existing order powers under the Terrorism Act 2006, by order of the Home Secretary, by order of the Home Secretary subject to approval by Parliament within 40 days, or by urgent primary legislation.[413] The advantages of renewal by order would be that the Home Secretary would be best placed to assess the nature of the threat, although it may appear to represent a less transformative change. Disadvantages of the other measures, some of which were seized on by the opposition,[414] included the difficulty in facilitating Parliamentary debate where criminal proceedings are in progress without jeopardizing pending trials, and a potential difficulty in recalling Parliament during a recess in order to pass emergency legislation. The Joint Committee, following comments made by the former Justice Secretary Jack Straw, has considered these arguments.[415] Other options that were analyzed and rejected in the review include the substitution of extended detention periods with police bail, or a compromise maximum limit of 21 days' detention.[416]

It is instructive that the options considered by the review fell short of the measures proposed by the Counter-Terrorism Bill 2008; and the same may be said of the proposed safeguards. The final recommendation of the review was to publish, but not introduce, a draft Bill that would be

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[412] See HC Deb 26 Jan 2011, col 311: 'We know already that the Home Secretary's policies in this area have been a complete shambles, but they are also irresponsible. She has identified that emergency provisions are needed, but she has left the police and the public in a difficult position by failing to put those provisions in place' (Yvette Cooper MP).
[413] Counter-Terrorism Review (n 124) 12-13 para 24.
[414] See n 412.
[415] Jack Straw MP, evidence to the Joint Committee on the Draft Detention of Terrorist Suspects (Temporary Extension) Bills, 4th April 2011. Footage available from <http://www.parliament.uk/business/committees/committees-a-z/joint-select/joint-committee-on-the-draft-detention-of-terrorist-suspects-temporary-extension-bills/news/committee-to-hear-from-home-secretaries-and-lord-goldsmith/> Accessed live, 4th April 2011.
[416] Counter-Terrorism Review (n 124) 13 para 24.

subjected to pre-legislative scrutiny.[417] Two such Bills were published.[418] A Select Committee was established to examine the minutiae and merit of the Bills, and took evidence from a variety of expert sources.[419] The Bills would have reintroduced a 28-day maximum period of pre-charge detention, subject to safeguards including a strict temporal limitation of 3 months.[420]

Lord Carlile, in evidence before the Committee, opined that such a contingency power was not appropriate.[421] There were concerns that it would not be possible to meaningfully brief Parliament about the nature of the terrorist threat without prejudicing ongoing investigations or trials. Allied to this, there is obvious trepidation regarding the feasibility, practicality and desirability of a Parliamentary recall in order to force legislation through on a swift timetable of as little as a few days.[422] Lord Macdonald has concluded that it was unlikely that there would be a need for pre-charge detention longer than 14 days, and that this would only be realized if there were simultaneous terrorism attacks on major cities.[423] As such, his Lordship suggested that the function of the bills is 'not really anything more than providing some reassurance to those who wanted to

[417] HC Deb 26 Jan 2011, col 309.
[418] Home Office, *Draft Detention of Terrorist Suspects (Temporary Extension) Bills* (Cmd 8018, 2011). One Bill is designed for use where the Terrorism Act 2006 order making powers are in force; another is designed for use following the repeal of these powers.
[419] Joint Committee on the Draft Detention of Terrorist Suspects Bills.
[420] cl 1(1) of Bill 1; cl 2(1) of Bill 2.
[421] 'I confirm it is still my view that something needs to be in place for the period between 14 and 28 days. As to whether it should be a contingency power, it really depends on what you mean by "a contingency power". My view is that there should be a power. The contingency power that has been designed in the Bill, in my view, is not a well-constructed provision for a number of reasons.' *Joint Committee on the Draft Detention of Terrorist Suspects (Temporary Extension) Bills, Lord Carlile Uncorrected Transcript of Oral Evidence* (HC 893-ii, 29 March 2011) 9.
[422] Jack Straw MP, evidence to the Joint Committee (n 415). Parliament's recall for the Birmingham bombings may be cited as precedent.
[423] 'You would be talking about mass casualty attacks in Birmingham, London, Sheffield, Liverpool and Manchester simultaneously' Macdonald Report (n 383) 2.

retain 28 days that there are things we can do if the worst really comes to the worst'.[424]

The innovation of these draft Bills had antithetical consequences. It allowed pre-legislative scrutiny to take place during a period of normalization: an advantage that increased the efficacy of the legislative oversight mechanism. This could be particularly useful given Parliament's historical reticence to resist the demands of the executive immediately following a terrorism trigger.[425] Conversely, laying the groundwork for a contingency power of 28 days in advance may have desensitized Parliament as to the consequences of a considerable increase in the detention powers of the government. The draft Bills risked creating a presumptive statutory maximum that would be introduced following a terrorism incident.

The report of the Joint Committee recommended that the draft Bills should be scrapped but has proposed that an additional procedure should be implemented in statute.[426] The new procedure grants statutory authority for the Secretary of State to extend the maximum permissible detention period to 28 days, with a sunset clause of 3 months, and the order creating power itself would be subject to annual renewal in Parliament.[427] A variety of other safeguards have been proposed, including a

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[424] Ibid 4.

[425] Waxman is one of many academics who recognize this as a recurring cyclical pattern (Seth Waxman, 'The Combatant Detention Trilogy Through the Lenses of History' in Peter Berkowitx (ed) *Terrorism, the Laws of War, and the Constitution (Hoover Institution Press 1995)*; Bruce Ackerman, 'The Emergency Constitution' (2004) 113 Yale Law Journal 1029; Bruce Ackerman, *Before the Next Attack: Preserving Civil Liberties in an Age of Terrorism* (Yale University Press 2006) 58-73; WE Scheuerman 'Emergency Powers' (2006) 2 Annual Review of Law and Social Science 257. Under this theory, the initial response of the state is based on an assessment of anticipatory risk during a period of emergency, in which the judiciary gives overarching deference to the executive. When the immediacy of the threat has passed, shifting attitudes result in the abrogation of emergency powers and the reassertion of conventional constitutional principles.

[426] Joint Committee on the Draft Detention of Terrorist Suspects (Temporary Extension) Bills, Draft Detention of Terrorist Suspects (Temporary Extension) Bills (HL 161 HC 893, 23 June 2011) (Joint Committee Report).

[427] Ibid 42.

requirement that the power should only be deployed in exceptional circumstances and with the consent of the Attorney General.[428] A 12-month sunset clause is to operate through the affirmative procedure.

The implementation of these suggestions has now been completed, but not all of the recommendations of the Joint Committee were followed. There is no permanent increase in the permissible limit of pre-charge detention, but an exceptional procedure, when Parliament is not in session, is provided.[429] Thus if powers of terrorism detention over and above 14 days are required, there must be an emergency vote in Parliament, with all of the requisite dangers associated with 'knee-jerk' legislating. If Parliament is not sitting, the Home Secretary, with the consent of the DPP, may make an order that temporarily increases the permissible period of pre-charge detention to 28 days. The order must be laid before Parliament as soon as is practicable and lapses unless affirmed by both Houses of Parliament within 20 days. Any use of the power must be subject to a report by the Independent Reviewer. Extensions to individual detention provisions require the usual approval of a High Court judge.[430]

The ways in which these safeguards are incorporated represents a nuanced compromise with sensible respect for constitutional oversight mechanisms, but should be treated with caution for two reasons. First, the process by which the pre-charge detention power will be increased will now be through a simple Parliamentary vote. If the Home Secretary outlines to Parliament that there is a significant terrorist threat, or if there is an attack, it is inevitable that the 28-day maximum will be reintroduced. Second, although the battery of safeguards that have been implemented

[428] Ibid.
[429] TACT, Sch 8, Part 4, para 38, inserted by s. 58 Protection of Freedoms Act 2012.
[430] Ibid.

far exceeds those previously in use, the 14-day limit should be revisited in future years by a rights audit. In this way, a further reduction may be achieved to the previous 7-day maximum. A requirement could be created for the Independent reviewer to report on every case in which pre-charge detention exceeded a set level: 7 days appears to represent a suitable limit. This would reflect the principle that a 14-day maximum does not represent a 'normal' detention power. Full sunset clauses should be provided.

There has also been a recent suggestion made by the Independent Reviewer with regard to Terrorism detention limits: David Anderson has recommended that bail should be considered, where appropriate, for individuals arrested and detained for terrorism-related offences.[431] This could decrease reliance on lengthy pre-charge detention. While such a provision would not need to apply to truly dangerous individuals, it has been seen elsewhere that bail conditions may be particularly onerous.[432] In some instances, the introduction of bail in place of continued pre-charge detention could be regarded as a more proportionate response.[433]

(ii) United States: Guantánamo and Beyond

The US has provision for only 48 hours' pre-charge detention,[434] in contrast to the current limit of 14 days in England and Wales, but these

[431] David Anderson QC, *The Terrorism Acts in 2011: Report of the Independent Reviewer on the Operation of the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006* (June 2012, LSO) Ch 7.
[432] See e.g. *Qatada v SSHD* SC/15/2002 (8 March 2004).
[433] Clive Walker, *Terrorism and the Law* (OUP 2011) 4.74.
[434] In the case of *Riverside v McLaughlin* 500 US 44 (1991), SCOTUS held that detention without a specific charge on the basis of probable cause was permissible for up to 48 hours. The limit was set to impart certainty but it should be noted that the court has indicated that in an emergency this period could feasibly be extended: 'Where an arrested individual does not receive a probable cause determination within 48 hours, the calculus changes. In such a case, the arrested individual does not bear the burden of proving an unreasonable delay. Rather, the burden shifts to the government to demonstrate the existence of a bona fide emergency or other extraordinary circumstance' [57] (Justice O'Connor).

comparisons are disingenuous, since the US detention regime is far more draconian than that currently seen across the Atlantic.[435] It has been established that the approach taken by the US was to circumvent constitutional guarantees and implement a detention strategy operating outside the boundaries of the criminal justice system.

The decisions of SCOTUS in 2004 continue to have significant ramifications for the US government's 'war on terror'. But the judgments merely forced the US executive to adopt alternative draconian measures in order to satisfy the requirements of SCOTUS, and to that extent amounted to only a temporary victory. The immediate response of the US government to the rulings was twofold. First, the government proposed a system of Combatant Status Review Tribunals (CSRTs) that would be established in order to conduct 'a formal review of all the information related to a detainee to determine whether each person meets the criteria to be designated as an enemy combatant'.[436] An individual who did not fall within this category was to be transferred to their own country or another jurisdiction consistent with US policy and domestic and international obligations.[437] Crucially, the process for CSRTs fell far short of the standard required in an ordinary court.[438]

The second strand to the government's response to *Rasul* was the enactment of the Detainee Treatment Act of 2005 (DTA). The 2005 Act

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[435] Above, p 119.
[436] JK Elsea & K Thomas, *CRS Report for Congress*, *Enemy Combatant Detainees: Habeas Corpus Challenges in Federal Court* (6 April 2007) <http://www.law.umaryland.edu/marshall/crsreports/crsdocuments/RL33180_04062007.pdf.> accessed 22 February 2011.
[437] Ibid.
[438] Ordinary rules of evidence did not apply; there was a presumption that evidence presented by the government was 'genuine and accurate'; and although the detainee was entitled to a representative in the hearing, such a representative would not act as an advocate of the detainee. Detainees would have the right to receive an unclassified summary of the evidence against them in advance of the hearing. The tribunal would receive all relevant evidence from the government, and a bench of 3 military officers would make a determination on the preponderance of evidence (ibid; see *Combatant Status Review Tribunal* (Fact sheet of October 17, 2006) accessed 22 February 2011.

prohibited the inhumane treatment of prisoners and Guantánamo detainees, yet also included an amendment that prohibited Guantánamo aliens from petitioning for a writ of *habeas corpus*.[439] After amendment, the DTA was combined into the Department of Defense Appropriations Act of 2006.[440] The result of the Act was that the pending lawsuits of Guantánamo detainees were expelled from the courts.[441] *Hamdan v Rumsfeld*[442] was one of many lawsuits that had been filed before the DTA was passed, and concerned the trial by military commission of Hamdan, which the government had purported to authorize under the Military Commission Order of 2002.[443]

Hamdan had served as Osama Bin Laden's chauffeur and bodyguard and challenged his detention by way of petition for *habeas corpus*. The Government argued that the DTA meant that the writ was not available, but SCOTUS was rather more muscular in its approach, rejecting the government's arguments and holding that absent explicit congressional authorization, the court was required to determine whether Hamdan's military commission was justified.[444] Further, the court held that the military commission was not established by either the AUMF or the DTA[445] and that the circumstances of Hamdan's arrest and charge were simply not suited to trial by military commission.[446] Justice Stevens stressed that the executive should undertake provisions in the criminal law to try and prosecute.[447] Several Justices filed stinging dissenting judgments,[448] the

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[439] §1005(e)(1). The amendment removed jurisdiction for *habeas* petitions for such detainees from the federal courts and vested the Court of Appeals for the district of Columbia with exclusive jurisdiction to hear appeals from Combatant Status Review Tribunals.
[440] Pub L No 109-148, 119 Stat 2680 (2005).
[441] 151 Cong Rec S14 263 (21 December 2005) (Senator Kyl).
[442] *Hamdan v Rumsfeld* 126 S Ct 622 (2005) (No 05-184).
[443] Military Commission Order No 1 of 21 March 2002.
[444] Hamdan (n 442) 16-19 (Justice Stevens).
[445] Ibid 29-30.
[446] Ibid 49.
[447] Ibid 72.

wording of which highlights the significance of this capricious ruling.[449]

Hamdan represents a further check on executive power, limiting the effect of the DTA and reasserting federal court jurisdiction over the treatment of some of the Guantánamo detainees. The decision should be championed as such.[450] It goes much further than the enemy combatant trilogy and had a marked impact on the government's Guantánamo strategy.[451] The political response to the judgment was vociferous, with the media reporting a 'swift and categorical defeat' for the Bush administration;[452] civil rights campaigners were delighted.[453] Others opined that it amounted to an end to the 'legal black hole' of Guantánamo.[454]

Although the judgment was undoubtedly muscular by standards of the four cases previously examined,[455] the end of the regime was not forthcoming: it merely forced legislative intervention by Congress. The judgment was largely concerned with statutory construction, and a replacement statute could placate many of the concerns. Some have described the SCOTUS

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[448] Justices Scalia, Thomas and Alito Jnr dissented.
[449] Justice Thomas opined that the case 'openly flouts our well-established duty to respect the Executive's judgment in matters of military operations and foreign affairs' (Ibid 1 (Justice Thomas) and that the court's duty was to 'defer to the President's understanding of the provision at issue'. Justice Scalia declared the decision that the DTA did not prohibit the hearing was 'patently erroneous' (ibid) since its interpretation was flawed.
[450] See, for example, the comments of W Dellinger, 'A Supreme Court Conversation: Still the most important decision on Presidential power ever', *Slate* <http://www.slate.com/id/2144476> accessed 22 April 2011: 'the court confronted and rejected a deep theory of the Constitution that had been developed by the incumbent administration and was invoked to justify perhaps hundreds of executive decisions … that at least appeared to violate valid acts of Congress. The rejection of that imperial claim is what is important about this case.'
[451] Jana Singer, '*Hamdan* as an assertion of political power', (2006) 66 Maryland Law Review 759, 766: '*Hamdan* represents an assertion of *judicial* authority as well as a pronouncement on the appropriate constitutional relationship between Congress and the President' (original emphasis).
[452] Linda Greenhouse, Supreme Court Blocks Guantánamo Tribunals. *New York Times* (New York, 29 June 2006) < http://www.nytimes.com/2006/06/29/washington/29cnd-scotus.html > accessed 22 April 2011.
[453] Ibid. See also Charles Lane, 'High Court Rejects Detainee Tribunals' Washington Post (Washington 30 June 2006) <http://www.washingtonpost.com/wp-dyn/content/article/2006/06/29/AR2006062900928.html.> accessed 22 April 2011.
[454] Ibid.
[455] Above p 169-171.

judgment as restrained;[456] it could have gone further.[457] Additionally, the decision was taken during a period in which there was no imminent threat.[458] In other words, the judiciary responded to rein in executive power where it was palatable to do so. If there had been a successful terrorist attack in the intervening period, it is likely that the decision would have been very different.[459]

Less than four months after the decision in *Hamdan* was handed down, Congress passed the Military Commissions Act of 2006.[460] The Act was a direct response to the judgment and created a system of military commissions that, *inter* alia, attempted to limit *habeas corpus* by requiring that all challenges to detention were heard by the new style commissions.[461] These commissions would apply to 'unlawful enemy combatants'[462] and the *habeas corpus* stripping provisions would apply to aliens.[463] Despite debate in Congress[464] and unremitting criticism from the

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[456] Peter Spiro, 'Military Commissions - Uniform Code of Military Justice - 1949 Geneva Conventions - Common Article 3 - Limits of Presidential Power' (2006) 100 American Journal of International Law 894.
[457] Robert Pushaw, 'The "Enemy Combatant Cases" in Historical Context: the Inevitability of Pragmatic Judicial Review' (2006) 82 Notre Dame Law Review 1005, 1071: 'if the court … had come to these weighty conclusions, it should have struck down the federal legislation as unconstitutional'.
[458] Spiro (n 456) 894.
[459] Pushaw (n 457) 1078.
[460] Military Commissions Act of 2006 Pub L No 109-366, 120 Stat 2600 (2006).
[461] Ibid §7a.
[462] §949(a). An unlawful enemy combatant is defined as 'a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al-Qaida, or associated forces); or (ii) a person who, before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense'. A lawful enemy combatant, by contrast, is defined as '(A) a member of the regular forces of a State party engaged in hostilities against the United States; (B) a member of a militia, volunteer corps, or organized resistance movement belonging to a State party engaged in such hostilities, which are under responsible command, wear a fixed distinctive sign recognizable at a distance, carry their arms openly, and abide by the law of war; or (C) a member of a regular armed force who professes allegiance to a government engaged in such hostilities, but not recognized by the United States'.
[463] 'Aliens' in this context includes US non-national residents.
[464] See, for example, Cong Rec 27 September 2006 (House), H7522-H7561; 152 Cong Rec S10, 243-274 (27 September 2006).

media, elements of which branded Congress ‘irresponsible’,[465] the Bill passed easily with a sizable majority.[466] The MCA effectively reasserted broad executive power that had been dealt a blow by the *Hamdan* decision and handed a blank cheque to the US government.[467] After Congressional intervention, the final wording of the MCA was largely an exercise in acquiescence to the demands of the Bush administration, seeking to limit further any judicial challenges.[468]

Subsequent tabled amendments to the MCA cast further focus onto this failure. Senator Arlen Specter offered a narrowly defeated amendment that would have restored the right of *habeas corpus* for detainees;[469] Senator Robert Byrd offered an amendment to sunset the provisions after a period of 5 years[470] that suffered the same demise. The Act was passed into law without change.[471] Various further attempts were made in the House and Senate to reassert the right to *habeas corpus* of Guantánamo detainees or US citizens generally.[472] The narrowness of some of these defeats, together with the few Republican votes that they garnered, suggests that Congress was repeatedly attempting to provide some sort of check on the power of the executive, but it failed to do so.

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[465] Editorial, ‘Rushing Off a Cliff’, *New York Times* (New York, 28 September 2006) ‘Congress passed a tyrannical law that will be ranked with the low points in American democracy, our generation’s version of the Alien and Sedition Acts’ <http://www.nytimes.com/2006/09/28/opinion/28thu1.html?ex=1317096000&en=3eb3ba3410944ff9&ei=5090&partner=rssuserland&emc=rss> accessed 25 February 2011. The New York Times opined that Republicans had forced the Democrats to vote against a ‘bad’ law so that they looked ‘soft’ on terrorism.

[466] With a majority of 80 in the House and 31 in the Senate (ibid).

[467] Singer (n 451) 760.

[468] Karen DeYoung, ‘Court Told it Lacks Power in Detainee Cases’, *Washington Post* (Washington, 18 October 2006) <http://www.washingtonpost.com/wp-dyn/content/article/2006/10/19/AR2006101901692.html?nav=rss_nation/special.> accessed 21 April 2011.

[469] S Amendment 5087 failed 48 – 51.

[470] S Amendment 5104 failed 47-52.

[471] S Amendments 5095 and 5088, relating respectively to oversight over CIA programs and the nature of the interrogation techniques prohibited by the Army Field manual, were also defeated.

[472] The Military Commissions Habeas Corpus Restoration Act of 2007, HR 267; The Habeas Corpus Preservation Act, HR 1189; The Habeas Corpus Restoration Act S 185 and HR 1416; the Restoring the Constitution Act of 2007, S 576, HR 1415.

In *Al-Marri v Wright,*[473] the Court of Appeals held that indefinite detention without charge or trial of a US resident combatant was unlawful, and simultaneously found that the MCA did not prevent federal courts from exercising *habeas* jurisdiction over US residents held in the US,[474] thus appearing to fly in the face of the government's interpretation of the provisions.[475] The Fourth Circuit then reversed itself in an *en banc* hearing by a 5:4 majority, holding (i) that if the allegations made by the government were true, they would permit indefinite detention as an enemy combatant; and, by the same majority, (ii) that al-Marri had not received due process to determine the truth in the allegations.[476] A subsequent appeal to SCOTUS was dismissed as moot[477] since a new administration had been sworn in. Upon reaching office, the President mandated the review of all detainees at Guantánamo.[478]

Perhaps the greatest assertion of civil liberties by SCOTUS then came with the decision in *Boumediene v Bush.*[479] Some have cautioned against premature celebration of the decision as evidence of a new era of judicial assertiveness; the political background saw President Bush with only 5

[473] *Al-Marri v Wright* No 06-7427.
[474] *Al-Marri v Wright* No 06-7427 per Judge Motz, giving the majority opinion, at 75-76: 'For a court to uphold a claim to such extraordinary power would do more than render lifeless the Suspension Clause, the Due Process Clause, and the rights to criminal process in the Fourth, Fifth, Sixth, and Eighth Amendments; it would effectively undermine all of the freedoms guaranteed by the Constitution'.
[475] The government attempted to assert that the MCA precluded the courts from exercising jurisdiction over enemy combatant detainees' hearings (see DeYoung (n 468)). It was contrarily argued that provisions of the MCA violated both the Suspension Clause of the US Constitution and the Geneva Conventions (the MCA sought to prevent detainees from relying on the Geneva Conventions as a source of rights (§3g). The President was given the authority to determine their 'meaning and application' (§6a(3)).
[476] No 06-7427, on hearing *en banc*, judgment 15 July 2008.
[477] In *Ali Saleh Kahlah al-Marri v Spagone (*08-368) SCOTUS was required to assess whether indefinite detention without charge and trial of a US resident combatant was unlawful. The decision of the Supreme Court in *al-Marri* was to remand the case back to the Fourth Circuit and direct it to be dismissed as moot, since al-Marri had been transferred from military custody into the custody of the Attorney General to face trial (*Ali Saleh Kahlah al-Marri, v. Spagone* 555 US 08-368, Summary Disposition, 6 March 2009).
[478] Executive Order 13492, *Review and Disposition of Individuals Detained at the Guantánamo Bay Naval Base and Closure of Detention Facilities*, 74 Fed Reg 4, 897 (22 January 2009).
[479] *Boumediene v Bush* 553 US 723 (2008).

months of his term remaining and poor approval ratings, and it is possible that this enabled the court to be rather more far-reaching than it could otherwise have been.[480] Nonetheless, in what was termed the 'Supreme Court showdown of the year,'[481] *Boumediene* was consolidated with *Al-Odah v United States,* a case that challenged the US administration's response to the judgment in *Rasul* through the DTA and MCA. Having first refused certiorari,[482] SCOTUS reversed[483] and heard the case, which attracted some 26 amicus curiae briefs from interested parties, NGOs and Parliamentarians worldwide. Judgment was handed down on 12 June 2008.

The court held that the detainees were entitled to the constitutional protection of *habeas corpus* and the suspension clause, notwithstanding their designation as enemy combatants.[484] *Habeas corpus* was designed to protect against cyclical abuses of the writ by the executive and legislative Branches.[485] The suspension clause was considered to have full effect at Guantánamo. The government's argument that the clause affords petitioners no rights because the US does not claim sovereignty over the naval station was rejected,[486] with the court holding that the 'nation's basic charter cannot be contracted away'.[487] Significantly, SCOTUS chose to decide the merits of the case itself, rather than remand back to the District Court, since the case raised grave 'separation of

[480] See generally Robert Pushaw, 'Creating Legal Rights for Suspected Terrorists: Is the Court Being Courageous or Politically Pragmatic?' (2008) 84 Notre Dame L Rev 1975.
[481] Editorial, 'The Supreme Court Showdown Of The Year' *New York Times* (New York, 23 October 2007) <http://theboard.blogs.nytimes.com/2007/10/23/the-supreme-court-showdown-of-the-year/.> accessed 22 February 2011.
[482] *Boumediene v Bush* 549 US (2007), Nos 06–1195 and 06–1196 2 April 2007.
[483] *Boumediene v Bush* 476 F3d 981.
[484] The court was divided 5:4. Justice Kennedy delivered the judgment of the court, with whom Stevens, Souter, Ginsburg, and Breyer JJ, joined. Souter J filed a concurring opinion, in which Ginsburg and Breyer JJ joined. Roberts CJ filed a dissenting opinion, in which Scalia, Thomas, and Alito JJ joined. Scalia J filed a dissenting opinion, in which Roberts CJ, Thomas and Alito JJ joined.
[485] Boumediene (n 479) 15 (Kennedy J).
[486] Ibid 35.
[487] Ibid.

powers issues'.[488]

The court held that the procedures for allowing the review of detainees' status did not amount to an adequate and effective substitute for *habeas corpus* and the court therefore held that §7 of the MCA amounted to an unconstitutional suspension of the writ.[489] The 'constitutional infirmities' that were suffered by the DTA included the absence of provisions allowing petitioners to challenge the President's authority under the AUMF to detain them indefinitely;[490] the inability to contest the CSRTs' findings of fact;[491] an inability to supplement the record on review with exculpatory evidence discovered after the CSRT proceedings, and no provision by which a detainee could request release.[492]

Conscious of the possible burden that the judgment would place on the executive, the court held that 'certain accommodations' should be made. Specifically, the court recommended the channelling of future cases to a single district court and requiring the use of discretion in order to accommodate the government's legitimate interest in protecting intelligence sources and gathering methods. Such accommodations would only be made provided the impact of the writ's protections was not impermissibly diluted.[493] The court stressed that while judges must 'accord proper deference to the political branches', security also subsists in 'fidelity to freedom's first principles, chief among them being freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers'.[494]

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[488] Ibid 43.
[489] Ibid 64.
[490] Ibid 59.
[491] Ibid.
[492] Ibid 60.
[493] Ibid 67.
[494] Ibid 68-69.

Boumediene forged the way for a new shift in US counter-terrorism policy.[495] Predictably, the case was well received by liberals and NGOs[496] and lambasted by conservatives.[497] The Wall Street Journal hoped that the case was 'not a tragedy for civil liberties in the long run' and (somewhat sensationally) implied that the decision may have rendered the constitution to be a suicide pact.[498] Media commentators decried the lack of judicial modesty, common sense and self-restraint,[499] yet other sources were more optimistic, championing the case from the perspective of civil liberties and the rule of law.[500] There were many commentators who predicted that SCOTUS might finally have instigated the demise of the regime;[501] Guantánamo's days already appeared to be numbered.[502] The number of detainees had already been steadily decreasing;[503] and on the

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[495] Michael Katz, 'Boumediene v Bush: A Catalyst for Change' (2008) 21 Regent University Law Review 363.

[496] Human Rights Watch, *US: Landmark Supreme Court Ruling on Detainees* (12 June 2008) <http://www.hrw.org/english/docs/2008/06/12/usintl9l23.htm.> accessed 12 June 2008.

[497] *Obama Statement on Today's Supreme Court Decision* (12 June 2008) <http://my.barackobama.com/page/community/post/samgrahamfelsen/gG5Gz5> accessed 25 February 2011; 'McCain: Guantánamo Decision One of the Worst Ever', *Huffington Post* (13 June 2008) <http://www.huffingtonpost.com/2008/06/13/mccain-Guantánamo-decisio_n_107057.html.> accessed 20 February 2011.

[498] Editorial, 'President Kennedy' *Wall Street Journal* (New York, 13 June 2008) <http://online.wsj.com/article/SB121331916222970351.html?mod=opinion_main_review_and_outlooks> (subscriber access 22 April 2011).

[499] John Yoo, 'The Supreme Court Goes to War', *Wall Street Journal* (New York, 17 June 2008) A23.

[500] 'The Supreme Court ruling yesterday that those held at Guantánamo Bay have a constitutional right to challenge their detentions in federal court is a welcome victory for due process and the rule of law. It completes a signal and totally avoidable failure by President Bush, who will leave office with the nation's regime for holding al-Qaeda combatants in shambles' Editorial, 'The Justices' Refrain', *Washington Post* (Washington, 13 June 2008) <http://www.cfr.org/world/Guantánamo-justice-gorbachevs-vision-asia-pacific-unity/p16530.> accessed 14 April 2011. The New York Times was cautiously optimistic, drawing attention to the close split between the SCOTUS ('The ruling is a major victory for civil liberties - but a timely reminder of how fragile they are' Editorial, 'Justice 5, Brutality 4', *New York Times* (New York, 13 June 2008) < http://www.nytimes.com/2008/06/13/opinion/13fri1.html.> accessed 14 April 2011).

[501] 'Now a dark chapter in the history of a proud democracy could be nearing an end, since there's no longer a shred of doubt that Guantánamo should be closed' Editorial, 'Unlawful Detention and Wiretapping', *Philadelphia Inquirer* (Philadelphia, 13 June 2008) <http://www.philly.com/philly/opinion/20080613_Editorial__Unlawful_Detention_and_Wiretapping.html.> accessed 10 April 2011.

[502] Megan Gaffney, '*Boumediene v Bush:* Legal Realism and the War on Terror' (2009) 44 Harvard Civil Rights and Civil Liberties Law Review 197.

[503] David Bowker and David Kaye, '*Guantánamo by the Numbers' New York Times* (New

campaign trail both sides had indicated that they wished to secure the closure of Guantánamo.[504]

Celebration of the judgment in *Boumediene* would be premature*.* Although the case amounts to a judicial bulwark against excessive executive power, it simultaneously highlights the relative impotence of the judiciary in bringing about long-term meaningful change. While it is true that the majority of the court eschewed a narrow interpretation of existing procedure and legal doctrine to reach their decision, the decision reflects judicial pragmatism 'animated by personal and political disagreements with the Bush administration'.[505] In common with the cases in the original enemy combatant trilogy, *Boumediene* relates not to *de facto* determinations of individual rights but instead considers a quagmire of procedural niceties.[506] As with *Belmarsh, Boumediene* did not result in the immediate release of the detainees. Rather, the federal court was to reprise its role of hearing individual challenges: CSRTs were no longer to be the sole forum in which classification as an enemy combatant could be challenged. Thus, from the perspective of the detainees, the decision represents an unfortunate paradox: while it allowed further challenges against detention to be lodged, it simultaneously served to lengthen the legal process and hence led to continued detention.

It has been argued that Boumediene was merely the 'beneficiary of a Supreme Court unwilling to cede power to Congress';[507] this was not well

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York, 10 November 2007) A15.

[504] President George W Bush, Press Conference, 14 June 2006 <http://www.whitehouse.gov/news/releases/2006/06/20060614.html.> accessed 15 April 2010.

[505] Robert Pushaw, 'Creating Legal Rights for Suspected Terrorists: Is the Court Being Courageous or Politically Pragmatic?' (2008) 84 Notre Dame Law Review 1975, 1978.

[506] Daniel Williams, 'Who got game? *Boumedieme v Bush* and the Judicial Gamesmanship of Enemy Combatant Detention' (2008) 43 New England Law Review 1, 10.

[507] Ibid 12.

received by Congressional members.[508] The judgment had not spelled out exactly which procedural requirements would be required to render the DTA constitutional, and left many issues unresolved.[509] Once again, the response to the decision by Congress was the passage of a further Military Commissions Act[510] and other changes to the regime. Many of these do not represent satisfactory compromise measures. The incoming Obama administration quickly produced a range of executive orders to give effect to its stated commitment to close Guantánamo Bay.[511] Pending proceedings against Guantánamo inmates were suspended for 120 days and directions were made that the facility should be closed within a year.[512] There was considerable pressure to relinquish the use of military commissions in favour of federal court hearings and to bring an end to indefinite detention.[513] But this political momentum proved to be short-lived. Despite broad European consensus as to the resettlement of European national Guantánamo detainees, and a stated commitment to facilitate the closure of Guantánamo accordingly, [514] which was

[508] See generally Senator Saxby Chambliss, 'The Future of Detainees in the Global War on Terror: A US Policy Perspective' 43 (2008) University of Richmond Law Review 821.

[509] Connie Kaplan, 'No End in Sight: The Effect of the Boumediene Decision on Detainees Held By The United States at Guantánamo Bay, Cuba' (2008) 15 ILSA Journal of International and Comparative Law 183, 200; D Cassel, 'Liberty, Judicial Review, and The Rule of Law at Guantánamo: A Battle Half Won' 43 New England Law Review (2008) 37, 37-38: 'The majority left open critical substantive and procedural questions. For example: Is there any lawful basis for indefinite detention of persons captured outside traditional war zones? What is the government's burden of proof in a habeas case from Guantánamo? How should the courts handle hearsay, classified evidence, and evidence obtained by coercive means?'

[510] Military Commissions Act of 2009, Title XVIII of the National Defense Authorization Act for Fiscal Year 2010, Pub L 111-84 123 Stat 2190.

[511] Executive Order 13492, *Review and Disposition of Individuals Detained at the Guantánamo Bay Naval Base and Closure of Detention Facilities*, 74 Fed Reg 4, 897 (22 January 2009).

[512] Ibid §3.

[513] Ibid §7.

[514] Council of the European Union, Joint Statement of the European Union and its Member States and the United States of America on the Closure of the Guantánamo Bay Detention Facility and Future Counterterrorism Cooperation, based on Shared Values, International Law, and Respect for the Rule of Law and Human Rights, 15 June 2009, <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/gena/108455.pdf.
> accessed 16 June 2009.

encouraged by NGOs,[515] speedy resolution and resettlement proved difficult.

Initial attempts to resettle Guantánamo inmates met with fierce resistance in Congress.[516] Balking at the political pressure, the White House dropped the plans.[517] This was to be the first in a long line of congressional interventions into the Obama administration's attempts to secure closure of Guantánamo: on 20th May 2009, Congress voted to reject the appropriation of $80 million to close Guantánamo in a move that paralyzed the efforts of the administration.[518] Some of the reasons for the rejection were the perceived lack of a 'workable plan'.[519] Although Obama attempted to dispel these criticisms with a comprehensive speech on the closure of Guantánamo, the measures that were announced were complex.[520] Guantánamo required a five pronged strategy: to prosecute in the federal courts; to use Military Commissions through the introduction of a new series of procedures and safeguards; to release where mandated

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[515] Amnesty International, 'Europe Urged to Protect Guantánamo Detainees Who Cannot Be Returned Home', 11 November 2008, <http://www.amnesty.org/en/news-and-updates/news/europe-urged-protect-Guantánamo-detainees-who-cannot-be-returned-home-20081111>; Human Rights Watch, 'European Governments Should Resettle Guantánamo Detainees', 10 November 2008 <http://www.hrw.org/en/news/2008/11/10/european-governments-should-resettle-Guantánamo-detainees.> accessed 11 November 2008.

[516] Veteran congressman Frank R. Wolf, who stated to the Obama administration and the media that there was a 'moral obligation to declassify … critical information [relating to the detainees]… the American people cannot afford to simply take your word that these detainees … are not a threat if released into our communities' (Facsmile from Frank R Woolf to President Obama (1 May 2009) <http://wolf.house.gov/uploads/Obama%20Guantánamo%20512009.pdf> accessed 10 June 2009).

[517] Matthew Taylor, 'Chinese Guantánamo detainees destined for Palau resettle in Bermuda' *Guardian* (London, 11 June 2009) <http://www.guardian.co.uk/world/2009/jun/11/Guantánamo-detainees-china-demands-return > accessed 18 June 2010.

[518] Supplemental Appropriations Act of 2009, HR 2346, Senate Vote 196 on S Amdt 1133.

[519] David Espo, 'Senate Votes To Block Funds For Guantánamo Closure' *Huffington Post (20 May 2009)* <http://www.huffingtonpost.com/2009/05/20/senate-votes-to-block-fun_n_205797.html> accessed 20 May 2009.

[520] White House, *Remarks by the President on National Security, Speech at the National Archives*, (21 May 2009) <http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5-21-09.> accessed 10 April 2010.

by the courts; to transfer to another country; and to use 'prolonged detention', subject to regular review and safeguards of individuals who could not be so treated.[521] The sought-after closure of Guantánamo, therefore, was not to be associated with an end to preventive detention: indefinite detention at Guantánamo was to be replaced with prolonged detention at other high security locations in the US[522] where alternative treatment strategies were not available.

The need for the Obama administration to seek to implement these strategies highlights the impotence of both the judicial and congressional oversight mechanisms. The decision was inherently political, since the Obama administration was not enjoying high scores in public opinion polls and was under sustained pressure from its opponents.[523] Disregarding such political limitations, some responsibility must lie with the judiciary. Had the decisions in *Hamdan* and *Boumediene* been more assertive, the corresponding pressure placed on Congress would have been considerable. Real change would have been more realistically achievable. In the absence of this, Congress actively prevented many of these powers from being voluntarily relinquished.[524]

In June 2009, Congress dealt a further blow to the efforts of the Obama administration by voting to effectively ban the transfer of Guantánamo detainees into the US, with the exception of those who would face

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[521] Ibid.
[522] Specifically, a correctional facility in Illinois was canvassed by the Obama administration in December 2009, but Congress blocked the necessary funding (see below).
[523] D Schoen & S Rasmussen, 'Obama's Poll Numbers Are Falling To Earth', *Wall Street Journal* (New York, 13 March 2009) <http://online.wsj.com/article/SB123690358175013837.html.> accessed 22 August 2010.
[524] This is true despite the fact that certain additional requirements were imposed on the President to keep Congress appraised of the developments at Guantánamo: the reporting requirement was found in The Supplemental Appropriations Act of 2009 (PL 111-32) § 319.

prosecution.[525] Progress was slow with trial by Military Commission. The Military Commissions Act of 2009 (MCA)[526] was eventually passed with concessions.[527] Some of these changes were significant; the rights of the accused, together with the applicable safeguards, [528] had been strengthened in line with SCOTUS guidance. The provisions explicitly provided the possibility that future courts could rule them unconstitutional, thus reversing in part Congress' response to *Hamdan.*[529] Some of the changes, however, were cosmetic.[530]

The MCA stopped far short of the overarching reform of the regime that had infused the rhetoric of the Obama campaign. The Act could be categorized as the definitive compromise measure, augmenting the preferred strategy of prosecution in federal courts, and falling in line with some of the recommendations of SCOTUS.[531] Opposition to the closure of Guantánamo was still growing.[532] The White House devised a strategy to complement the trial by military commission of some Guantánamo detainees with the trial in federal court of several others, and in November

[525] § 14103 of the Supplemental Appropriations Act 2009 (PL 111-32). The US President could present a plan to Congress 45 days before a transfer if the prosecution of a detainee was sought.
[526] PL 111—84, §§ 1801-1807.
[527] Military Commissions Bill HR 2647.
[528] such as the requirement for an annual report to Congress to on the use of Military Commissions: §1806.
[529] Which was simply to state that the 2006 military commissions afforded the necessary judicial guarantees.
[530] For example, see the largely cosmetic change in rhetoric of the term 'enemy combatant' to 'unprivileged enemy belligerent': §1802, amending 10 USC §949(a), and see generally Joanne Mariner, 'A First Look at the Military Commissions Act of 2009' *FindLaw* (4 November 2009) <http://writ.news.findlaw.com/mariner/20091104.html?pagewanted=all> accessed 5 May 2010).
[531] See generally Editorial, 'Military Commissions', *New York Times,* (New York, 25 April 2011) <http://topics.nytimes.com/top/reference/timestopics/subjects/d/detainees/military_commissions/index.html> accessed 15 May 2011.
[532] Letter to the President, *Coalition for Security, Liberty and the Law*, signed by Retired senior armed forces personnel, 7 October 2009, <http://securitylibertylaw.org/?page_id=5.> accessed 22 October 2009.

2009 announced that five 9/11 conspirators would be tried in New York,[533] including Khalid Shaikh Mohammed.[534] At the same time, President Obama directed the acquisition of the Thomson Correctional Facility in Illinois as a detention camp for Guantánamo inmates.[535]

The review of the detainees at Guantánamo[536] stressed the presumption that individuals would be tried before a federal court 'wherever feasible', but military commissions were to be used where this was not the case.[537] Nonetheless, Congress remained opposed to the appropriation of funds to Guantánamo for trial or transfer into the US, and blocked such funds in a variety of legislative measures throughout 2009 and 2010.[538] This obstruction effectively spelled the demise for Obama's 1 year plan to close Guantánamo and is likely to continue to do so over the next several years.

In order to gauge public perception and the likelihood of successful prosecution in the federal courts, Ahmed Ghailani was prosecuted. Although the trial finally resulted in a conviction for conspiracy and life imprisonment, the jury also acquitted Ghailani of some 284 other

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[533] Press Release, US Department of Justice, 'Departments of Justice and Defense Announce Forum Decisions for Ten Guantánamo Detainees,' (13 November 2009) <http://www.justice.gov/opa/pr/2009/November/09-ag- 1224.html.> accessed 10 April 2010. See also Mark Tran, 'Guantánamo Bay detainees to face September 11 trial in New York', *Guardian* (London, 13 November 2009) <http://www.guardian.co.uk/world/2009/nov/13/Guantánamo-bay-september-11-trial.> accessed 13 November 2009.

[534] Known in the media as KSM, the mastermind of the 9/11 attacks, against whom the US had deployed waterboarding as an interrogation tactic a total of 183 times Scott Shane, '2 Suspects Waterboarded 266 times' *New York Times* (New York, 20 April 2009) <http://www.nytimes.com/2009/04/21/world/21detain.html> accessed 26 April 2009.

[535] Presidential Memorandum Directing Certain Actions with Respect to Acquisition and Use of Thomson Correctional Center to Facilitate Closure of Detention Facilities at Guantánamo Bay Naval Base, 75 *Federal Register* 1015 (15 December 2009).

[536] Final Review, *Guantánamo Review Task Force* (22 January 2010) <http://www.justice.gov/ag/Guantánamo-review-final-report.pdf> (Guantánamo Review). The publication of the review's conclusions coincided with the 1 year deadline for the closure of Guantánamo that had been set by the President.

[537] Ibid.

[538] Department of Homeland Security Appropriations Act 2010 (PL 111-83); National Defense Authorization Act for Fiscal Year 2010 (PL 111- 84); Department of the Interior, Environment, and Related Agencies Appropriations Act 2010 (PL 111-88).

charges.[539] The case was seen as a significant failure for Obama's Guantánamo strategy, providing proof that criminal trials in a federal court were not a viable option,[540] and effectively stymieing the future federal prosecution of Guantánamo detainees. Congress responded with yet another restriction on the transfer of Guantánamo detainees in December 2010, barring transfer into the US even for prosecution.[541] This challenge, passed as part of the National Defense Authorization Act of Fiscal Year 2011,[542] significantly usurped the role of the executive. The Obama administration criticized the restriction as 'dangerous' from the perspective of the separation of powers,[543] yet avoided a head-on battle with Congress.[544]

Over two years after the date on which Obama announced his intention to close Guantánamo Bay within a year, the camp remains open. Progress has been made, and the number of detainees has been dramatically reduced. But there remain a small core of individuals who have been determined to pose an unacceptable risk and continue to be interned. In March 2011, Obama signed a new Executive Order that effectively put an end to hyperbole around imminent Guantánamo closure.[545] The order

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[539] Charlie Savage, 'Terror Verdict Tests Obama's Strategy on Trials' *New York Times, (New York,* 18 November 2010) <http://www.nytimes.com/2010/11/19/nyregion/19detainees.html?_r=1.> accessed 19 November 2010.

[540] See Pamela Geller, 'The lesson of Ghailani's trial fiasco' *Guardian* (London, 18 November 2010 <http://www.guardian.co.uk/commentisfree/cifamerica/2010/nov/18/al-qaida-terrorism.> accessed 20 November 2010.

[541] §§1032 & 1034.

[542] HR 6523, otherwise known as the Ike Skelton National Defense Authorization Act for Fiscal Year 2011.

[543] See Charlie Savage, 'Obama Aides Lean Against Bypass of Guantánamo Rules' *New York Times* (New York, 4 January 2011) <http://www.nytimes.com/2011/01/05/us/politics/05gitmo.html?_r=1&partner=rss&emc=rss> accessed 01 April 2011; Charlie Savage, 'Vote Hurts Obama's Push to Empty Cuba Prison' *New York Times* (New York, 22 December 2010) <http://www.nytimes.com/2010/12/23/us/politics/23gitmo.html> accessed 01 April 2011.

[544] The President registered 'strong objections' in a signing statement.

[545] Executive Order 13567 of March 7, 2011, Federal Register Vol 76, No 47, *Periodic Review of Individuals Detained at Guantánamo Bay Naval Station Pursuant to the Authorization for Use of Military Force.*

implemented a regime of indefinite detention, together with review mechanisms, for individuals who could not be prosecuted[546] and the administration also indicated that it would be restarting trial by military commission at Guantánamo,[547] criticizing elements of Congress for 'the restrictions […which amounted to an] unprecedented challenge to Executive authority to select the most effective means available to bring terrorists to justice and safeguard our security'.[548] KSM is now being tried under a military commission.[549]

Predictably, critics have attacked these developments, accusing Obama of reneging on his original commitment to close the camp.[550] The Washington Post opined that the *volte-face* 'all but cements Guantánamo Bay's continuing role in US counterterrorism policy'[551] and the New York Times acknowledged the 'failure' of the administration.[552] Others highlight the progress that has been made and observe the fact that Obama is merely attempting to work around the policies established by the Bush

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[546] Ibid §§ 2-3.
[547] White House, Fact Sheet: New Actions on Guantánamo and Detainee Policy, 7 March 2011, <http://www.whitehouse.gov/sites/default/files/Fact_Sheet_--_Guantánamo_and_Detainee_Policy.pdf.> accessed 05 April 2011. The fact sheet was issued to accompany the executive order, which made no reference to the resumption of military commissions.
[548] Ibid 2.
[549] See generally Benjamin Wittes, 'Will military commissions survive KSM?' *Washington Post* (Washington, 4 May 2012) <http://www.washingtonpost.com/opinions/ksm-trial-will-put-military-commissions-to-the-test/2012/05/03/gIQAXeE0zT_story.html>.
[550] Fiss describes the promise as a 'gesture of doubtful significance' (Owen Fiss, 'A Predicament Of His Own Making—A Commentary by Owen Fiss', Yale Law School (3 May 2011) <http://www.law.yale.edu/news/13142.htm)> accessed 10 June 2011; see also the comments of the President of the American Civil Liberties Union, accusing Obama of an 'about face', in Peter Finn & Anne Kornblut, 'Obama creates indefinite detention system for prisoners at Guantánamo Bay' *Washington Post* (*Washington,* 8 March 2011)
< http://www.washingtonpost.com/world/obama-creates-indefinite-detention-system-for-prisoners-at-Guantánamo-bay/2011/03/07/ABbhqzO_story.html.> accessed 10 June 2011.
[551] Ibid.
[552] Scott Shane and Mark Landler, 'Obama Clears Way for Guantánamo Trials' *New York Times* (New York, 7 March 2011)
<http://www.nytimes.com/2011/03/08/world/americas/08Guantánamo.html?_r=2&scp=2&sq=Guantánamo&st=cse.> accessed 10 June 2011.

administration.[553] Although Obama remains committed to the closure of Guantánamo and the prosecution of detainees in federal courts,[554] the US is effectively implementing internment, on a small scale, for high-risk individuals, a practice eschewed by the UK seven years previously.[555] The dangers of such a strategy have already been noted.

Although internment has not been ruled out as a legitimate weapon in the counter-terrorism armoury,[556] such arbitrary detention does not sit comfortably with the rule of law and it is entirely possible that the appellate courts will have the opportunity to strike down offending provisions in the near future. Internment does not work: although it may be effective to contain a short-term risk, the general outcome is the alienation (and in this case, potential radicalization) of a substantially larger group of people.[557] In December 2011, Congress passed the National Defense Authorization Act For Fiscal Year 2012,[558] which controversially affirms the broad executive powers of potentially indefinite detention of terrorist suspects, and does not exclude US citizens from the scope of the powers.[559] An injunction has been temporarily granted preventing the use of these powers in some contexts and an appeal is currently pending.[560]

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[553] BBC News, 'Obama to restart Guantánamo military commissions' (London, 7 March 2011) <http://www.bbc.co.uk/news/mobile/world-us-canada-12671777.> accessed 10 June 2011.
[554] White House Fact Sheet (n 547).
[555] With the decision in *Belmarsh* and the passage of the PTA: see above.
[556] See generally Fiona de Londras, 'Can Counter-Terrorist Internment Ever Be Legitimate' (2011) Human Rights Quarterly. de Londras argues that while the internment regime instigated under the Bush administration does not have legitimacy, this does not preclude the establishment of a legitimate regime of internment where there is public justificatory deliberation, non-discrimination, meaningful review, and temporal limitation of the provisions.
[557] On the ineffectiveness of internment, see Christopher Hewitt, *The Effectiveness of Anti-Terrorism Policies* (Rowman & Littlefield, 1986).
[558] HR 1540.
[559] Ibid §§1021, 1022.
[560] In May 2012, the injunction was granted in District Court: *Hedges v Obama, 12 Civ 331.* See generally Huffington Post, 'Indefinite Detention Ruling Appealed By Federal Prosecutors' 6 August 2012 <http://www.huffingtonpost.com/2012/08/07/indefinite-detention-ruling_n_1749566.html#slide=more228606>.

Conclusions: application of the benchmarks to the detention regime

The benchmarks for constitutional optimization established in chapter 2 are pervasive across counter-terrorism detention strategies. As to how a ‘better law’ may be achieved, a variety of suggestions may be explored. These require a confluence of enhanced legislative and juridical oversight mechanisms.

Benchmark 1: certainty

In England and Wales, some of the lessons from Northern Ireland-related terrorism have at last been learned. Current pre-charge detention limits are statutorily limited and subjected to a robust mechanism of judicial review. By contrast, the approach of the USA has been mired in uncertainty following discordant actions taken by the judicial and legislative branches. Following the abolition of internment, the use of control orders in England and Wales has also been subject to criticism on the basis of a lack of certainty and precision. These issues are explored in chapter 4.

Benchmark 2: legislative oversight

Numerous legislative oversight mechanisms have operated across the detention regimes. The UK Parliament scrutinized a variety of measures that helped to preserve constitutionalism across the preventive and pre-charge detention regimes, but there still remain areas in which these mechanisms could be improved. Absent a significant and paralyzing terrorism incident, it is unthinkable that internment will be reintroduced. If it is ever necessary, it is essential to ensure strict temporal limitation and the operation of further legislative oversight mechanisms.

Sunset clauses should be used to ensure meaningful debate; clauses that require primary legislation for renewal have appeared to be more effective than their secondary counterparts. Scrutiny by Select Committees, the Independent Reviewer and NGOs will play an important role. A specific Parliamentary procedure for the declaration of a terrorism-related emergency may be a step in the right direction. It is axiomatic that full judicial review must accompany any reintroduction of internment. These issues are explored throughout the remainder of the investigation and inform the overarching recommendations made in the conclusion.

Benchmark 3: judicial oversight

The judiciary discharges an essential function in making an assessment as to whether extended periods of pre-charge detention are necessary and justified in individual cases. In relation to control of the existence of an emergency, however, the judicial system has been found wanting: excessive deference was paid to the executive branches. Both domestic courts and the ECtHR deployed the Margin of Appreciation doctrine. *Belmarsh* provided a minimum of assertiveness, but sole reliance on the judicial oversight mechanism will do little to keep the executive in check, particularly if there is a further terrorism incident. The abolition of internment in England and Wales following *Belmarsh* ensured that there were few substantial judicial challenges to detention practices after 2004. Nonetheless, the judiciary are empowered by the HRA and there is merit in examining the use of these powers in a terrorism-related context.

In the United States, detention at Guantánamo Bay should serve as a cautionary tale to England and Wales: once extraordinary powers have been granted, it may prove difficult, if not impossible, for them to be quickly relinquished. Congress did not act responsibly to hasten a return to normalization away from the 9/11 exception: rather, it normalized the

exception itself. No single US judgment brought about meaningful reform such as the closure of Guantánamo Bay. There is little in the way of US counter-terrorism provisions, or operation of relevant constitutional oversight mechanisms, that would be usefully transposed into the legal order of England and Wales. On the contrary: the US would benefit from an analysis of the ways in which England and Wales has abolished internment, placed judicially-reviewed limits on pre-charge detention, and moved towards less draconian alternatives.

Benchmark 4: proportionality

An upper limit on the permissible period of pre-charge detention should be set that cannot be exceeded. Below that limit, the maximum period of pre-charge detention should remain proportionate to the general terrorism risk. There is a prevailing concern that pre-existing provisions will be considered to be inadequate in the event of a further terrorist attack. In these circumstances, it must be recognized that changes to the permissible period of pre-charge detention have already constituted the doubling of an exceptional power. Despite a recent downgrading of pre-charge detention periods by the Coalition government, any normalization creep is concerning. It is necessary to keep detention provisions under continuous review to ensure that the powers are proportionate.

Across counter-terrorism detention regimes, criticisms relating to the rule of law and separation of powers can be assuaged with tailored modifications to the applicable oversight mechanisms. Before these suggestions are explored in more detail, it is necessary to continue the analysis with reference to the Control Order and TPIM strategies, which are exclusively in use in the UK. As will be seen, the issues raised by this chapter apply *a fortiori* to the executive, legislative and judicial practices associated with the new measures.

Chapter 4

Controlling Terrorist Suspects

The decision of the House of Lords in *Belmarsh* precipitated an entirely new mechanism of terrorist control. Control orders- preventive orders imposed on terrorism suspects based on a 'reasonable suspicion' that an individual is involved in terrorism-related activity- were developed to replace the powers of indefinite detention without charge. The innovation was originally unique to the UK; there has been no emulation of the provisions in the US.[1] This chapter critiques the use of control orders and the subsequent regime of TPIMs across England and Wales.

The chapter is structured in six parts. Part I introduces the control order regime and provides a critique of its passage and renewal. Part II examines the key jurisprudence of the House of Lords, which had a significant impact on the structure of control orders and their viability. Part III analyses subsequent renewal votes and legal challenges that arose out of the House of Lords' judgments. Following previous conclusions, this chapter analyzes the ways in which such oversight was provided by sunset clauses, considerable Parliamentary debate, and a plethora of judgments that provided scrutiny of the proportionality of the measures.

Part IV then explores the passage of the TPIM regime, which came into force in January 2012. A substantive analysis of the new provisions, including an assessment of how TPIMs will operate and impact of the most recent jurisprudence, is conducted in Part V. Finally, Part VI concludes by offering suggestions as to how constitutional optimization may be achieved. Specific recommendations for improvements to the

[1] Note that Australia also utilize a control order regime modelled on the UK framework.

TPIM regime are made, which directly inform the overarching conclusions of the investigation.

I. Introduction of the Control Order Regime

Control orders were introduced under s. 2(1) Prevention of Terrorism Act 2005 (PTA) in response to the *Belmarsh* verdict.[2] The purpose of control orders was to plug a gap in terrorism suspect treatment strategies, where prosecution was not possible, deportation was not achievable, and long-term detention was not an option. While control orders 'sat unhappily'[3] with individual liberty, their three advantages were that they were 'capable of preventing terrorist activity; had the potential to be ECHR-compliant in a way that preventative detention did not; and [were] considerably cheaper than round-the-clock surveillance'.[4]

The passage of the 2005 Act was swift, yet beset by difficulties,[5] with over 180 amendments tabled during the Report stage, equating to an average of less than 2 minutes' Parliamentary consideration for each amendment.[6] This was described as 'indecent haste'.[7] The perils of such 'indecently' scant scrutiny have been previously identified: it has previously led to the adoption of emergency draconian measures that have subsequently been considered a bridge too far in the fight against terrorism.[8] The government

[2] *A (FC) and others v Secretary of State for the Home Department; X (FC) and others v Secretary of State for the Home Department* [2004] UKHL 56 ('Belmarsh' or 'A'). The House of Lords ruled that provisions in Part IV of the ATCSA were incompatible with Articles 5 and 14 ECHR. In so ruling, their Lordships quashed the designated derogation from the provisions of Article 5 ECHR. See ch 3 p 159-161.
[3] David Anderson QC, 'Control Orders in 2011: Final Report of the Independent Reviewer on the Prevention of Terrorism Act 2005' (March 2012) 2.13.
[4] ibid.
[5] First Reading was 22nd February 2005: HC Deb 22 Feb 2005, col 186. Royal Assent was granted on the 11th March 2005.
[6] HC Deb 28 Feb 2005, col 647, noting that such a timetable was a 'disgrace' (John Bercow MP).
[7] HC Deb 28 Feb 2005, col 648.
[8] Yet even the Prevention of Terrorism (Temporary Provisions) Act 1974 was subjected to lengthier scrutiny, with the House sitting all night to consider the provisions within a short timeframe.

was criticized for failure to prepare for the *Belmarsh* ruling[9] and was required to act quickly to find a replacement mechanism before the 13th March 2005, at which point the Part IV powers of ATCSA were due to lapse.

Control orders were preventive orders that require specified individuals to comply with obligations imposed for purposes connected with protecting members of the public from a risk of terrorism.[10] Under s. 2(1) PTA, the Home Secretary had the power to impose a non-derogating control order where she had reasonable grounds for suspecting that an individual was involved in terrorism-related activity and where she considered it necessary, for purposes connected with protecting members of the public from a risk of terrorism, to make a control order imposing obligations on an individual.[11] The High Court would hold a hearing to determine whether the concept of reasonable suspicion was satisfied.[12] Various obligations could be imposed under a control order, including electronic tagging, curfew of up to (originally) 18 hours per day, residence requirements, obligations to report daily to a police station, surrender of passport and ban on international travel, restrictions on whom a controlee could meet, and a bar on the use of mobile phones and the internet. Any breach of a control order was a criminal offence.[13] By way of affording controlees a substantive degree of due process, security cleared counsel, or Special Advocates, were appointed to represent their interests in court.[14] In order

[9] HC Deb 23 Feb 2005, col 364.
[10] The use of civil preventive orders in this way has become widespread: see, for example, the use of Anti-Social Behaviour Orders; Serious Crime Prevention Orders; and Football Travel Banning Orders. As to the use of Sexual Offences Prevention Orders, see Alisdair Gillespie, 'Sexual offences prevention orders and the right of entry' (2009) 8 Criminal Law Review 576.
[11] Derogating control orders could be created pursuant to s. 4 PTA 2005 but have never been used.
[12] s. 3(10) PTA 2005.
[13] The mechanism is provided by Sch 1 to the PTA and embodied in Part 76 of the Civil Procedure Rules (CPR).
[14] CPR 76.23 & 76.24.

to ensure that information is not disclosed contrary to national security, a controlee could be excluded from a hearing[15] and no communication was permitted between Special Advocate and the concerned individual once closed material had been served.[16] The ordinary rules of evidence did not apply and the court could receive evidence that would not be usually admissible.[17]

The control order regime represented the quintessential compromise measure, allowing the imposition of a plethora of stringent control conditions upon a terrorist suspect, effectively amounting to house arrest, yet falling short of the complete restriction of liberty afforded by the detention without charge regime. It has proven to be extremely controversial.[18] Opposition to the regime took a number of forms and became increasingly vociferous. The principal legal arguments against control orders related to claims that the obligations, taken together, amounted to a deprivation of liberty contrary to Article 5 ECHR, or that they did not afford a controlee a fair hearing, contrary to Article 6 ECHR. A further stinging criticism of the regime was that the orders existed outside the criminal justice system, were subject to a very low standard of proof, could impose a variety of severe restrictions upon an individual, and were sought where prosecution was not possible. The imposition of a control order could itself decrease the likelihood of a successful future prosecution.[19] In short, the criticisms directed at the control order regime

[15] CPR 76.2.
[16] Unless the court gives permission: CPR 76.25, 76.28.
[17] CPR 76.26.
[18] NGOs have been vociferous in their opposition: see, for example, Human Rights Watch, 'UK: 'Control Orders' for Terrorism Suspects Violate Rights' (2 March 2009); Liberty, 'From War to Law: Liberty's Response to the Coalition Government's Review of Counter-Terrorism and Security Powers 2011' <http://www.liberty-human-rights.org.uk/pdfs/policy10/from-war-to-law-final-pdf-with-bookmarks.pdf> accessed 22 April 2011; Amnesty International, 'United Kingdom: Five Years On: Time To End The Control Orders Regime' (August 2010, AI Index 45/012/2010).
[19] Although s. 8(2) PTA requires consideration of the possibility of prosecution, together with subsequent review pursuant to s. 8(4), see the comments of Nick Clegg MP: the

related to the doctrines required for constitutional optimization: the obligations could be disproportionate and the judicial and legislative oversight mechanisms flawed.

At first glance, it appears incongruous that the regime that replaced detention without charge, and was supposedly compliant with the ECHR,[20] suffered similar judicial challenges to its predecessor. Yet a number of control orders were quashed by the High Court on this basis.[21] The practical result of these decisions created political tension and difficulty for successive Home Secretaries, who bemoaned the decisions generally and complained that they were being forced to fight with one hand tied behind their back.[22] Each adverse decision provoked subtle modifications to the operation of the regime, although no legislative changes were forthcoming.

Application of the benchmarks to the passage and renewal of the regime

In terms of legislative oversight, the political attitudes to the control order regime are reminiscent of the previous Northern Ireland experience. The initial debate on the passage of the control order regime was acerbic, and the provisions were designed to sunset after 12 months, pending renewal by Parliament.[23] This safeguard placed an important temporal limitation on the new provisions, but its utility would turn out to be limited by the nature of the clause itself and the impact of other terrorism triggers.

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control order regime 'removes, or appears to remove, the pressure to charge and prosecute the criminals whom we all want to see apprehended' Nick Clegg MP, HC Deb 22 February 2007, col 447.

[20] A compatibility statement was made pursuant to s. 19 of the HRA.

[21] See, for example, *CA v SSHD* [2010] EWHC 2278; *SSHD v AP* [2010] UKSC 24.

[22] *SSHD v JJ & others* [2006] EWCA Civ 1141, upholding the earlier decision of Sullivan J at [2006] EWHC 1623 (Admin). Six orders were quashed in the High Court, and this was upheld by the Court of Appeal. See also Philip Johnson, 'Human rights may be dropped to arrest suspects' *Telegraph* (London, 17 July 2011) <http://www.telegraph.co.uk/news/uknews/1552456/Human-rights-may-be-dropped-to-arrest-suspects.html> accessed 18 June 2011.

[23] ss. 13(1) and 13(4) PTA.

At the first renewal in the Commons, the debate was almost *laissez-faire* and the regime was never in any real danger.[24] This may be attributed to the fact that it came in the aftermath of the 7/7 attacks on the London Transportation Network. Although the Terrorism Bill 2006 did not contain any knee-jerk amendments to the control order regime, Parliament was undoubtedly conscious of the threat posed by terrorism, as was reflected by the controversial extension to the permissible period of pre-charge detention to 28 days.[25] The issues contained therein were dominating the political agenda and media coverage.[26] The first renewal debate came immediately after a lengthy period of consideration of Lords' amendments to the Terrorism Bill 2006. It is at least conceivable that these issues played significantly on the minds of legislators and hindered the debate.

Further oversight of the regime was vested in the Independent Reviewer, who would investigate the use of the powers, had access to all of the Home Secretary's information on each controlee, and would produce an annual report on the operation of the regime.[27] Lord Carlile acted in this post and produced a total of 6 annual reports on the operation of the control order regime from 2006 to 2011. David Anderson QC replaced Lord Carlile in 2011 and produced a comprehensive report on the control

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[24] It has been observed that at one point in the debate, only 13 members of the Commons were actually in attendance (see C Walker, 'Keeping Control of Terrorists Without Losing Control of Constitutionalism' (2007) 59 Stanford Law Review 1395, 1408).

[25] See ch 4 p 176-177 for the impact of the Terrorism Act 2006 on pre-charge detention.

[26] See Andrew Grice, 'House of Commons, 4:56pm: The moment Tony Blair lost his authority' *Independent* (London, 10 November 2005) <http://www.independent.co.uk/news/uk/politics/house-of-commons-456pm-the-moment-tony-blair-lost-his-authority-514681.html.> accessed 10 April 2011. See also the comments of the House of Commons Home Affairs Committee that 'If 28 days proves inadequate in due course, new primary legislation to extend the maximum pre-charge detention period is likely also to be very divisive.' House of Commons Home Affairs Committee, *Terrorism Detention Powers, Fourth Report of Session 2005-6* (HC 910-I, June 2006) 46.

[27] See, for example, Lord Carlile, *First Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005* (2 February 2006) <http://tna.europarchive.org/20100419081706/http://security.homeoffice.gov.uk/news-publications/publication-search/legislation/prevention-terrorism-act-2005/independent-reviews/first-independent-review?view=Binary> accessed 20 September 2011>.

order regime in March 2012. The importance of these reports, as a means to provide oversight of the control order regime, cannot be overstated. The reports are presented to Parliament by the Home Secretary and can be drawn on by Committees such as the JCHR and various NGOs. In his first report on the control orders, Lord Carlile was of the opinion that the imposed obligations, including curfew of up to 18 hours, 'inhibit normal life considerably' and fell 'not very far short of house arrest',[28] despite the conclusion that as a last resort, the control order regime provided a 'justifiable and proportional safety valve for the proper protection of civil society'.[29]

Despite the straightforward renewal debate and similar conclusions drawn by Lord Carlile in the second review,[30] the courts intervened and handed down a number of conflicting judgments.[31] In *SSHD v MB*,[32] the Court of Appeal opted to 'read down' the control order provisions under s. 3(10) PTA, so that the court would consider whether the determination of the Home Secretary to make the order was obviously flawed at the time at which it was made.[33] In so ruling, the Court of Appeal recognized that the Home Secretary was best placed to make such a determination in the first instance and that it was appropriate to afford deference to his decision. Notwithstanding such deference, the court professed that it would give intense scrutiny to the necessity for each of the obligations imposed,[34]

[28] Ibid 43.
[29] Ibid 63.
[30] 'I would prefer it if no control order system was necessary. However, in my view it remains necessary given the nature of the risk of terrorist attacks and the difficulty of dealing with a small number of cases. Control orders provide a proportional means of dealing with those cases, if administered correctly', Lord Carlile of Berriew, *Second Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005* (19 February 2007) 7.
[31] Since many of these decisions have now been overruled, and there is more recent authority on the issue, no substantive analysis of the lower court decisions is attempted here.
[32] *Secretary of State for the Home Department v MB* [2006] EWCA Civ 1140.
[33] Ibid [46] (Phillips LCJ).
[34] Ibid [65].

appearing to demonstrate a judicial bulwark against the operation of the control order regime by the executive.

The second renewal of the control order regime caused rather more by way of consternation, but passed with an overwhelming majority of 261 votes in the Commons, despite 'reluctance' expressed by the Official Opposition.[35] Court challenges had an immediate impact on the control order regime, both in terms of the political scrutiny that they attracted, and also in regard to the nature of the control conditions themselves. The most obvious of these modifications was to the maximum permissible period of curfew, which decreased to 14 hours.[36] These changes, however, came as a result of discordant judgments, rather than through meaningful long-term revision; there was no legislative intervention. The political furore was fuelled by media reports, from January 2007, of control order absconds,[37] much to the derision of opponents of the regime.[38] The Home Secretary indicated his dissatisfaction,[39] stating that Parliament and the courts were preventing the Government from taking a more aggressive stance, and floated the idea of a further derogation from Article 5 ECHR.[40]

Lord Carlile urged caution regarding the need to implement measures to replace control orders once they had outlived their legal and political

[35]HC Deb 22 February 2007, col 442 (Patrick Mercer MP).
[36] Lord Carlile, *Fifth Report of Independent Reviewer Pursuant to s. 14(3) of the Prevention of Terrorism Act 2005* (1 February 2010) Annex 2.
[37] Alan Travis and Alex Kumi, 'Manhunt as terror suspect escapes control order' *Guardian* (London, 17 January 2007) <http://www.guardian.co.uk/politics/2007/jan/17/uk.topstories3> accessed 20 January 2007; Philip Johnston, 'Human rights may be dropped to arrest suspects', *Telegraph* (London, 24 May 2007) <http://www.telegraph.co.uk/news/uknews/1552456/Human-rights-may-be-dropped-to-arrest-suspects.html.> accessed 9 June 2009.
[38] See, for example, the comments of the Director of Liberty that control orders are 'a disgrace and an embarrassment to our security policy', Johnston (n 37). See also the statement of Patrick Mercer MP, HC Deb 22 February 2007, col 441.
[39] BBC News, 'Control Orders flawed, says Reid' (London, 24 May 2007) <http://news.bbc.co.uk/1/hi/uk_politics/6686415.stm> accessed 3 April 2011.
[40] Johnston (n 37).

viability,[41] but the Government refused to revoke control orders 'according to an arbitrary timetable'.[42] Although His Lordship's observations did not bring about immediate changes, these myriad concerns were escalating and increasing pressure on the government to legislate. Yet it would take over three years before the regime would eventually be subjected to complete overhaul.[43] It was largely the judicial triggers and corresponding political pressure that acted as a lodestar for legislative intervention.

II. Control orders reach the House of Lords

The political tension and legal challenges to the control order regime reached critical mass in October 2007, by which time the number of absconds stood at 7 out of a total of 17.[44] The House of Lords attempted to provide definitive guidance as to how the matrices of control conditions should be interpreted in order to help ensure rights compatibility. Unfortunately, the advice was discordant at best, and continued to trouble the lower courts.[45] In a series of leading cases, referred to as *JJ,*[46] *E*[47] *and MB / AF,*[48] the House of Lords were asked to rule on two main issues. The first of these issues, relevant to *JJ* and *E,* was whether the stringent non-derogating control order conditions could amount to a violation of Article 5 ECHR. The second issue, in relation to *MB/AF,* was whether the special advocate system satisfied the basic requirements of a fair trial contained in

[41] Lord Carlile, Second Report (n 30) 43.
[42] Home Office, *The Government Reply to the Report by Lord Carlile of Berriew QC, Second Report* (Cmd 7194, 2007).
[43] Though as to the mechanisms of their successors, see below.
[44] Lord Carlile of Berriew, *Third Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005* (18 February 2008) 11.
[45] *SSHD v JJ* [2007] UKHL 45. The House of Lords followed the judgment of *Guzzardi v Italy* (1981) 3 EHRR 333: the court takes in to account 'a whole range of criteria such as the type, duration, effects and manner of implementation of the measure' ([92] (Lord Bingham)).
[46] *SSHD v JJ* [2007] UKHL 45.
[47] *SSHD v E* [2007] UKHL 47.
[48] *SSHD v MB; Same v AF* [2007] UKHL 46.

common law and provided by Article 6 of the ECHR, since an individual did not have the right to see all of the evidence against him.

In *JJ*, the House of Lords concluded that the cumulative effect of the control order conditions, including relocation into an unfamiliar area and curfew of up to 18 hours, constituted a breach of Article 5 ECHR.[49] Since there was no derogation in place, the Home Secretary had acted *ultra vires* and the orders were quashed. In reaching judgment, the court considered the ECtHR case of *Guzzardi v Italy,*[50] which established that it was necessary to examine an applicant's 'concrete situation' through analysis of a 'whole range of criteria such as the type, duration, effects and manner of implementation of the measures in question'.[51] The Home Office had regulated all aspects of the controlees' lives[52] and the controlees were considered to be effectively held in 'solitary confinement'.[53] In *E*, by contrast, the Upper House considered that a 12-hour curfew, together with associated conditions, did not amount to a deprivation of liberty. The majority of the House took as their starting point the 'core element' of confinement: the length of the curfew itself.[54] Other conditions would be capable of tipping the balance.

In *MB and AF*,[55] the court concluded that non-derogating control orders did not involve the determination of a criminal charge. The Appellate Committee stated that under the control order regime, there was no assertion of criminal conduct, only a foundation of suspicion; no identification of any specific criminal offence was provided for; and the

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[49] *JJ* (n 45) [24] (Lord Bingham).
[50] *Guzzardi v Italy* (1981) 3 EHRR 333.
[51] Ibid [92].
[52] *JJ* (n 45) [24] (Lord Bingham).
[53] Ibid.
[54] *E* (n 45) [25] (Lord Bingham).
[55] *MB and AF* (n 48).

order was preventative rather than punitive or retributive in purpose.[56] The obligations imposed had to be no more restrictive than was judged necessary to achieve the preventative object of the order.[57] Notwithstanding this decision, their Lordships held that the civil limb of Article 6(1) ECHR entitled a controlee to such a measure of procedural protection as was commensurate with the gravity of the potential consequences of his control order.[58]

In reaching judgment, the court was mindful of the fact that the ECtHR has not precluded the use of a Special Advocate procedure.[59] Although the House of Lords was not confident that Strasbourg would consider that every such use of the special advocate procedure would comply with Article 6 ECHR, the Committee considered that with strenuous effort it should usually be possible to accord the controlled person a substantial measure of procedural justice.[60] In order to ensure that the controlee was awarded a fair hearing, their Lordships used s. 3 HRA to 'read down' the provisions of Schedule 1 of the Act. The provision was thus read and given effect 'except where to do so would be incompatible with the right of the controlled person to a fair trial'.[61] But the judgment was confusing in several respects. Lords Brown and Bingham and Baroness Hale chose not to distill a unified *ratio decidendi*, making guidance for the lower courts difficult to ascertain.[62]

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[56] *MB and AF* (n 48) [24] (Lord Bingham).
[57] Ibid.
[58] *MB and AF* (n 48) [24] (Lord Bingham); [90] (Lord Brown).
[59] Indeed, the system was set up partially in response to the court's judgment in *Chahal v UK* (1996) 23 EHRR 413, para 131. See also the comments of Lord Hoffmannn, *MB* (n 48)[54]: 'in principle the special advocate procedure provides sufficient safeguards to satisfy article 6'.
[60] *MB and AF* (n 48) [66] (Baroness Hale); [90] (Lord Brown); [35] (Lord Bingham).
[61] Ibid [44] (Lord Bingham); [72] (Baroness Hale).
[62] '[u]nless in these cases the judge can nevertheless feel quite sure that in any event no possible challenge could conceivably have succeeded...he would have to conclude that the making or...confirmation of an order would indeed involve significant injustice to the suspect' ([90] (Lord Brown)), thus apparently establishing a 'makes no difference' test.

The decision in *MB* raises some practical points as well as issues of constitutional importance. The practical impact of the judgment was that the Home Secretary could be forced to decide whether to disclose further information to a controlee in order to comply with their right to a fair trial. If the Home Secretary refused to do so, the court would not consider the evidence as part of the closed control order hearing. This led to a reduction in the number of control orders upheld by the court,[63] and critics suggested that the demise of the control order regime was imminent.[64] These judgments were given a mixed reception by NGOs.[65]

Application of the benchmarks to the control order jurisprudence

Of constitutional interest is the decision of the court to 'read down' the provisions, rather than declare the provisions to be incompatible with Article 6 ECHR, pursuant to s. 4 HRA. The impact of such a decision was significant to the regime. By using s. 4 as opposed to s. 3, the courts effectively obviated the need for the government to enact sweeping, wholesale reform. This may be viewed as further deference to the executive, since the court could well have ruled the measures to be incompatible with Article 6 and forced the hand of the government either to repeal the measures or to declare a derogation from the ECHR, which would have been politically unthinkable given the House of Lords' decision

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This was at best confusing and at worst a direct contradiction to the judgments of Baroness Hale and Lord Bingham.

[63] *SSHD v Abu Rideh* [2008] EWHC 1993, in which the High Court held that the open material gave insufficient disclosure to the controlee and therefore was not compatible with Article 6 ECHR; see also *SSHD v AF* [2008] EWHC 689.

[64] JCHR, *Counter-Terrorism Policy and Human Rights (Fourteenth Report): Annual Renewal of Control Orders Legislation 2009* (HL 37 HC 282, 2009) para 27.

[65] Amnesty International, 'Law lords control orders ruling may lead to equally-unfair 'control order lite' warns amnesty' (31 October 2007) <http://www.amnesty.org.uk/news_details.asp?NewsID=17505> 30 March 2011; see also the comments of Shami Chakrabarti of Liberty that 'These decisions will cause few celebrations at Liberty or the Home Office, and fully satisfy neither fairness nor security', Peter Walker, 'Control orders breach human rights, law lords say', *Guardian* (London, 31 October 2007) <http://www.guardian.co.uk/uk/2007/oct/31/terrorism.politics> accessed 30 March 2011.

in *Belmarsh.*[66] Baroness Hale was of the opinion that granting a declaration of incompatibility would have constituted a 'derogation in order to cater for the minority of cases,'[67] but Lord Bingham was less certain.[68]

It is respectfully submitted that Lord Bingham had a point. The use of s. 3 was undoubtedly ingenious and capricious, to the extent that it allowed the judiciary to create a significant amendment to the regime that cannot be considered commensurate with the original intention of Parliament.[69] Section 3 provides a mechanism by which a recalcitrant judiciary may keep the government in check; indeed, it may be rather effective at curtailing excessive executive powers and objectionable terrorism provisions, since it may involve the addition or deletion of words, or even sentences, into legislation.[70] Yet the wording of the provisions of the 2005 Act was altered almost beyond recognition. Statutory interpretation should not be used to the extent that it begins to usurp the role of the legislature;[71] changing the nature of a control order hearing, even in accordance with the interpretive powers under s. 3 HRA, appears to be taking this rather too far. As has been stated by Fenwick, Parliament 'clearly contemplated *some* limits on what could be achieved by means of s. 3' since it enacted s. 4.[72] Nonetheless, the scope of s. 3 was effectively left to the judiciary to determine. A declaration of incompatibility under s. 4 HRA would have been a preferable alternative with several benefits: it

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[66] A similar argument is suggested in the context of alternative rights by Steve Foster, 'The fight against terrorism, detention without trial and human rights' (2009) 14 Coventry Law Journal 4, 9.
[67] *MB* (n 48) [73] (Baroness Hale).
[68] This point was later stressed in the case of *BM v Secretary Of State for the Home Department* [2009] EWHC 1572 (Admin). See also the comments of Lord Bingham that 'any weakening of the mandatory language used by Parliament would very clearly fly in the face of Parliament's intention... and ... [it] might be thought preferable to derogate from article 6, if judged permissible to do so' *MB* (n 48) [44] (Lord Bingham).
[69] Ibid.
[70] Under this model, 'The courts are charged by Parliament with delineating the boundaries of a rights-based democracy' (Jeffrey Jowell, 'Judicial Deference: servility, civility or institutional capacity?' [2003] Public Law 592, 597).
[71] H Fenwick, *Civil Liberties and Human Rights* (Routledge-Cavendish, 2007) 172.
[72] Ibid.

would have avoided the crippling uncertainty that followed the judgment in *MB;*[73] the rule of law would have been respected; and there would have been real political impetus to facilitate legislative revision and hence legal certainty.

Proponents of Ewing's 'futility thesis', as categorized by Kavanagh,[74] would no doubt argue that the courts are not 'free from culpability'[75] and should have done more. The deference and judicial capriciousness of the UK courts draws parallels with that seen on the other side of the Atlantic in the enemy combatant cases. Many judgments showcase judicial minimalism.[76] Ewing and Tham would consider that the judiciary did not strike the correct balance,[77] stating that the trilogy of cases have created a 'strong lingering sense of deference by the courts to the political branches'.[78] Indeed the JCHR expressed surprise at their Lordships' use of s. 3.[79]

It is unclear as to whether the use of s. 3 in *MB and AF* can properly be categorized as judicial minimalism. The courts may have preferred to use the s. 3 power because it presented an opportunity to be more assertive: it allowed substantial modification of the statute and was therefore more empowering than the s. 4 alternative. In the context of the *Belmarsh* litigation, some commentators have castigated the choice of the use of s.

[73] Lord Carlile, Third Report (n 44) para 61: 'There has been concern expressed about the apparent circularity of the read down. There can be no doubt that the lack of certainty in the language used will ensure the most careful consideration of each case by the Home Secretary'.
[74] Aileen Kavanagh, 'Judging the judges under the Human Rights Act: deference, disillusionment and the "war on terror' (2009) Public Law 287.
[75] K Ewing & J Tham, 'The continuing futility of the Human Rights Act' (2008) Public Law 668, 690.
[76] See e.g. ch 3 p159-161, 189, 196.
[77] 'The control order cases reveal a deep and paradoxical respect for traditional constitutional principle, in terms of a commitment to the sovereignty of Parliament in particular, but a commitment to only a weak conception of the rule of law' Ewing and Tham (n 75) 670.
[78] Ibid 692.
[79] JCHR, *Counter-Terrorism Policy and Human Rights (Eighth Report): Counter-Terrorism Bill*, *Ninth Report of Session 2007–08* (HL 50 HC 199, 2008) 18.

4 HRA, since that case was effectively the precursor to, if not directly the cause of,[80] the enactment of the control order regime. Kavanagh, for example, deals with the criticism that *Belmarsh* did not result in the release of the detainees through an analysis of the scope and function of s. 4 HRA. Although a declaration of incompatibility clearly has no effect on the continuing validity of primary legislation,[81] it is clear that it may exert considerable political pressure on the government. Ewing's second criticism lends further credence to this line of argument: the *Belmarsh* ruling gave the 'green light' to 'almost as offensive legislation'[82] in the form of the control order regime.

As has been noted above, the passage of the PTA was unduly swift as a result of the pre-existing sunset clause in Part IV of ATCSA. In this respect, the s. 4 declaration undoubtedly fuelled further human rights concerns; the fast-tracked legislation failed to strike the appropriate balance, and many of the control order provisions were disproportionate to the threat. Although Kavanagh disagrees with this sentiment,[83] noting that 'legally speaking, a declaration of incompatibility under s. 4 gives neither a green light nor a red light to subsequent legislation',[84] it is possible that the court favoured s. 3 rather than risk the statutory enactment of a more draconian regime.

These conflicting principles highlight the tension that surrounds judicial use of s. 4. The court was never in the position to declare *in toto* the control regime to be incompatible with the relevant provisions of the

[80] 'Some of the writings of democratic sceptics give the impression that the causal connection was direct, such that *Belmarsh* "gave rise" to the PTA. In fact, the link between them is indirect' Kavanagh (n 74) 292-293.
[81] s. 4(6) provides that a declaration (a) does not affect the validity, continuing operation of enforcement of the provision in respect of which it is given; and (b) is not binding on the parties to the proceedings in which it is made.
[82] K Ewing, 'The Futility of the Human Rights Act' (2005) 37 Bracton Law Journal 41, 44.
[83] Kavanagh (n 74).
[84] Ibid 293.

ECHR,[85] although the declaration mechanism comes close to amounting to a *de facto* strike down power.[86] It is nonetheless accepted by both Ewing and Kavanagh that the control order regime was less objectionable than the detention without trial regime it replaced, even if it was only marginally so.[87] There is an inherent tension here between according the sovereignty of Parliament appropriate respect and upholding the rule of law. This is particularly difficult where the courts are exercising a power of statutory construction conferred on them by Parliament in order to make a decision as to the rights compatibility of intrusive powers that have themselves been created by Parliament.[88]

Kavanagh argues convincingly that the judiciary were neither obligated nor empowered to strike down the control order regime as a whole;[89] the judgments could be considered to show an element of appropriate deference.[90] The standard of review that the courts used was laid down in statute, and Kavanagh's argument is correct in this sense: the courts have achieved marginal gains within the constraints of their constitutional mandate.

[85] Ewing and Tham (n 75) 681.
[86] Lord Hoffmann has described this as 'a technical distinction': Lord Hoffmann, 'Human Rights and the House of Lords' (1999) 62 Modern Law Review 159, 159-160. See also the Kavanagh's observation that, in practice, the government has always responded to declarations of incompatibility: Aileen Kavanagh, *Constitutional Review under the UK Human Rights Act* (Cambridge University Press 2009) 283.
[87] Kavanagh (n 74) 303: 'If judges succeed in resisting the various pressures brought to bear on them, they deserve some credit for doing so, even if their efforts only produce a partial rather than absolute barrier to draconian counter-terrorist policies'; Ewing and Tham (n 75) 688: the courts 'shaved the worst features of the control order regime'.
[88] Whilst not a terrorism-related case, the judgment of Lord Nicholls in *Re S Care Order: Implementation of Care Plan)* [2002] UKHL 10 is particularly instructive here. At [40] his Lordship stated: '…it is sufficient to say that a meaning which departs substantially from a fundamental feature of an Act of Parliament is likely to have crossed the boundary between interpretation and amendment. This is especially so where the departure has important practical repercussions which the court is not equipped to evaluate.' But conversely note the leading decision on the use of s. 3 in *Ghaidan v Godin-Mendoza* [2004] UHHL 30, [32] in which 'to an extent bounded only by what is "possible", a court can modify the meaning, and hence the effect, of primary and secondary legislation'.
[89] Kavanagh (n 74) 295.
[90] See ch 2 p 110-115.

An intriguing question arises with respect to whether the power of review itself could have been subject to statutory interpretation under s. 3 HRA. The function of the court in a control order hearing is to determine whether the order is 'obviously flawed'.[91] It would not take a quantum leap in reasoning for the courts to use s. 3 to interpret this power in a manner to ensure that a more rigorous standard of review could take place, particularly when the Article 5 and 6 ECHR rights of the terrorist suspect are at stake.[92] Although many would castigate this course of action, it may have gone some distance to placating Ewing's concerns.[93] The very fact that this is identified as a possible (if not plausible) suggestion highlights the uncertainty inherent in overreliance on the s. 3 power of construction.

The reality is that neither s. 3 nor s. 4 were perfect choices. The judiciary were not empowered to do much more; some of the weaknesses of a s. 4 declaration have already been discussed.[94] There is perhaps merit in advocating an amendment to s. 3; Parliamentary consideration of each judicial use of s. 3 could be required so as to evaluate whether legislation should be brought on the subject. Perhaps a simpler option would be to require the Home Secretary to report to Parliament on each control order decision, thus helping to facilitate Parliamentary intervention where necessary.

Some of the possible advantages of these mechanisms would include additional pressure being placed on the government to enact legislation, together with the requisite Parliamentary debate, in light of the decisions of the UKSC. Parliament would remain free to legislate in any way that it sees fit. This would increase Parliamentary scrutiny, as well as facilitating

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[91] s. 3(2)(a) PTA.

[92] Elsewhere (not in a terrorism-related context) the courts have shown themselves willing to 'read in' words to legislation in order to ensure that they are ECHR compliant: see eg *R v A (No 2)* [2001] UKHL 25, [17] (Lord Steyn).

[93] But such an approach is not advocated by this thesis.

[94] Above ch 2 p92-93.

compliance with the suggestions of the JCHR. Increased certainty in the law would be a welcome development. These proposals are explored further in the conclusion.[95]

III. Aftermath of the control order trilogy

In the wake of the House of Lords' decisions, the control order regime cracked but did not implode. Their Lordships remitted the cases back to the High Court for individual determinations to take place. The Home Secretary regarded the decisions as a vindication of control orders,[96] despite the latter observations of Lord Carlile that 'one is left with the clear conclusion that control orders will never be regarded by the courts as acceptable routine'.[97] Rather predictably, opponents to the regime remained troubled with the Government's stance.[98] The JCHR prepared a report before the 2008 renewal of the control order regime that evaluated the impact of the House of Lords decisions and concluded that amendments to the regime were urgently needed.[99] These amendments, *inter alia,* included suggestions for a statutory limitation of the maximum duration of a daily curfew; a strengthened obligation to consult with police as to a possible prospect of conviction; and to put on a statutory footing much of the guidance that had been distilled from the courts' judgments in

[95] See ch 6 p353-354.
[96] Home Office, *Government Reply to the Tenth Report from the Joint Committee on Human Rights*, (Cmd 7368, 2008) 4. See also the statement in United Nations Human Rights Committee, *Replies to the list of issues to be taken up in connection with the consideration of the sixth periodic report of the government of the United Kingdom of Great Britain and Northern Ireland* (CCPR/C/GBR/6 2008) 124: 'Overall, the Government regards the judgments as a positive endorsement of the principles of control orders'.
[97] Lord Carlile, Third Report (n 44) para 64.
[98] Amnesty International, *United Kingdom: Five Years On: Time to End the Control Orders Regime, 2010.* (AI Index EUR 45/012/2010, 2010) 14 (hereafter AI Report).
[99] JCHR, *Counter-Terrorism Policy and Human Rights (Ninth Report): Annual Renewal of Control Orders Legislation 2008*; *Tenth Report of Session 2007-08* (HL 57 HC 356, 2007).

MB, JJ and *E.*[100] At a similar time, the Counter-Terrorism Bill 2008 was making its legislative passage and the JCHR proposed that amendments to the regime could suitably be included.[101] The proposals were eventually dropped from the Bill, despite their potential to remove some of the resultant ambiguity.

In response to the judgments, the maximum permissible length of overnight curfews was, in practice, set at 16 hours; Lord Brown had sympathetically provided the Home Secretary with this limit for what he considered to be a rights-compliant curfew.[102] No other member of the House of Lords actively endorsed Lord Brown's approach and indeed conspicuously avoided doing so.[103] Nonetheless, although curfews continued to be tailored to the requirements of the individual, it is remarkable that the outcome of this case actually served to give the government justification to *increase* the length of some curfews.[104] In some respects, and not unlike the result of the US decision in *Boumediene*, the decisions amounted to a pyrrhic victory for rights campaigners. The judgment in *MB* potentially slowed down long-term reform of the control order regime.[105]

The government's compromise measures had been challenged, and the courts had intervened, diluting some of the powers but allowing them to continue. The judgments represent a nuanced check on the power of the executive, although they raise concerns around a lack of certainty and transparency in the regime generally. Critics on both sides of the argument

[100] JCHR, 8th *Report* (n 79).
[101] Ibid 17.
[102] *JJ* (n 45) [108] (Lord Brown).
[103] *JJ* (n 45) [16] (Lord Bingham); [63] (Baroness Hale).
[104] AI Report (n 98) 14.
[105] A similar observation was noted in ch 3 in respect of *Boumediene* (p196).

could argue that these decisions went too far or not far enough.[106] The House of Lords could have favoured a more broad interpretation of Article 5 ECHR and further constrained the options available to the Home Secretary,[107] although the court did reject the Home Secretary's submission that national security should require only a very narrow interpretation of Article 5 ECHR.[108]

In his third Report, Lord Carlile acknowledged these key decisions but recognized that control orders remained a necessity in a small number of cases for which there was no viable alternative.[109] His Lordship proposed that 'light touch' control orders, analogous to other civil measures such as Anti-Social Behaviour Orders, could be used in some limited circumstances, but the government did not accept this suggestion.[110] Perhaps more pressingly, the need for an exit strategy was acknowledged.[111] Lord Carlile proposed the implementation of a temporal limit of no more than 2 years, save in exceptional circumstances.[112] This was again rejected by the Government.[113] His Lordship also made similar conclusions the following year;[114] indeed the 2009 reports, together with the response by the government, draw broadly similar conclusions as their

[106] It is perhaps indicative of the ambiguity of the House of Lords judgments that proponents of the control order regime have been as vociferous in their praise as opponents have been in their criticism (see the conflicting statements made by T McNulty for the Home Office, HC Deb 12 December 2007 vol 469, and Liberty, 'Mixed Law Lords decision further undermines control orders regime' (31 October 2007).
[107] Ed Bates, 'Anti-terrorism control orders: liberty and security still in the balance' (2009) 29 Legal Studies, 99, 106-107.
[108] *JJ* (n 45) [107] (Lord Brown).
[109] Lord Carlile, Third Report (n 44) paras 26-27.
[110] Home Office, *Government Reply to the Report by Lord Carlile of Berriew QC Third report* (Cmd 7367, 2008) 2.
[111] Walker (n 24) 1395.
[112] Lord Carlile, Third Report (n 44) paras 50-51.
[113] Home Office, *Government Response to the Report by Lord Carlile of Berriew QC, Fourth report* (Cmd 7624, 2008) 4.
[114] Lord Carlile, Fourth Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005 (3 February 2009).

predecessors.[115] The government's responses did not always illustrate the efficacy of the role of the Independent reviewer as an executive oversight mechanism: there are myriad examples of instances in which Lord Carlile's advice was not followed.[116]

Following the enigmatic guidance offered by the House of Lords, numerous cases flooded the High and appellate courts in 2008. Several of these regarded the modification of existing control orders.[117] The majority of the remainder considered specific challenges as to the correct interpretation of the Article 6 ECHR argument following judgment in *MB*[118] or assessments as to whether a particular package of control conditions amounted to a violation of Article 5 ECHR.[119] There remained some evidence of judicial deference being awarded to the decision of the Home Secretary,[120] despite sustained pressure caused by control order challenges on a number of fronts.

Many of these difficulties could have been averted had Parliament decided to implement some of the House of Lords' judgments into statute. Codification may have triggered a wave of challenges to the new provisions, yet even this approach would have had the comparative advantage of legislative certainty. In the 2009 control order renewal debate, the JCHR reiterated its previous request for statutory amendments, highlighting the dangers in continuous renewal of temporary

[115] Home Office, *Government Response to the Report by Lord Carlile of Berriew QC*, *Fourth report* (Cmd 7624, 2008).
[116] In addition to the above example, see the government's rejection of Lord Carlile's suggestion to use other civil law orders, such as ASBOs, in certain cases (ibid 2); or the repeated reluctance to reform the Special Advocate system in light of concerns expressed by Lord Carlile (Home Office, *Government Response to the Report by Lord Carlile of Berriew QC*, Fifth report (Cmd 7855, 2010) 22).
[117] *SSHD v Abu Rideh* [2008] EWHC 1382; *SSHD v AE* [2008] EWHC 1743; *SSHD v AV and AU* [2008] EWHC 1895.
[118] *SSHD v AF* [2008] EWHC 689; *SSHD v AH* [2008] EWHC 1045; *SSHD v AF, AM, and AN; AE (JUSTICE intervening)* [2008] EWCA Civ 1148.
[119] *SSHD v AH* [2008] EWHC 1018; *SSHD v AP* [2008] EWHC 2001.
[120] *SSHD v Bullivant* [2008] EWHC 337.

measures.[121] Once more, the government disagreed.[122] In the Commons, the renewal was again passed with a large majority, notwithstanding the abstention of many on the Conservative benches.[123]

The House of Lords was finally required to readdress the fair trial issue. In *SSHD v F; E v SSHD; SSHD v N*,[124] the Appellate chamber attempted to clarify its earlier position, this time with some instructive guidance from the ECtHR, which had reviewed appeals from the *Belmarsh* detainees in *A v UK*,[125] and appeared to be fundamentally at odds with the earlier decision of the Court of Appeal.[126] Since it goes to the heart of the terrorism treatment strategies employed by the UK, the *A* case requires some exposition.

In *A,* the ECtHR held that the declaration of an emergency and derogation lodged by the UK in 2001 was within the wide margin of appreciation enjoyed by states in that area,[127] and also upheld the decision of the House of Lords that there was a violation of Article 5 ECHR insofar as the provisions under Part IV of ATCSA discriminated between nationals and non-nationals.[128] On the fair hearing issue, the ECtHR was similarly determinative, holding that where full disclosure to a controlee was not possible, Article 5(4) required that the difficulties this caused should be counterbalanced in such a way that each applicant still had the possibility of effectively challenging the allegations against him.[129] Special Advocates provided an important additional safeguard, performing an important role

[121] JCHR, *Fifth Report from the JCHR Session 2008-9* (HL 37 HC 282, 2008).
[122] Home Office, *Government Reply to the Fifth Report from the Joint Committee on Human Rights Session 2008-9*, *Counter-Terrorism Policy and Human Rights (Fourteenth Report): Annual Renewal of Control Orders Legislation 2009* (Cmd 7625, 2009) 1.
[123] The Order was passed after a (formally scheduled) 90 minute debate by a majority of 182 votes, but only 360 votes were cast in total (HC Deb 3 March 2009, col 760).
[124] *SSHD v F; E v SSHD; SSHD v N* [2009] UKHL 28.
[125] *A v UK* [2009] 49 EHRR 29.
[126] *SSHD v AF, AM, and AN; AE (JUSTICE intervening)* [2008] EWCA Civ 1148.
[127] *A v UK* [2009] (n 125) [174 – 181].
[128] Ibid [189-190].
[129] Ibid [218].

in testing the evidence and putting arguments on behalf of the detainee during closed hearings.[130] The question as to whether the detainee had been provided with enough information so as to allow him to give effective instructions to his special advocate would be decided on a case-by-case basis.[131] The acid test was propounded thus:

> 'Even if all or most of the underlying evidence remained undisclosed, so long as the allegations contained in the open material were sufficiently specific, it [would be] possible for a detainee to provide his representatives and the special advocate with information with which to refute them, without knowing the detail or sources of the evidence which formed the basis of the allegations. However, if the open material consisted purely of general assertions and a decision by SIAC to uphold the certification and continued detention were based solely or to a decisive degree on closed material, the procedural requirements of art. 5(4) would not be satisfied.'[132]

The *A* case caused some consternation for the House of Lords, with Lord Roger simply stating that 'Strasbourg has spoken, the case is closed',[133] and Lord Hoffmann mounting a withering attack on the Grand Chamber, opining that the decision was 'wrong' and that it 'may well destroy the system of control orders'. His Lordship went so far as to suggest that the reading of the European jurisprudence under s. 2 HRA could still make it possible to prefer domestic over European law, yet sided with the majority 'with very considerable regret'.[134] Lord Scott's judgment raises some interesting issues in relation to the 'read down' under s. 3 HRA, omitting

[130] Ibid [219-220].
[131] Ibid [220].
[132] Ibid.
[133] *SSHD v F* (n 124) [98] (Lord Rodger).
[134] Ibid [70] (Lord Hoffmann).

any detailed consideration of the possible mechanisms and instead appearing to chastise the government for not having the courage of its convictions.[135] Lord Phillips, giving the leading judgment of the appellate committee, applied the decision in *A*.[136] As such, the appellate committee once again reached for its tool of choice, using s. 3 HRA to 'read-down' the control order hearing provisions[137] so that a judge in a control order hearing 'would have to consider not merely the allegations that have to be disclosed in order to place in the open sufficient to satisfy the requirements laid down by the Grand Chamber, but whether there is any other matter whose disclosure is essential to the fairness of the trial'.[138] The appeals were allowed, with each case remitted back to the judge for this consideration to take place.

The Strasbourg judgment in *A* undoubtedly tied the hands of the judiciary, but it also normalized the Special Advocate system in the UK. The case gave a clear indication that, subject to safeguards, the system *per se* does not amount to a violation of key ECHR principles. Baroness Hale hoped that the principles would not have to trouble the appellate courts again.[139] The Home Secretary indicated disappointment with the ruling, stating that

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[135] Lord Scott stated at [95] that the government should not be 'unwillingly publicly to accept that the implementation of these provisions may require the curtailment of fair hearing rights, and [should] … face up to whatever may be the political consequences of their acceptance' and that that if the powers are needed, sovereign Parliament could legislate for their use, notwithstanding the fair trial implications.

[136] Where the material available to a controlee consisted of general assertions and where the case against the controlee is based solely or to a decisive degree on closed materials, Lord Phillips held that the requirements of a fair trial would not be satisfied, irrespective of however cogent the case in the closed materials may be ([59]). His Lordship continued that 'there are strong policy considerations that support a rule that a trial procedure can never be considered fair if a party to it is kept in ignorance of the case against him' (at [63]). The low threshold of the test of reasonable suspicion meant that there would be many cases in which it would be impossible for the court to be confident that disclosure would make no difference to the outcome. Reasonable suspicion may also be founded on misinterpretation of facts in respect of which a controlee may be able to provide an innocent explanation.

[137] under s. 3(10) PTA, pursuant to s. 3(1) HRA.

[138] Ibid [68].

[139] Ibid [106].

it makes it harder to protect the public,[140] and subsequent cases were critical of the House of Lords' judgment,[141] serving only to fuel opposition to the regime generally.[142]

It is nonetheless significant that neither the domestic courts nor the ECtHR precluded the use of Special Advocates. The culmination of these judgments was a judicially diluted regime that was broadly considered to be rights-compliant. The plethora of legal challenges had fundamentally re-cast the regime into a different mould. The executive were forced to compromise by the judiciary; although the law in relation to the fair trial implications of control orders was settled,[143] the political tensions and criticisms of the regime stubbornly refused to subside. New legislation had not been created to address the s. 3 declarations; once again, the government simply adapted its practices to comply with the judgments.

By February 2010, Lord Carlile had been asked by the Home Secretary to pursue a programme of consultation on the policies behind and future viability of the control order regime.[144] The political tensions had been considerable in the wake of the courts' interventions, and His Lordship had *inter alia* recommended that control orders were no longer suitable to prevent individuals from travelling abroad.[145] Following the judgment in *AF*, the Home Secretary had been forced to revoke two control orders, where further disclosure to the concerned individuals could not be made

[140] Frances Gibb, 'Disarray over terror control orders after law lords ruled on secret evidence' *The* Times (London, 11 June 2009) <http://www.timesonline.co.uk/tol/news/uk/article6469431.ece> accessed 12 June 2009.
[141] In *BM v SSHD* [2009] EWHC 1572 (Admin), Mr Justice Mitting stated that on the closed evidence, he would have upheld the control order in that case, but could not do so on the basis of the open evidence. In doing so, it was concluded that this is not a 'satisfactory basis upon which to determine the rationality and proportionality of a decision properly made in the public interest by the Secretary of State. It is, however, the inevitable result of applying the principles clearly identified by the Appellate Committee in *AF*'.
[142] See the comments of Lord Pannick QC in Gibb (n 140).
[143] *a fortiori* their subsequent replacement, TPIMs: see below.
[144] Letter from the Home Secretary to Lord Carlile, Lord Carlile, Fifth Report (n 36) 63-64.
[145] Ibid para 2.

due to potential damage to the public interest.[146] The High Court held that all significant material essential to establishing reasonable suspicion or the necessity of a control order must be disclosed in line with the *AF* criteria,[147] and that even light-touch control orders require disclosure of an irreducible minimum of evidence.[148]

From the perspective of compliance with Article 5 ECHR, the High Court continued to hear individual challenges, with a 16-hour curfew being upheld in the presence of social isolation caused by the unwillingness of a controlee's family to visit.[149] Other decisions quashed or upheld individual control conditions[150] or upheld the orders generally.[151] The Court of Appeal was required to consider the issue of whether a 16-hour curfew could amount to a deprivation of liberty; the court stated that such a decision, following *Guzzardi* and *JJ*, would depend on the entire factual matrix of the control conditions.[152] From the myriad of cases that flooded the High Court and appellate courts, it is clear that the regime remained mired in uncertainty: repeated use of the s. 3 read down and the discordant guidance merely exacerbated this problem.

Once again, Lord Carlile provided a range of suggestions for reform, noting that 'abandoning the control orders system entirely would have a damaging effect on national security' and that '[t]here is no better means of dealing with the serious and continuing risk posed by some individuals'.[153] Unable to find or devise a suitable alternative to control orders,[154] His Lordship held that the *AF* judgment should not render the

[146] Ibid 7 para 17. See *SSHD v AN* [2009] EWHC 1966 (Admin).
[147] *SSHD v AS* [2009] EWHC 2564 (Admin).
[148] *SSHD v BB & BC* [2009] EWHC 2927 (Admin).
[149] *SSHD v AU* [2009] EWHC 49 (Admin).
[150] *SSHD v GG & NN* [2009] EWHC 142; *SSHD v AT & AW* [2009] EWHC 512 (Admin).
[151] *SSHD v BG & BH* [2009] EWHC 3319; *SSHD v AM* [2009] EWHC 3053 (Admin).
[152] *SSHD v AP* [2009] EWCA Civ 731.
[153] Lord Carlile, Fifth Report (n 36) para 85.
[154] Ibid para 97.

regime unworkable.[155] A Travel Restriction Order (TRO) was mooted to replace control orders in some instances,[156] but while the government largely welcomed these findings, the proposal was not further developed.[157] Similarly, in 2008, the government rejected proposals to introduce a statutory maximum on the daily length of curfews.[158]

The JCHR produced a detailed report in 2010 which made a number of key recommendations,[159] including proposed changes to the system of Special Advocates, and the suggestion that future primary legislation should be required to renew temporary provisions after their sunset.[160] Once again the Labour government used its majority to push through the 2010 renewal of the control order regime.[161] Like many of the recommendations of the Independent Reviewer, some germane suggestions of the JCHR were ignored.

With the Article 6 issue settled by the second House of Lords ruling,[162] it is perhaps of little surprise that it took a second legal challenge to settle the principles in relation to Article 5 ECHR. In *SSHD v AP,*[163] the UKSC held that conditions which amounted to proportionate restrictions upon the right to respect for private and family life under Article 8 ECHR were capable of

[155] Ibid para 98.
[156] Ibid paras 87-95.
[157] Home Office, *Government Reply to the* Fifth Report (n 122).
[158] Home Office, *Counter-Terrorism Policy and Human Rights (Ninth Report): Annual Renewal of Control Orders Legislation* (Cmd 7368, 2008). Such proposed amendments to the 2005 Act were subsequently defeated at the Report Stage of the Counter-terrorism Bill 2008.
[159] JCHR, *Counter–Terrorism Policy and Human Rights (Sixteenth Report): Annual Renewal of Control Orders Legislation 2010*, *Ninth Report of Session 2009–10* (HL 64 HC 3, 2009).
[160] The JCHR opined that ‘the annual renewal debates on control orders are poorly attended, despite the significance of the issues at stake. We recommend that, in future, counter-terrorism powers as extraordinary a departure from principle as those contained in sections 1-9 PTA 2005 be made subject to a proper sunset clause, requiring them to be renewed by primary legislation’ Ibid para 14.
[161] By a majority of 121 votes; 291 votes were cast in total, lending credence to the submission of the JCHR (n 159); HC Deb 1 March 2010, col 747.
[162] Insofar as the regime could operate within the confines of Article 6 ECHR: that is not to say that the special advocate system functions without problems (ibid).
[163] *SSHD v AP* [2010] UKSC 24.

'tipping the balance' in relation to a finding of a deprivation of liberty contrary to Article 5.[164] The court highlighted that it would be a role for the decision maker to take into account a whole range of criteria, together with its impact on the person in question, but that for a control order with a curfew of 16 hours (*a fortiori* one with a curfew of 14 hours) to be struck down as involving a deprivation of liberty, 'the other conditions imposed would have to be unusually destructive of the life the controlee might otherwise have been living'.[165] In so ruling, the UKSC all but rubber-stamped curfews of less than 16 hours so long as the High Court, as arbiter, does not consider them to be accompanied by other unduly onerous conditions. Person-specific factors, such as social isolation faced by a controlee where his family had difficulty visiting him, would only not be relevant to such a finding if the family had behaved unreasonably in attempting to visit.[166]

Human Rights groups used en affective media campaign in the wake of the judgment in *AP*; both Amnesty International and Liberty indicated that control orders should be scrapped.[167] The NGOs described the judgment as a defeat for the Home Secretary, but this stance was a little disingenuous. The House of Lords merely reaffirmed the previous decision of the High Court. It did not consider whether the regime generally violated the right to liberty; it merely confirmed that the cumulative result of a specific group of control order obligations did so, taking into account

[164] Ibid [12] (Lord Brown).
[165] Ibid [4] (Lord Brown).
[166] A High Court judge considering whether or not a control order amounts to a deprivation of liberty must therefore disregard the 'lack of contact resulting from the family's unreasonable failure to overcome these difficulties in order to visit him' (ibid [15]).
[167] Amnesty International, 'UK Supreme Court strike another blow to UK government's use of Control Orders regime' (16 June 2010) <http://www.amnesty.org.uk/news_details.asp?NewsID=18823> accessed 30 July 2010; Afua Hirsch, 'Sixteen-hour control order curfews breach human rights, supreme court told' *Guardian* (London, 5 May 2010) http://www.guardian.co.uk/uk/2010/may/05/16-hour-curfews-human-rights accessed 5 May 2010.

subjective factors of the appellant.[168] What is more, the UKSC recognized that High Court judges had developed special expertize and experience in the area and there was wisdom in generally not interfering with their decisions in control order cases.[169]

Application of the benchmarks to the second round of challenges

Several important lessons can be drawn from the control order regime and the litigation that it has generated. There is a need to ensure that executive action is checked by an appropriate oversight mechanism.[170] For control orders, the twin strategies of judicial review and legislative oversight operated. It has been shown that both of these strategies have significant limitations. Parliament bequeathed upon the judiciary substantial powers of statutory construction in the HRA, yet the judiciary were not as muscular in their application as some would like. The legislative check was likewise inhibited by hasty Parliamentary passage, by poorly informed opposition debate, and by a weak sunset clause that operates by secondary legislation, which in turn weakened subsequent debate. There was no catalyst of *Belmarsh* proportions.

Other oversight mechanisms have no doubt played their part in facilitating scrutiny of the control order regime. The role of the Independent Reviewer remains of crucial importance in drawing attention to use of the various powers; Lord Carlile frequently stated that having reviewed the material, he would have reached the same decision as the Home Secretary in making various control orders.[171] The annual reports facilitate more informed Parliamentary debate; this has particularly been the case where

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[168] Thus even this decision could be said to be reflective of judicial minimalism (particularly the discussion of the US cases in ch 4, p186-204).
[169] *AP* (n 163) [19-20] (Lord Brown).
[170] See generally ch 2 p 78-90.
[171] See, for example, Lord Carlile Fifth Report (n 36) 40 para 114; Lord Carlile, *Sixth Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005* (3 February 2011) 40 para 107.

the provisions are subject to annual renewal. Parliamentary Committees, including the JCHR, conduct valuable scrutiny of the regimes and proposed amendments. There was, however, a fundamental weakness in the operation of these oversight mechanisms: the government was free to ignore many of the proposals. The JCHR suggested enhanced legislative scrutiny and greater statutory clarity, including legislating to clarify the impact of some of the more discordant control order jurisprudence. The Independent Reviewer had suggested more proportionate alternatives to some of the control order obligations. These proposals had largely been ignored, and this suggests that there is scope for a closer relationship between the recommendations of these bodies and the legislative process in Parliament.

IV. Terrorism Prevention and Investigation Measures

The Counter-Terrorism Review was announced on 13th July 2010 to amend or 'roll back' legislation where needed in order to 'restore the balance of civil liberties'.[172] The review had been commissioned by the incoming coalition government, elements of which had long-opposed aspects of the counter-terrorism regime operated by the previous Labour government. Liberal Democrats had pledged to '[s]crap control orders, which can use secret evidence to place people under house arrest'.[173] A central proposal of the review was to prioritise every attempt to gather evidence and prosecute, with the engagement of the CPS.[174] Independent oversight of the review was trusted to Lord Macdonald, who produced a

[172] Home Office Press Release, 'Rapid review of counter-terrorism powers' (13 Jul 2010) <http://www.homeoffice.gov.uk/media-centre/press-releases/counter-powers.> accessed 30 July 2010.
[173] Liberal Democrat Manifesto 2010, <http://network.libdems.org.uk/manifesto2010/libdem_manifesto_2010.pdf> 94-95.
[174] Ibid 40 para 21.

largely supportive report.[175]

Many of the changes that were suggested by the review are a direct result of the unlikely formation of the Coalition government. Prolific litigation and adverse judgments had aroused vehement political rhetoric, although it has been noted that media reports of absconds also played their part. The demise of the control order regime was imminent, but although the review recommended the repeal of the control order regime, it proposed a 'less intrusive', more clearly defined alternative.[176] The new mechanisms for terrorism control are TPIMs. Since the Counter Terrorism Review considered that a future derogation from Article 5 ECHR is 'highly unlikely',[177] there are no derogating provisions included in the new system; instead, the regime is designed to mirror more closely pre-existing control mechanisms available under the civil law. But the structure of TPIMs themselves appears to offer little by way of meaningful reform. Despite making modest improvements, many of the changes point more towards political rebranding than sweeping, wholesale change. It follows that critics of the control order regime, including Amnesty International and Liberty, remain highly critical of the replacement mechanism.[178] In their last year of force, control orders continued to be challenged, and the JCHR had called for orders in the period immediately preceeding the introduction of TPIMs to be mirrored on the new obligations.[179] Parliament declined to do so.[180]

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[175] Lord Macdonald, *Review of Counter-Terrorism and Security Powers: A Report by Lord Macdonald of River Glaven QC* (Cmd 8003, 2011) ('Macdonald Report').
[176] HM Government, *Review of Counter-Terrorism and Security Powers: Review Findings and Recommendations* (Cmd 8004, 2011) (Counter- Terrorism Review) 21 para 23 (Counter-Terrorism Review).
[177] Ibid 41.
[178] Tim Hancock, Amnesty International, 'UK: TPIMs anti-terrorism plans would 'seriously undermine' human rights', 4 September 2011, <http://www.amnesty.org.uk/news_details.asp?NewsID=19666>; Sophie Farthing, 'Anyone for TPIMs- Control Orders with a twist?', 2 September 2011, <http://www.liberty-human-rights.org.uk/news/2011/anyone-for-tpims-control-orders-with-a-twist-.php>.
[179] JCHR, *Eighth Report, Renewal of Control Orders Legislation 2011* (HL 106 HC 838, 2011).
[180] HC Deb 2 March 2011, cols 425-426.

Use of the new mechanisms began in January 2012.[181] As of 31st May 2012, there were 9 TPIM notices in force (all against British nationals),[182] and one individual had been charged with breaching his TPIM notice.[183]

Learning the lessons of the control order litigation

The aim of TPIMs was to create a system that would provide adequate protection without the degree of intrusiveness evident in previous control order obligations; many of the measures are diluted in order to allow individuals subjected to the new measures to lead a relatively normal daily routine, with the powers augmented by regular surveillance.[184] The new powers are remarkably similar to their predecessor: it is clear why Liberty branded TPIMs 'control orders lite'.[185] The requirement to report to a police station continues to feature in the new measures; breach of the conditions continues to amount to a criminal offence in the absence of a 'reasonable excuse';[186] and the High Court has a similar mandatory role to carrying out a 'full review' of each TPIM, with powers to revoke or quash offending measures.[187] Despite such similarities, there are some differences in terms of the obligations that can be imposed. The review proposed an end to both lengthy curfews and forced relocation, both of which appeared to reflect a desire to provide a more proportionate response to the terrorism threat.[188]

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[181] Terrorism Prevention and Investigation Measures Act 2011.
[182] HC Deb 19 June 2012 Col 57WS.
[183] Danny Shaw and Jeremy Britton, 'Terror suspect first to be charged under new TPIM law' *BBC News* (London, 1 June 2012) <http://www.bbc.co.uk/news/uk-18298438>.
[184] Counter-terrorism review (n 176) 41 para 23.
[185] Liberty Press Release, 'Progress on Stop and Search But Control Orders By Any Other Name', (26 January 2011) <http://www.liberty-human-rights.org.uk/media/press/2011/progress-on-stop-and-search-but-control-orders-by-any-ot.php> accessed 5 April 2011.
[186] s. 23(1)(b) Terrorism Prevention and Investigation Measures Act 2011 (TPIMA).
[187] s. 6 TPIMA 2011.
[188] s. 9(5) TPIMA 2011.

Under the new measures, curfews are replaced with an 'overnight residence requirement' that is supported by an electronic tag.[189] In practice, recent control orders had been enforced by means of a curfew on average of 11.9 hours in duration, up to a maximum of 14 hours.[190] Lords Carlile and Macdonald had contested the need for curfews, with the latter describing their use as 'disproportionate, unnecessary and objectionable,'[191] and the media had seized on this criticism.[192]

The end of forced relocation is a reasoned compromise in line with the judgment in *AP*.[193] Restrictions on geographical movement were relaxed: individuals are only excluded from foreign travel and tightly defined places.[194] These measures were strongly supported by Lord Macdonald[195] and are particularly significant in light of reports regarding the poor mental health of individuals subject to control orders.[196] Other welcome reforms include the relaxing of telecommunications restrictions and the use of the Internet, provided that authorities are given the relevant phone number and login details of the accounts. Bars on association with other individuals have been similarly relaxed.[197]

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[189] Sch 1 para 1 TPIMA 2011.
[190] Lord Carlile Sixth Report (n 171) 12 para 19.
[191] Macdonald Report (n 175) 13 para 28.
[192] Alan Travis, 'Scrap worst aspects of control orders now, says former DPP Lord Macdonald' *Guardian (London, 8 February 2011)* <http://www.guardian.co.uk/uk/2011/feb/08/control-orders-dpp-lord-macdonald> accessed 9 February 2011.
[193] The courts have both upheld and quashed control orders that incorporate a requirement to relocate depending on an assessment of the proportionality of the measures (*CA v SSHD* [2010] EWHC 2278; *SSHD v AP* [2010] UKSC 24; *BX v SSHD* [2010] EWHC 990 (Admin)).
[194] Sch 1, para 3 TPIMA 2011.
[195] Macdonald Report (n 175) 12. Lord Macdonald considered relocation also to be inimical to potential criminal prosecution.
[196] JCHR, *Ninth Report, Counter-Terrorism Policy and Human Rights (Sixteenth Report): Annual Renewal of Control Orders Legislation 2010* (HL 64 HC 395, 2011) para 44.
[197] The new provisions in TPIMA 2011, Sch 1, para 8 are less restrictive than those available under control orders and do not cover, for example, bars on chance meetings with specified individuals.

The impact of these modifications is significant in terms of the potential legal basis of any future challenges. Given the judgments in *JJ* and *AP* it is highly unlikely that a combination of these relaxed powers will fall foul of the high threshold required by an Article 5 ECHR challenge. Additionally, in light of the end to forced relocation and the relaxed bars on association and telecommunications, it us unlikely that any interference with the family and private lives of such individuals will be found to be a disproportionate interference under Article 8(2) ECHR. Nonetheless, it would be desirable to include an exhaustive statutory list of these potential TPIM conditions.

V. Creating TPIMS

Lord Macdonald suggested that the making of a TPIM should be linked to a certification by the DPP that a criminal investigation into that individual is justified; it was thought that this might promote synergies between the measures sought and the requirements of a possible prosecution.[198] The JCHR agreed with this proposal and favoured a much more structured link between the imposition of a TPIM and a criminal investigation,[199] as did various NGOs.[200] The government rejected these arguments, stating that while prosecution would always be the priority, there would inevitably be some instances in which a preventive civil order was necessary in the absence of the possibility of a viable prosecution.[201] The report of the Independent Reviewer corroborates these arguments.[202] The TPIMA requires the Home Secretary to consult with the chief officer of the appropriate police force, and the chief officer must commit to keeping the

[198] Macdonald Report (n 175) 10-11.
[199] JCHR, *Legislative Scrutiny: Terrorism Prevention and Investigation Measures Bill,* Sixteenth Report from the JCHR Session 2010-12 (HL Paper 180, HC 1432) paras 1.23-1.26.
[200] Justice, *Terrorism Prevention and Investigation Measures Bill: Briefing for House of Lords Report Stage* (November 2011), para 12.
[201] Government Reply to the JCHR, *Legislative Scrutiny: Terrorism Prevention and Investigation Measures Bill,* Sixteenth Report from the JCHR Session 2010-12 (2011, Cm 8167) 5-7.
[202] David Anderson, Final Report (n 3) 3.23.

possibility of prosecution under review for the duration of the TPIM.[203] There is a further requirement for the chief officer to consult with the DPP,[204] and the Home Secretary must keep the necessity of the TPIM under review.[205] This provision represents an attempt to prioritise the prosecution of terrorist suspects, but it is unclear as to how this 'strengthened' duty will actually be more effective than its criticized predecessor.[206] Lord Carlile had repeatedly asked for more detail to be included in the letters giving reasons as to why prosecution is not possible.[207]

There are five prerequisites needed for the Home Secretary to impose a TPIM notice on an individual. These requirements are modeled on the tests employed under the control order regime, and making these requirements explicit is a step towards legislative certainty.[208] The government rejected a higher degree of judicial supervision than that available under judicial review, as had been suggested by the JCHR.[209] The Home Secretary's decision is subject to judicial review: in a hearing, the court has the power to quash the TPIM notice, to quash specific measures, or to direct the Secretary of State to revoke the TPIM or vary its conditions.[210] The court must have regard to the five prerequisites needed

[203] s. 10(5) TPIMA 2011.
[204] s. 10(8)(a) TPIMA 2011.
[205] s. 11 TPIMA 2011.
[206] Compare the largely supportive statement by Lord Carlile (n 171) para 64, with the obverse comments of Lord Macdonald that 'controlees become warehoused far beyond the harsh scrutiny of due process and, in consequence, some terrorist activity undoubtedly remains unpunished by the criminal law' (Macdonald Report (n 175) 10).
[207] See Lord Carlile, Second Report (n 30) para 57; Third Report (n 44) para 74, which notes some improvement; Fourth Report (n 114) paras 77-78; Fifth Report (n 36) paras 153-154.
[208] HC Deb 5 September 2011 cols 95-108.
[209] Government Reply to the JCHR, *Legislative Scrutiny: Terrorism Prevention and Investigation Measures Bill,* Sixteenth Report from the JCHR Session 2010-12 (2011, Cm 8167) 8.
[210] Respectively s. 9(5)(a), (b), (c) TPIMA 2011.

for the Home Secretary to impose a TPIM notice:[211]

> Condition A: The Secretary of State reasonably believes that the individual is, or has been, involved in terrorism-related activities.

This criterion requires the court to examine all of the circumstances of the case and material before it. It is clear, for example, that if the individual has not made any attempt to refute the allegations and has remained silent notwithstanding the open evidence against him and a gisting of the closed evidence, adverse inferences can and will be drawn.[212] Any exhibition of 'security-conscious' behaviour is likely to provide part of the factual matrix that may inform the Home Secretary's belief.[213]

The required standard of proof has been raised from 'reasonable grounds to suspect' involvement in terrorism-related activity to 'reasonable belief'.[214] Lord Carlile has emphasized that there is a real difference between these two thresholds:[215] reasonable belief is a higher threshold than reasonable grounds for suspicion. As Lord Brown has stated, '[t]o suspect something to be so is by no means to believe it to be so: it is to believe only that it may be so.'[216] Even 'great suspicion' will not satisfy this higher standard.[217] In other contexts, the courts have struggled to form clear guidance on the meaning of reasonable belief.[218] There has been judicial confirmation that the 'reasonable belief' test is a higher standard than that of 'reasonable suspicion'[219] and commensurate clarification that following acquittal for a terrorism-related offence, it is possible to impose a

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[211] s. 3 TPIMA 2011.
[212] *SSHD v AY* [2012] EWHC 2054 (Admin) [125-126] (Justice Silber); and *see SSHD v AF* (No.3) [2010] 1 AC 269.
[213] *SSHD v AY* [2012] EWHC 2054 (Admin).
[214] Ibid.
[215] Carlile Report, Sixth Report (n 171) para 28.
[216] *R v Saik* [2006] UKHL 18, para 120.
[217] *R v Elizabeth Forsyth* [1997] 2 Cr App R 299, [318-319] (Beldam LJ).
[218] Ibid 319. See *R v Griffiths* (1974) 60 Cr App R 14, 18.
[219] *A & Others v SSHD* [2005] 1 WLR 414, [229] (Laws LJ); *R v Saik* [2007] 1 AC 18 [120] (Lord Brown): 'To suspect something to be so is by no means to believe it to be so: it is to believe only that it may be so'.

TPIM, given the very different standards of proof involved.[220] It has further been upheld that the 'reasonable belief' test does not equate to proof on the balance of probabilities.[221]

Lord Carlile opined that implementing the change will cause 'no material difference to the existing controlees,'[222] the majority of whom would satisfy the full civil standard of proof.[223] If this is the case, it begs the question of why the full civil standard could not have be used. Elsewhere, the civil standard has proven to be flexible in application, depending on the nature of the measures in question.[224] Adopting such a standard would be commensurate with the review's recommendations that restrictions should 'more closely mirror those available under civil law'.[225] Lord Carlile's opinion in this regard has been contradicted by David Anderson, who formed a 'firm impression from reading the evidence … that there were some [cases] in relation to which [the test] would not be met'.[226]

> Condition B: Some or all of the relevant activity is new terrorism related activity.

For the short-term imposition of TPIMs, this criterion has little value, since it will be satisfied where evidence of terrorism-related activity occurred at any time, provided there has previously been no TPIM in force.[227]

[220] *SSHD v AY* [2012] EWHC 2054 (Admin) [35] (Justice Silber).
[221] *SSHD v BM* [2012] EWHC 714 (Admin)[34] (Justice Collins).
[222] Carlile Report, Sixth Report (n 171) para 30.
[223] Ibid para 29.
[224] As to a potentially variable civil standard of proof, see generally Ennis McBride, 'Is the civil "higher standard of proof" a coherent concept?' (2009) 8(4) Law Probability and Risk 323; Peter Mirfield, 'How many standards of proof are there' (2009) 125 Law Quarterly Review 31. It is generally accepted that there is one civil standard, the balance of probabilities, but that the courts may choose to apply a criminal standard where it appears to be justified (for example when the liberty of an individual is at stake).
[225] Counter-Terrorism Review (n 176) 40. It may be that the flexibility of the civil standard of proof is precluding such a development: the government could be reluctant to risk the possibility of the court equating the civil and criminal standards, given the severity of the implications for an individual subjected to such measures.
[226] David Anderson QC, Final Report (n 3) 5.14.
[227] s. 3(6) TPIMA 2011.

Condition B is therefore more likely to come into play as the regime matures, and individuals are subjected to renewed TPIM notices.

> Condition C: The Secretary of State reasonably considers that it is necessary for purposes connected with protecting members of the public from a risk of terrorism, for terrorism prevention and investigation measures to be imposed on the individual.

Under this heading, a 'novel' argument has been advanced.[228] It has been suggested that if an individual had been previously subjected to a control order for two years, then in the absence of terrorism-related activity during that period, it would not be necessary and proportionate to continue to impose restrictive conditions on that individual.[229] The High Court rejected this argument, holding that the Act was clear.[230] The court will consider a situation where an individual makes no attempt to demonstrate that he has relinquished an extremist agenda. Although there is no burden upon him to demonstrate that allegations are untrue, the principle against self-incrimination does not preclude an individual from adducing some evidence that a terrorism-related agenda has been rejected. A failure to testify will therefore result in the Court giving less weight to the contentions of the individual.[231]

> Condition D: The Secretary of State reasonably considers it is necessary for purposes connected with preventing or restricting the individual's involvement in terrorism related activity for the

[228] *SSHD v AY* [2012] EWHC 2054 (Admin) [129] (Justice Silber). This argument reflects the observations in chapter 1 that the courts may Parliamentary intention through the use of *Hansard.* The court also considers the opinion of Lord Carlile as Independent Reviewer of Terrorism Legislation.

[229] On behalf of AY: *SSHD v AY* [2012] EWHC 2054 (Admin) [142].

[230] Ibid [159-168]; and see *SSHD v AM* [2012] EWHC 1854.

[231] *SSHD v AM* [2012] EWHC 1854 [22-23] (Justice Mitting); *SSHD v BM* [2012] EWHC 714 (Admin)[23] (Justice Collins). And see, *ibid*: ' [the individual] knows the identities of those with whom he must have no contact and can explain … what his relationships (if any) with them are. In particular, he can explain that such relationships have nothing to do with terrorism. This is not a situation such as applies in a criminal case where a defendant is entitled to say nothing and play his cards close to his chest. While he does not have to explain himself, BM's failure to do so when he could can properly be used to form the view that an adverse conclusion is justified' [36].

specified terrorism prevention and investigation measures to be imposed on the individual.

Under this condition, the test that will be applied by the High Court will be analogous to the control order regime: when reviewing the measures imposed under a TPIM, the court will have regard to the proportionality of the measures, ensuring that the measures are intrusive only to the extent as is necessary, and may explore alternative options that may achieve the same result.[232] Strict scrutiny of the conditions will be carried out, but the court must pay a degree of deference to the decisions taken by the Home Secretary.[233] This form of judicial review is likely to be rigorous.[234] Where an individual has previously been subjected to a control order, and judgment has already been rendered, the court will not automatically use this as a 'building block' for a TPIM decision.[235] Instead, the approach will be to check the instant court's findings against those previously made by SIAC.[236]

What is clear from the more recent jurisprudence is that the Home Secretary and the courts are recognizing the need for an 'exit strategy' from each TPIM notice.[237] TPIM measures that are not conducive to such a strategy may be particularly scrutinized, for example where it is already clear that prosecution is unlikely and deportation is not an option.[238] As has been judicially stated:

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[232] *SSHD v AY* [2012] EWHC 2054 (Admin) [29-30] (Justice Silber).
[233] *SSHD v AM* [2012] EWHC 1854 [28] (Justice Mitting). In this way, AM's TPIM was to be modified so as to remove the requirement for him to provide 2 days' notice in advance of any first meeting with a new person.
[234] Government reply to the JCHR Sixteenth Report, above (n 209) 9.
[235] Ibid [43]. Particularly where there is a significant amount of time between the judgments, given the differences between the two regimes. Note, however, that this will not always be the case: *SSHD v AF (No 2*) [2008] 1 WLR 2528 [37,42] (Sir Anthony Clark MR).
[236] *AR v SSHD* [2008] EWHC 3164 [5] (Mitting J); *SSHD v AY* [2012] EWHC 2054 (Admin) [45] (Justice Silber).
[237] *SSHD v BF* [2012] EWHC 1718 (Admin) [61-62] (Justice McCombe);
[238] *SSHD v AM* [2012] EWHC 1854.

> 'if a TPIM has achieved its purpose and the Secretary of State has no reason to believe that any terrorism related activity has occurred, there will be no power to impose a fresh TPIM whether or not, absent any new terrorism-related activity, the Secretary of State has reason to believe the subject will involve himself in terrorism-related activity.'[239]

This is a welcome development that appears to recognize, for the first time, that TPIMs cannot continue indefinitely, even if the Act that brought them into being is only subjected to 5-yearly review. TPIMs notices are limited to a 2-year maximum, albeit with the proviso that a new TPIM may be created where new evidence emerges that an individual has re-engaged in terrorism-related activity.[240] Once created, it is less likely that a TPIM notice will be renewed past an initial 12 month period. It should be noted that Lord Carlile identified at least two individuals subject to control orders who still would risk re-engaging in terrorism related activities after such a 2-year period.[241] The 2-year limit is a sensible and proportionate compromise in line with Lord Carlile's previous recommendations.

As to the length of the 'overnight residence requirement', the court has provided additional guidance. Any curfew should be imposed 'overnight' and should 'bear some relationship to the hours between which most people would regard it as reasonable to think that people might be at home, the evening having come to an end… overnight does not reasonably stretch beyond 9pm until 7am.'[242] Eight to ten-hour curfews around these times are likely to be used. Parliament should set a maximum limit on the duration of these curfews;[243] the absence of a finite

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[239] *SSHD v BM* [2012] EWHC 714 (Admin)[16] (Justice Collins).
[240] Lord Carlile has suggested the test for subsequent creation of TPIMs should be at the civil standard of proof: see Lord Carlile Sixth Report (n 171) para 56.
[241] Ibid 23 para 58.
[242] *SSHD v BM [2012*] EWHC 714 (Admin) [52] (Justice Collins).
[243] While the acceptable duration of such a curfew for Article 5 ECHR purposes has been determined by the court in *JJ* and *AP*, is still sensible to include a statutory maximum so as to ensure transparency and consistency.

limit in statute ignores concerns raised by the JCHR.[244] 8 hours would appear to strike a more acceptable balance if the aim is to ensure that individuals subjected to the measures could lead a relatively normal life.

> Condition E: The Secretary of State has been given permission by the Court … or the Secretary of State reasonably considers that the urgency of the case requires terrorism prevention and investigation measures to be imposed without obtaining any such permission.

Usually, permission will be sought from the High Court, and the court will apply the usual procedures of judicial review to ensure that the Home Secretary's decision was not flawed.[245] The initial application will be made *ex parte* and there is no requirement for the concerned individual to be informed.[246] In urgent cases, the Home Secretary must state that the urgency requires measures to be imposed without prior court permission.[247] Immediate referral, specifically within 7 days, must be made to the court; again the hearing is *ex parte* and the function of the court is the same as under the non-urgent procedure.[248] Interestingly, the court is also given the power to 'make a declaration' if it considers that the Home Secretary's decision to impose a TPIM notice by the urgent procedure is obviously flawed.[249] A declaration to this effect does not affect the power of the court to quash or uphold the TPIM notice, but it appears to be intended to provide an additional political safeguard to the use of the emergency procedure.[250]

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[244] JCHR, *Counter-Terrorism Policy and Human Rights (Ninth Report): Annual Renewal of Control Orders legislation 2008, Tenth Report of Session 2007-8* (HL 57 HC 356, 2007) paras 47-48.
[245] s. 6(3)(a) and s. 6(6) TPIMA 2011.
[246] s. 6(4) TPIMA 2011.
[247] Sch 2 para 2 TPIMA 2011.
[248] Sch 2 para 3 TPIMA 2011.
[249] Sch 2 para 4(4) TPIMA 2011.
[250] Ibid.

Application of the benchmarks to the TPIM regime

TPIMs were subject to much more extensive Parliamentary scrutiny than their predecessors, not least due to the fact that they were conceived by a reasonably lengthy and open Counter-Terrorism Review, [251] which received evidence from a number of expert sources and was, in turn, debated in Parliament.[252] The result of this debate was that the final TPIM regime that has been enacted in statute has been revised in some welcome ways, but inevitably compromises were made in which potential modifications were rejected.[253] Lords' amendments were tabled that would have increased the standard of judicial review, effectively replacing the Home Secretary's determination with that of the High Court. These amendments were resisted by the government and rejected by considerable margin in the Upper Chamber, although there were some notable voices of dissent.[254] There were a variety of interventions made by learned members in the House of Lords, including Lord Lloyd of Berwick, Lord Carlile, and Lord Macdonald, all of whom had previous experience of reviewing the operation of counter-terrorism legislation.[255]

During the passage of the Bill, limits were imposed on the nature of possible enhanced measures.[256] As originally envisaged, the Bill did not have a sunset clause and sought to implement TPIMs as a permanent addition to the statute book. Following intervention at the House of Commons Committee stage, the Government added a five-year sunset

[251] Counter-Terrorism Review (above n 176).
[252] HC Deb, 26 January 2011, col 306.
[253] See House of Lords Select Committee on the Constitution 19th Report of Session 2010-
12, Terrorism Prevention and Investigation Measures Bill (15 September 2011) para 10-
13.
[254] HL Deb 15 November 2011 Col 596. The amendment was rejected 273-79.
[255] See, for example, HL Deb 19 October 2011, Cols 290-305.
[256] See, e.g. HC Deb 5 September 2011 Col 101.

clause to the Bill.[257] Various Parliamentarians introduced amendments favoured by the JCHR and NGOs that the TPIM regime should be subject to annual renewal, but these amendments were withdrawn during the Committee Stage in the House of Lords.[258] Lord Pannick pushed through such an amendment to Report stage, which was narrowly defeated after lengthy debate.[259] Concerns were perhaps placated by the introduction of a power for the Home Secretary to repeal the TPIM powers if she considers them to be no longer necessary, together with provision for the powers to be reinstated by the Home Secretary if required.[260] While this is indeed a novel intervention, this power is largely symbolic, since it is unlikely that a Home Secretary would voluntarily relinquish powers and risk having to urgently reinstate them. A five-year sunset clause appears in the new Act.[261]

In terms of legislative oversight, it has been shown that there is a need for temporal limitation of counter-terrorism powers in order to avoid undesirable normalization of far-reaching powers. The five year sunset clause goes some way to acknowledging that the TPIM regime should not be a permanent addition to the counter-terrorism armoury, but it falls far short of the (admittedly imperfect) annual renewals of the control order regime.[262] The new measures mirror many control order conditions,

[257] HC Deb 5 September 2011, Cols 50-86.

[258] Justice, *Terrorism Prevention and Investigation Measures Bill: Briefing for House of Lords Report Stage* (November 2011), para 17. See particularly the amendment moved by Lord Pannick in the House of Lords (HL Deb 1 November 2011, Col 1133; HL Deb 15 November 2011, Col 636).

[259] HL Deb 1 November 2011, Col 1133; HL Deb 15 November 2011, Col 636. The amendment was defeated 165-168.

[260] s.21(2) TPIMA 2011.

[261] s. 21(1) TPIMA 2011.

[262] During debate at the Report Stage, Lord Lloyd recognized that despite continued renewals in which the need for the control order regime was questioned in the House of Lords, no progress had ever been made on the issue and therefore the introduction of such a power in the new TPIM Bill could simply mean that the Upper Chamber would be 'wasting their breath'. Other members of the House of Lords were a little more optimistic regarding the utility of an annual renewal mechanism as a means to keep the executive in

imposing obligations on individuals in the absence of proof beyond reasonable doubt. Since their purpose, like that of the control order system, is to plug a gap in prosecution and removal strategies, it is somewhat autocratic and inherently undesirable to expect that this new system should not require the further approval of Parliament before 5 years have expired. Instead, a 2-year sunset clause, requiring primary legislation, should be implemented. This would allow for a period of considered reflection on the operation of the regime before renewal. It would also permit Parliamentary consideration of the Independent Reviewer's Report on how the new measures had worked in the first year of operation. Interim court judgments could be considered.

One area for potential greater Parliamentary scrutiny could lie in the recommendation of David Anderson that the quarterly statements to Parliament on the operation of the TPIM regime should refer to all open judgments, and provide details of the regional location of TPIM subjects.[263] With political sensitivity, the Independent Reviewer has invited the JCHR and other Parliamentary Committees to consider how a link between the Reviewer and their Committees would help Parliamentary review of the legislation, in the absence of the requirement for annual renewal by a statutory sunset clause.[264]

Proportionality of the measures

While TPIMs were intended to 'rebalance' the counter-terrorism armoury, there were real concerns expressed that the new regime would not

check and ensure that the powers were not normalized. See HL Deb 15 November 2011 Cols 570-596.

[263] David Anderson, Final Report (n 3) 82.

[264] Ibid.

provide a sufficient degree of protection.[265] The end of forced relocation provided a microcosm of these arguments: during the last few months of the control order regime, several individuals had contested the legality of their control order, *inter alia,* on the basis of such a requirement, and the Home Secretary had successfully challenged their applications to the court on that basis.[266] Concerns were expressed that in an emergency, the Home Secretary may require additional powers, such as those available under the control order regime, but may not have the time to seek Parliamentary approval.[267]

During debate, these concerns were placated by a two-pronged approach to the recognition of the potential need for 'enhanced' measures. First, there is provision for the Home Secretary to be given a temporary power to impose enhanced measures, where she considers that it is necessary to do so by reason of urgency, where Parliament is dissolved and hence unable to legislate, and where she is satisfied, on the balance of probabilities, that the individual is or has been involved in terrorism-related activity.[268] The measures that may be imposed under such an order are 'enhanced'.[269] If such a TPIM notice is created, there is a requirement that it must replace any ordinary TPIM that is then in force.[270] The notice making power will sunset after 90 days or earlier, as specified in the order.[271] As soon as is practicable after making the order, the Secretary of State must lay it before Parliament.[272] In practice, it is unlikely that this specific power will need to be frequently deployed, but its enactment is

[265] HC Deb 5 September 2011, Col 110. Both the Independent Reviewer of Terrorism Legislation and police offers, giving evidence to the Committee, stated the importance of keeping a power of forced relocation.
[266] *CD v SSHD* [2011] EWHC 1273 (Admin).
[267] HC Deb 5 September 2011, Cols 80-120.
[268] S. 26(1)-(2) TPIMA 2011.
[269] s. 26(3) TPIMA 2011.
[270] s. 26(5) TPIMA 2011.
[271] s. 27(1)(a), (b) TPIMA 2011.
[272] s. 27(3) TPIMA 2011.

highly significant to the strategy of terrorism control since it laid the groundwork for a draft 'enhanced' TPIM Bill.[273]

The enhanced Bill was introduced late during Parliamentary consideration of the TPIM Bill[274] and was designed to provide a more robust (and intrusive) package of measures where the Home Secretary deemed them necessary.[275] The draft Bill may remain on file to be used if there is a terrorism-related emergency that necessitates greater control powers than those available under the 2011 Act. There were many discussions in Parliament, particularly during debate on the pre-charge detention draft Bills, when consideration was given to the circumstances in which such a Bill would be introduced.[276] It had been stated that the provisions will be brought in only in the event of a very serious terrorist attack that cannot be managed by other means.[277] Following public discussion, there may be a degree of political force in this statement: it is less likely that a Home Secretary will blithely ignore the sentiment and implement the enhanced measures in the absence of a serious terrorism-related emergency.[278] The Independent Reviewer suggests that it is difficult to see how such an emergency trigger could be implemented in legislation,[279] but there is certainly scope to consider this possibility, bearing in mind the concomitant

[273] Draft Enhanced Terrorism Prevention and Investigation Measures Bill (September 2011, Cm 8166) (DETPIMB).
[274] The Draft Bill was published on 1 September 2011, some four days before the House of Commons Report Stage.
[275] HC Deb 5 September 2011 Col 90.
[276] Ibid Cols 90, 92: 'I shall not second-guess the circumstances in which the draft Bill and those provisions would be required. Clearly, it would be in exceptional circumstances in which we were faced with a serious terrorist risk that could not be managed by any other means. That is the sort of situation we are contemplating, but I am not prepared to second-guess future developments in the threat picture'.
[277] This explanation was referred to in the Counter-Terrorism Review and was placed in the explanatory notes to the DETPIMB (Cm 8166): *Explanatory notes, 1.*
[278] A point acknowledged (in a positive way) by the Independent Reviewer: David Anderson QC, *Evidence to the Joint Committee on the Draft Enhanced Terrorism Prevention and Investigation Measures Bill* (HC 491-I, 11 July 2012) 5.
[279] Ibid.

difficulty posed by the doctrine of Parliamentary sovereignty.[280] Political entrenchment could play a part in ensuring that emergency powers are not easily sought.[281]

The provisions in the enhanced Bill are essentially the same as the temporary power contained in the 2011 Act. There are additional safeguards incorporated, including a 12 month sunset clause,[282] renewable by statutory instrument,[283] placed before and affirmed by Parliament within 40 days,[284] following mandatory consultation with the independent reviewer, the Intelligence Services Commissioner, and the Director-General of the Security Service.[285] Surprisingly, however, there is also provision that the renewal instrument does not need to be laid before Parliament where the Home Secretary declares it to be urgent.[286]

Detailed scrutiny of the draft bill is to be provided by a Joint Select Committee in 2012,[287] which is far preferable than simple consultation with opposition members in Parliament.[288] Members of Parliament and academics have suggested that if the powers may be required at some point in the future, it would have been preferable to include them in the initial TPIM Bill and subject them to scrutiny in the standard way.[289] It is suggested that this approach may not have solved the problem; without lengthy pre-legislative consultation conducted on the enhanced measures, it is unlikely that Parliamentary scrutiny would be greater than that conducted by the Joint Committee. The main problem with the Enhanced

[280] Ibid 4.
[281] See above, ch 2 p 67-68.
[282] DETPIMB, cl 9(1).
[283] DETPIMB, cl 9(2).
[284] cl 9(6)(b) DETPIMB.
[285] cl 9(3) DETPIMB.
[286] cl 9(5) DETPIMB.
[287] The Committee is expected to report by November 2012.
[288] HC Deb 5th September 2011 Col 53.
[289] Clive Walker and Alexander Home, 'The Terrorism Prevention and Investigation Measures Act 2011: one thing but not much the other?' [2012] Crim LR 421, 437-438.

Bill is that it was introduced late and hence the opportunity for meaningful scrutiny without the use of a Select Committee was circumscribed. This is regrettable, particularly since the government had considerable advance notice that replacement measures would be necessary.

As the Minister responsible for Counter-Terrorism has stated, there is hope that the enhanced powers will be 'considered rationally, calmly and coldly by the Joint Committee':[290] the scrutiny with which the previous Joint Committee considered the Draft pre-charge detention extension bills demonstrates the value of such an oversight mechanism.[291] As noted in that context, there remain problems with this approach: the draft Bill, especially given the presence of temporary analogous powers under s. 26 TPIMA, risks creating a presumptive system that will be too easily implemented, rather than a system of last resort. Certainly it should not be possible to renew the provision without Parliamentary approval: the Home Secretary should be obligated to seek timely Parliamentary renewal. As a significant additional difficulty, the House of Lords Constitution Committee has cautioned against the use of emergency legislation in the context of pre-charge detention, since it risks blurring the boundaries between the legislative and the judiciary; a highly charged debate may place considerable pressure on the latter.[292] It is important to separate the role of Parliament, 'which is to provide powers of general application, and the role of the judiciary, which is to decide upon application to exercise those powers in particular cases'.[293]

In terms of the specific powers offered by the Enhanced Bill, there are few significant differences between the powers that may be imposed and

[290] HC Deb 5th September 2011 Col 92.
[291] Above, ch 3 p 184-185.
[292] House of Lords Constitution Committee, 5 August 2008, Tenth Report, session 2007–08 *Counter-Terrorism Bill: The Role of Ministers, Parliament and the Judiciary,* para 38.
[293] Joint Committee on the Draft Detention of Terrorist Suspects (Temporary Extension) Bills (Session 2010-12) (HL Paper 161 HC Paper 893) (23 June 2011) para 86.

those previously available under the control order regime. There are four principal issues. First, the power to create an ETPIM would be exercisable only in the presence of proof on the balance of probabilities of involvement in terrorism-related activity.[294] Second, the range of restrictions available under an ETPIM is finite, as opposed to the potentially unlimited range of restrictions available under control orders.[295] Third, ETPIMs would be subject to a 2-year limit.[296] Fourth, an ETPIM places less onerous restrictions upon travel abroad than those available under control orders.[297]

Notwithstanding these differences, the ETPIM Bill would effectively bring about a more closely limited control order regime. As David Anderson has stated, it is 'difficult to get too upset about the ETPIM Bill because, really, it simply reintroduces the law as it was.'[298] It is likely that substantial (probably up to 14 hour) curfews could be reintroduced and forced relocation in specific instances could be considered, since both were confirmed as lawful and proportionate under the control order regime.[299] Restrictions on communications with others, greater restrictions on movement and the use of communication devices would be likely.[300] The reintroduction of these powers would amount to a retrograde step, but the provisions could clearly be proportionate to the terrorism threat.

[294] DETPIMB cl 2(1).
[295] DETPIMB, Sch 1.
[296] The two-year limit is imposed by virtue of cl 3(1)(a) DETPIMB, mirroring the limit imposed by s. 4 TPIMA 2011.
[297] DETPIMB, Sch 1 cl 2.
[298] David Anderson QC, *Evidence to the Joint Committee on the Draft Enhanced Terrorism Prevention and Investigation Measures Bill* (HC 491-I, 11 July 2012) 4.
[299] With regard to forced relocation, see the dicta of Justice Lloyd Jones: 'I consider that the case for relocating CE is compelling. The Secretary of State has reasonable grounds to suspect that CE is a member of a group based in London and overseas which is engaged in terrorism-related activity and that he has a continuing intention to travel to Somalia to engage in such activities. I am entirely satisfied that the relocation obligation is rationally connected to the objective of protecting the public from the risk of terrorism. The placing of physical distance between members of a group is a valuable and legitimate means of controlling the risk which they pose to members of the public' *SSHD v CE* [2011] EWHC 3159 (Admin) [98].
[300] ETPIMB, Sch 1 cls 8,9.

Conclusions: application of the benchmarks to the control strategies

Notwithstanding the abolition of the control order regime, control orders and their successor, TPIMs, have been considered necessary by both the government and the Independent Reviewer of terrorism legislation.[301] Control orders were declared to be effective and not self-defeating.[302] The way in which these regimes operated and will continue to operate raises numerous issues from the perspective of constitutional optimization; many of these will inform the overarching conclusions.[303]

Benchmark 1: certainty

One of the evident difficulties with the control order regime was that a disparate corpus of law formed over a period of several years; the result was a regime mired in uncertainty. It would have been desirable to codify the principles from *JJ, MB, F and AP* into statute. Had this proposal of the JCHR been followed in the first instance, much litigation may have been avoided. The introduction of the TPIM regime did place on a statutory footing many of the prerequisites needed for the Home Secretary to impose a TPIM notice on an individual. These requirements are modeled on the tests employed under the control order regime, and will help to imbue certainty into the provisions. There remains scope to include an exhaustive statutory list of defined TPIM measures. Parliamentary consideration should also be given as to whether curfews should be retained. Absent this change, a statutory maximum of 8 hours should be

[301] David Anderson, Final Report (n 3).
[302] Ibid. Note also the conclusions regarding fairness: ‘Though it fell well short of the ideal, and for all the uncertainties and delays that it produced, the control order system did manage in the period under review to provide a substantial degree of fairness to the controlled person’.
[303] Below, ch 6.

applied to any future curfew in order to propagate certainty and transparency.

Benchmark 2: legislative oversight

The five year temporal limitation of the TPIM regime is preferable to no limitation at all, but even the flawed renewal process that operated under the system of control orders would have been welcome. Far preferable would have been the implementation of a 2-year sunset clause, renewable by primary legislation in Parliament. There is no reason why the Home Secretary could not seek timely renewal of the provisions. It should not be possible to renew the regime in the absence of Parliamentary approval.

In terms of the oversight of enhanced measures, it is correct that a shorter sunset clause should operate. The manner of the legislative scrutiny to which these measures are subjected is open to debate. Detailed scrutiny by Select Committee is welcome, but should not be routinely sought as a replacement to early inclusion in primary legislation, following an appropriate consultation period. It is also important to find ways in which to legislative effectively in a period of emergency; there is scope to consider the nature of an emergency trigger mechanism in statute, bearing in mind the difficulties posed by the doctrine of Parliamentary sovereignty.

In relation to ongoing oversight of the regime, there is scope for a more formal link between Committee and Reviewer reports and Parliamentary consideration. There were numerous instances in which recommendations by the JCHR and Independent Reviewer were ignored. Informed debate would be facilitated if these could be implemented as part of an annual or biannual renewal process.

Benchmark 3: judicial oversight

In several of the control order cases, a judicial declaration of incompatibility would have been a more desirable outcome, particularly in the cases of *MB* and *F.* This would have catalysed legislative intervention and imbued the regime with much-needed certainty. Other possibilities have been suggested: the court could have chosen to increase the standard of judicial review. But the reality is that neither ss. 3 nor 4 were perfect tools of choice, and there may be scope to consider an alternative mechanism for statutory construction in these cases. David Anderson's suggestion for quarterly reports to Parliament on the outcome of recent TPIM cases[304] will be a step in the right direction.

There was no fundamental legal challenge to the validity of the control regime as a whole: the decisions demonstrated judicial micro-analysis rather than macro-analysis. The government rejected a higher degree of judicial supervision than that available under judicial review, as had been suggested by the JCHR. Greater judicial assertiveness could be encouraged, particularly while conducting 'strict scrutiny' together with 'appropriate deference' during judicial review of TPIM notices.

Benchmark 4: proportionality

When reviewing the measures imposed under a TPIM, the court will have regard to the proportionality of the measures, ensuring that the measures are intrusive only to the extent as is necessary, and may explore alternative options that may achieve the same result. The requirement for a heightened burden of proof is a welcome modification; further consideration could be given as to whether using the alternative full civil

[304] above (n 263).

standard is a realistic option in light of operational requirements. This development could result in a more proportionate use of the TPIM powers.

The need for a heightened standard of proof before enhanced measures may be introduced should ensure that more severe conditions, such as forced relocation and lengthy curfews, will be used only where proportionate. Measures implemented under conventional TPIMs will almost certainly satisfy the proportionality and necessity requirements of Articles 5 and 6 ECHR, if sufficient attention is given to the control order jurisprudence discussed above. The 2-year limit on each TPIM, together with the stringent recognition given to exist strategies, should also help to ensure the future proportionality of TPIMs.

The ability of the control order and TPIM regimes to deal with the threat posed by foreign national terrorist suspects is limited. Neither regime was, nor should be, intended as a permanent strategy. Following the repeal of the detention measures under ATCSA, the UK government has implemented a pre-existing mechanism of immigration detention and removal by way of an alternative exit strategy. Several individuals who were initially subjected to ATCSA detention and then control orders have now been deported under this mechanism.[305] It is to an analysis of these provisions that the investigation will now turn.

[305] Of the 52 people who had been subjected to control orders, 10 were served with notices of intention to deport, 6 of whom were deported as of March 2012 (David Anderson Report (n3) 41)).

Chapter 5

Removing Terrorist Suspects

Removal strategies are of prime importance where there is a desire to find an alternative mechanism to those of terrorist detention or control.[1] Deportation is possible only if the terrorist suspect is a foreign national,[2] and removal of a terrorist suspect from the jurisdiction may be precluded by a variety of factors. Perhaps the overarching prohibition stems from the obligation not to return an individual where there is a risk of torture (the non-refoulement principle). States have resorted to 'assurances', or diplomatic promises, by which they hope to reduce this risk to acceptable levels, in order to remove a suspect from their soil in a constitutional and rights-compliant manner.

This chapter examines the use of deportation in England and Wales and US and is structured in four parts. Part I explores the framework for removal procedures in England and Wales and contextualizes the bars to terrorist removal through an analysis of the most recent jurisprudence of the ECtHR. Part II examines the approach taken in the United States, in order to identify any issues of relevance or concern. In part III, the chapter then considers the overlapping criticisms that have beset DWA regimes. Part IV concludes the analysis: it is argued that each of the criticisms may be addressed by adhering to the benchmarks for constitutional optimization. In particular, the DWA regime should be statutorily

[1] None of the individuals currently subjected to TPIMS are eligible for deportation since they are British nationals (David Anderson QC, 'Control Orders in 2011: Final Report of the Independent Reviewer on the Prevention of Terrorism Act 2005' (March 2012) 3.50).
[2] S.40(4) British Nationality Act 1981 provides that the Home Secretary cannot deprive an individual of their British Nationality if it would render him stateless. See also *Convention relating to the Status of Stateless Persons* (ECOSOC RES/526, 28 September 1954) (in force 6 June 1960).

established, subject to mandatory Parliamentary and Independent review, and guidance as to its operation should be codified.

I. Removal of Terrorists from England and Wales

The deportation regime that has been in place in the UK has variously been described as a 'sprawling corpus'[3] of 'imperfect'[4] laws of 'daunting complexity'.[5] Non-British foreign nationals from outside the EU are subject to Immigration control.[6] Leave to enter or remain in the UK may be given, but can be revoked at any time, even if a non-citizen has indefinite leave to remain in the UK, where the Home Secretary considers it 'conducive to the public good'.[7] These powers are used frequently in terrorism-related cases.[8] Indeed, deportation and exclusion form part of the PURSUE strand of the government's counter-terrorism strategy,[9] since its use requires a lower standard of proof than is required in order to substantiate a criminal conviction. If the Home Secretary wishes to rely on a particular act as evidence to deport, the civil standard of proof applies.[10] The House of Lords has affirmed that it is the function of the Home Secretary to carry

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[3] Alison Harvey, 'Legislative Comment: The Borders, Citizenship and the Immigration Act 2009' (2009) 24 Journal of Immigration, Asylum and Nationality Law 118.
[4] AW Bradley and KD Ewing, *Constitutional and Administrative Law* (14th edn, Pearson 2008) 452.
[5] David McClean, 'Immigration and asylum in the United Kingdom' (2010) 12 Ecclesiastical Law Journal 152.
[6] s. 3 Immigration Act 1971. Note that aliens who are nationals of EU countries benefit from the right to freedom of movement within the EU and do not require leave to do so: s. 7 Immigration Act 1988.
[7] s. 3(5) Immigration Act 1971.
[8] For example, between July 2005 and the end of 2008, 153 people were excluded from the UK on national security grounds (Home Office, *Pursue, Prevent, Protect, Prepare: The United Kingdom's Strategy for Countering International Terrorism* (Cmd 7547, 2009) 66) (CONTEST 2009).
[9] Although CONTEST stresses that these executive powers affect only a very small number of individuals (ibid 62), this does not detract from the fact that these alternative treatment strategies are in use and have proven problematic. By way of statistics, CONTEST provides that some 20 individuals were subject to deportation or had deportation appeals pending in 2008 (ibid 67).
[10] *SSHD v Rehman* [2001] UKHL 47 [22] (Lord Slynn).

out an assessment of risk posed by the individual and to determine whether their presence in the UK is not 'conducive to the public good'. Their Lordships have cogently stated the position:

> '[The Secretary of State] is entitled to have regard to the precautionary and preventative principles rather than to wait until directly harmful activities have taken place, the individual in the meantime remaining in this country. In doing so he is not merely finding facts but forming an executive judgement or assessment. There must be material on which proportionately and reasonably he can conclude that there is a real possibility of activities harmful to national security but he does not have to be satisfied, nor on appeal to show, that all the material before him is proved, and his conclusion is justified, to a "high civil degree of probability".'[11]

These broadly conferred deportation powers are analogous, though not identical, to those formerly exercised in the UK under the control order regime, and similar deference to the security-based assessment of the Home Secretary appears in TPIMs.[12] When the decision to make a deportation order is made, the subject of the order can be detained under the authority of the Secretary of State.[13] Detention pending deportation is an essential feature of the risk-management of terrorist suspects.[14] The Secretary of State's determination regarding the threat posed by a terrorist

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[11] Ibid.
[12] The similarities relate to the possibility for secret intelligence to inform the process and the fact that the decision stems from a simple executive determination (though note that in the case of TPIMS, court authorization (save as for urgent cases) is also required under s. 3 of the Terrorism Prevention and Investigation Measures Act 2011).
[13] Immigration Act 1971 sch 3 para 2(2).
[14] Following *Regina v Governor of Durham Prison ex parte. Hardial Singh* [1984] 1 WLR 704 at 706, an individual can be detained only for a period that is reasonably necessary, and the Secretary of State should not seek to detain him if it becomes apparent that deportation cannot take place within a reasonable period. Similarly, the Secretary of State must act with reasonable diligence and expedition to effect removal. Deportation proceedings must therefore be 'in progress' before detention is a possibility: see also *Chahal v UK* App no 22414/93 (ECtHR, 15 November 1996) [113].

suspect, and a decision to deport based on whether their presence is not conducive to the public good, is largely objective in nature. The courts will reach their own assessment;[15] but the judiciary have consistently leaned towards affording the executive a considerable degree of deference.[16]

Section 3(2) Immigration Act 1972 gives the Home Secretary the power to make Immigration Rules. These powers must be exercised in accordance with the provisions of the HRA 1998.[17] Immigration control decisions are generally subject to an appeals process heard by the Asylum and Immigration Tribunal.[18] For terrorist suspects, such appeals are often lodged against decisions to withdraw leave to remain in the UK or refusal to revoke a deportation order and are heard by the Special Immigration Appeals Commission (SIAC),[19] which can conduct closed hearings where necessary in order to receive secret information. Deportees are represented by Special Advocates in this situation.[20]

Deportation may represent an attractive option to governments wishing to protect their populous but it is not without its limitations; the need for States to implement measures to deal with 'home-grown' terrorists

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[15] *N (Kenya) v The SSHD* [2004] EWCA Civ 1094, [83] (Judge LJ). The Special Immigration Appeals Commission Act 1997 established SIAC, a superior court of record, to hear such national security appeals.

[16] *SSHD v Rehman (AP)* [2001] UKHL 47, [26] (Lord Slynn): the Home Secretary 'is undoubtedly in the best position to judge what national security requires even if his decision is open to review. The assessment of what is needed in the light of changing circumstances is primarily for him'.

[17] A provision contained in r 2 (HC 395 (1994-5) as amended), that is largely rendered superfluous by ss. 6(1) and 6(3)(b) of the Human Rights Act 1998.

[18] Asylum and Immigration (Treatment of Claimants etc) Act 2004 s. 26 and sch 4.

[19] The jurisdiction and task of the Commission is to determine an appeal against a decision to make a deportation order under s. 5(1) of the Immigration Act 1971 when the Secretary of State has issued a certificate under s. 97 of the Nationality Immigration and Asylum Act 2002 (see s. 2(1)(a) SIAC Act 1997 and s. 82(2)(j) of the 2002 Act).

[20] An analysis of the role and function of Special Advocates lies outside the ambit of this article, and the ECtHR has held that deportation is a Public law issue and not determinative of any civil right: *Maaouia v France* (2001) 33 EHRR 42, [36-38].

remains.[21] Additionally, the deportation of terrorist suspects is an International phenomenon. Other countries that do not share Western ideologies, or indeed share commitments to International Human Rights guarantees, are often implicated in these arrangements.[22] In these circumstances, a complex set of agreements may be necessary to mitigate against the risk of a suspect being subject to a human rights violation upon their return.

A deportee who is desperate to avoid being returned to his country of origin may claim various human rights breaches. Purported evidence of threats of lengthy periods of incommunicado detention, a flagrantly unfair trial, interferences with private and family life, and interferences with religious convictions are routinely deployed in UK challenges to removal proceedings.[23] These provisions, however, are not absolute in nature and can be comparatively easily circumvented.[24] Articles 8 and 9 ECHR are qualified rights; such qualifications ensure that the state may have little difficulty in discharging these burdens in order to deport.[25] Nonetheless,

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[21] Four British terrorists were behind the 2005 bombings on the London transport network. While these terrorists had links to Al-Qa'ida, they were British citizens, with British passports. This issue was widely reported in the media and in CONTEST (see, for example, Philip Johnston, 'Home Grown Terrorists are Britiain's Biggest Threat to life and liberty' *The* Telegraph (London, 7 July 2006). <http://www.telegraph.co.uk/news/uknews/1523282/Home-grown-extremists-are-the-biggest-threat-to-life-and-liberty.html> accessed 3 April 2010. Section 40(4) British Nationality Act 1981 provides that the Home Secretary cannot deprive an individual of their British Nationality if it would render him stateless. See also *Convention relating to the Status of Stateless Persons* (ECOSOC RES/526, 28 September 1954) (in force 6 June 1960). As was noted above, all TPIMs currently in force have been imposed on British nationals.

[22] The United Kingdom, for example, has sought or is seeking arrangements with several countries including Algeria, Ethiopia, Jordan, Lebanon, and Libya and Pakistan (below n 62-63).

[23] As to the liberty and fair trial considerations, see e.g. *J1 v SSHD* SC/98/2010 (11 July 2011) and in particular *Othman (Abu Qatada) v United Kingdom* (App no. 8139/09), ECtHR, 17th January 2012 (hereafter *Qatada*), discussed below.

[24] It is clear that assurances should ensure that a suitable degree of protection with regard, for example, to the fairness of the trial (see *RB (Algeria) (FC) and another v SSHD; OO (Jordan) v SSHD* [2009] UKHL 10 para 233 (RB).

[25] That is not to say, however, that these issues are not raised in deportation cases; in *Uner v Netherlands* (2007) 45 EHRR 14 the Grand Chamber of the ECtHR ruled that a

the ECtHR in *Soering* has recognized the 'exceptional' possibility that deportation may be precluded by fair trial requirements under Article 6 ECHR.[26] A 'real risk' of treatment that amounts to a 'flagrant denial' of Article 6 is needed in order to constitute a breach.[27] This has been subsequently held to amount to a 'complete denial or nullification' of the right.[28] The same test applies to the right to liberty and security under Article 5 ECHR.[29]

Reliance on these provisions in a deportation context may be the exception rather than the rule given the high threshold involved, but these rights-based bars must not be ignored.[30] In a recent application to Strasbourg, Abu Qatada (Omar Othman) successfully argued that deportation to Jordan would violate his right to a fair trial since there was a risk that upon his return, he would be subjected to a trial in which torture-tainted evidence would be admitted.[31] Notwithstanding the *Qatada*

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ten-year expulsion order imposed on an individual who had family ties to the Netherlands was a proportionate and lawful interference with this right. In reaching its judgment the court provided guidance as to how the balancing act would be construed in Article 8 ECHR terms. The court has interpreted these criteria more recently to reach the obverse conclusion: in *Khan v UK* (2010) 50 EHRR 47 and *Omojudi v UK* (1820/08) Times, 15 December 2009 (ECtHR), the court has shown that family ties may be sufficiently strong so as to cause a violation of Article 8 ECHR. Such cases in the past have aroused significant political fallout (See, for example, Chris Hope & Caroline Gammell, 'David Cameron: Scrap the Human Rights Act'. *The Telegraph* (London, 22 August 2007) <http://www.telegraph.co.uk/news/uknews/1560975/David-Cameron-Scrap-the-Human-Rights-Act.html> accessed 9 April 2010.

[26] *Soering v United Kingdom* (1989) 11 EHRR 439, [479].

[27] Ibid. The court refused to suggest that the Article 6 ECHR issue should be determined on the basis of the civil standard of proof (*Othman v SSHD*, SC/15/2005, [430] (*Qatada SIAC*)). Similar principles would apply to Article 5 ECHR.

[28] *R v Special Adjudicator ex parte Ullah* [2004] UKHL 26, [70] (Lord Carswell).

[29] *Qatada* (n 23) 233: 'The Court therefore considers that … it is possible for Article 5 to apply in an expulsion case. Hence, the Court considers that a Contracting State would be in violation of Article 5 if it removed an applicant to a State where he or she was at real risk of a flagrant breach of that Article. However, as with Article 6, a high threshold must apply. A flagrant breach of Article 5 would occur only if, for example, the receiving State arbitrarily detained an applicant for many years without any intention of bringing him or her to trial. A flagrant breach of Article 5 might also occur if an applicant would be at risk of being imprisoned for a substantial period in the receiving State, having previously been convicted after a flagrantly unfair trial.'

[30] Ibid [287].

[31] Ibid [249, 251]. The ensuing direct involvement of the UK Prime Minister and Home Secretary have proven necessary in an attempt to obtain further assurances from Jordan

decision, the greatest bar to deportation is formed by the prohibition on torture and ill-treatment, and specifically the 'non-refoulement' obligation. In a European context, the principal consideration is whether there is a real risk that an individual will be subjected to ill-treatment or torture contrary to Article 3 ECHR upon their return.

The statutory basis for deportation is well established and clear, but the basis upon which removal may be challenged is less so. In these cases, the practice of obtaining assurances from potential recipient States takes place outside the legislative framework and is largely the result of executive practices and political controls. The ability to judicially challenge deportation decisions is therefore of fundamental importance, and the approach of the courts requires some examination.

The prohibition of torture: jus cogens erga omnes

CAT [32] provides non-derogable overarching international principles. [33] Extradition, expulsion, or 'refouler' of an individual to a State where there are substantial grounds for believing there to be a real danger that he would be subjected to torture are prohibited.[34] Despite having some 76 signatories and 147 parties, [35] a number of these States retain

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that such evidence will not be used in court. See Patrick Wintour, 'Theresa May to visit Jordan for Abu Qatada deportation talks' *Guardian* (London, 18 February 2012); below n 112.

[32] United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (CAT).

[33] Article 2(2) CAT provides that 'No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.'

[34] Article 3 CAT provides:

> 1. No State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
> 2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

[35] CAT, Article IV, Section 9.

questionable human rights records in the area.[36] The Convention Relating to the Status of Refugees 1951[37] has an impact, yet the applicability of this general prohibition on returning an individual to face torture or ill-treatment[38] is circumscribed. Protection under the Refugee Convention is excluded where an individual has committed acts contrary to the purposes of the United Nations, which in practice includes acts of terrorism,[39] whether this was before or after the refugee came within the State's jurisdiction.[40] Indeed, as the House of Lords has observed, arguments against deportation raised by terrorist suspects under the Refugee Convention are largely academic,[41] since even if an individual is entitled to invoke its provisions, he would still be prevented from relying on the prohibition of refoulement.[42]

Within the UK, protection is afforded via Article 3 ECHR, which does have robust enforcement mechanisms at both European and domestic levels.[43]

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[36] See, for example, Jordan, Algeria and Pakistan: all three of these states are considered, in the absence of specific assurances to the contrary, to potentially pose a risk of torture and/or ill-treatment by UK authorities.
[37] (Refugee Convention).
[38] Article 33(1) Refugee Convention.
[39] As defined by s. 54 Immigration, Asylum and Nationality Act 2006: includes the commission, preparation or instigation of acts of terrorism; and encouragement of others to do the same (ss. 51(1)(a) and (b) respectively). This has been criticized and subjected to change following the recommendations of the JCHR: JCHR, *Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters* (HL 75-I HC 561-I, 2005) [171-179]. From an international perspective, a difficulty with this exclusion lies in the fact that there is no internationally agreed definition of terrorism, and attempts to provide such have failed, due largely to the reservations of the United States that it would politicize the International Criminal Court (see R Bruin & K Wouters, 'Terrorism and the non-derogability of non-refoulement', (2003) 15 International Journal of Refugee Law 5, 15).
[40] *RB* (n 24).
[41] Ibid [129].
[42] Article 33(2) provides that this protection may not be claimed by a refugee 'whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.'
[43] At a European Level, the ECtHR hears cases involving alleged breaches of the ECHR and has a broad range of powers: its decisions are binding on European member states and can enforce the award of compensation where a breach is found. The European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment, established under the European Convention of the same name, makes visits to member States and produces reports. Other International documents which prohibit torture, of which detailed analysis lies beyond the ambit of this article, include the UN

Article 3 ECHR prohibits torture and inhuman and degrading treatment in absolute terms.[44] No derogation from it is permissible, even in wartime; nor can there be any justification in terms of public benefit, national security, or public safety.[45] But the UK does not enjoy an unblemished reputation in this area. Experience in relation to Northern Ireland terrorism cast sharp focus on interrogation methods and conditions of detention for terrorist suspects. In *Ireland v UK*,[46] the ECtHR ruled that the UK had breached its obligations under Article 3 ECHR by the adoption of a range of interrogation techniques *inter alia* including hooding, subjection to 'white noise', sleep deprivation, reduced diet and the use of stress positions.[47] Despite these practices being quickly denounced,[48] Article 3 ECHR continues to shackle the government's counter-terrorism strategy.[49] The obligations imposed by the ECHR have significant ramifications on removal policies for both America and the UK; the jurisprudence of the ECtHR is relatively developed and requires close analysis.

General Assembly Res 3452, *Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (9 December 1975); the Universal Declaration of Human Rights 1948, Art 5; the International Covenant on Civil and Political Rights 1966, Art 7; and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Conduct 1987. The Geneva Conventions I-IV 1949 also generally apply.

[44] To this extent, it offers a broader scope of protection than CAT, which merely prohibits torture.

[45] See the judgment of the ECtHR in *Balogy v Hungary App* 479499/99 (ECtHR, 20 July 2004) [44].

[46] *Ireland v UK* (1979-1980) 2 EHRR 25.

[47] The ECtHR ruled (ibid at [167-168]) that such practices amounted not to torture, but to inhuman treatment, contrary to Article 3 ECHR.

[48] the Government gave an 'unqualified undertaking… that the 'five techniques' will not in any circumstances be reintroduced as an aid to interrogation' (ibid [102]).

[49] See the ruling in *Saadi v Italy* (2009) 49 EHRR 30 (discussed below), which was seized on by the Conservative Party in election manifesto as part of the rationale for scrapping the HRA and replacing it with a Bill of Rights. The government have since distanced themselves from this rather disingenuous proposal, and the Prime Minister has indicated that assurances are now the priority when it comes to securing Convention-compliant deportations (see HC Deb 2 Jun 2010, col 434).

The Chahal benchmarks and beyond

The ECtHR has made it clear that ECHR rights apply extra-territorially, even where a receiving country is not a signatory to the ECHR.[50] Where a receiving country provides assurances, this does not necessarily discharge the Article 3 burden.[51] In *Chahal v UK*,[52] the ECtHR was invited, *inter alia,* to assess whether the deportation of a failed asylum seeker and terrorist suspect to India would violate his rights under Article 3 ECHR. Reaffirming the absolute nature of the prohibition of torture and inhuman and degrading treatment,[53] the court held that the behavior of the individual in question, however undesirable, was irrelevant:

> 'whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 if removed to another State, the responsibility of the Contracting State to safeguard him or her against such treatment is engaged in the event of expulsion.'[54]

The court was anxious to clarify that 'it should not be inferred that there is any room for balancing the risk of ill-treatment against the reasons for expulsion in determining whether a State's responsibility under Article 3 is engaged'.[55] The ECtHR was not persuaded that such assurances would provide an adequate guarantee of safety, particularly since the violation of

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[50] In *Soering v UK* (n 26) 478, the applicant challenged the decision of the UK government to extradite a West German national to the USA to face a murder charge, which carried with it the death penalty. The ECtHR considered that in light of all of the circumstances, the mental anguish of awaiting execution on death row could lead to suffering contrary to Article 3 ECHR if he was extradited. The ECtHR held that while Article 1 ECHR set a territorial limit on the reach of the Convention, and did not require contracting states to impose Convention standards on other states, the provisions had to be interpreted and applied in a manner as to make its safeguards practical and effective (467).

[51] The ECtHR indicated that it must be satisfied that any assurance given is likely to remove the risk that the death penalty will be imposed (ibid [112]).

[52] *Chahal v UK* (1997) 23 EHRR 413.

[53] Ibid 456-457.

[54] Ibid 457.

[55] Ibid.

human rights by certain members of the security forces in Punjab and elsewhere in India was an 'enduring problem'.[56]

The effect of *Chahal* was to set a series of benchmarks: a European State cannot deport a terrorist suspect to his country of origin, should there be a real risk of the individual being subjected to treatment contrary to Article 3 if he is returned.[57] The ECtHR has made it explicit that 'a mere possibility of ill-treatment…is not in itself sufficient to give rise to a breach of Article 3'.[58] Assurances that an individual will not be tortured or subjected to ill-treatment may assuage the risk, but this might not always be the case.[59] The court will consider the entire factual matrix and determine whether this risk exists.[60]

From the perspective of Article 3 compliant deportations, therefore, *Chahal* represents a significant roadblock for governments wishing to neutralize a national security threat in this way. In a bid to circumvent these difficulties, the Foreign and Commonwealth Office (FCO) in the UK has developed and facilitated the signing of formal diplomatic assurances, known as Memoranda of Understanding,[61] with Algeria, Ethiopia, Jordan, Lebanon, and Libya.[62] The FCO is also actively pursuing a MOU with Pakistan.[63]

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[56] Ibid 463.
[57] Ibid 463-464.
[58] *Shamayev and others v Georgia and Russia* App no 36378/02 (ECtHR, 1 April 2005) [352].
[59] *Chahal* (n 52) 463.
[60] Ibid 460-464.
[61] The use of the term 'Memoranda of Understanding' (MOU) and 'diplomatic assurances' can often be misleading, since they may denote different formalized agreements. 'Assurances' usually denote negotiation for promises with regard to a specific individual; MOU are broad agreements that cover the treatment of more than one individual.
[62] CONTEST 2009 (n 8) 67. Note that a formal MOU is not in place with Algeria; instead there is reliance placed on a series of written correspondence between the respective governments.
[63] HC Deb 3 May 2011, col 465.

Simultaneously, the government has sought to challenge the *Chahal* ruling alongside other European countries.[64]

In *Saadi v Italy*,[65] the complainant was a Tunisian national who had submitted that he would be subjected to ill-treatment contrary to Article 3 ECHR if he was deported. The Italian embassy in Tunisia requested diplomatic assurances from the Tunisian government that Saadi would not be subjected to ill-treatment upon his return. As to the nature of the assurances, the Tunisian Minister of Foreign Affairs sent notes to the Italian embassy iterating that Tunisian laws guaranteed prisoners' rights and that Tunisia had acceded to the relevant laws and conventions (including CAT). The UK had joined with Italy as a third party intervener in the case, arguing that a distinction must be drawn between treatment inflicted directly by a signatory State and treatment that might be inflicted by the authorities of another State, and that protection against this latter form of ill-treatment should be weighed against the interests of the community as a whole. This argument was fundamentally rejected by the court, which stated that there 'was no basis for drawing any distinction between treatment inflicted by a State party to the Convention and a third-party State. To do so would undermine the protections of art.3.'[66] Unequivocally the court affirmed its previous directions under *Chahal*.[67] The court denounced as 'misconceived' the argument that the risk posed

[64] See the Joint document submitted to the ECtHR by the UK, Portugal, Slovakia and Lithuania in *Ramzy v The Netherlands* App No 25424/05, contained in Annex 2 of JCHR report: JCHR, *The Human Rights Act: the DCA and Home Office Reviews, Thirty-Second Report of Session 2005-06* (HL 278 HC 1716, 7 November 2006).
[65] *Saadi v Italy* (2009) 49 EHRR 30.
[66] Ibid 761.
[67] Ibid. The court noted the 'immense difficulties faced by states in modern times in protecting their communities from terrorist violence … That must not, however, call into question the absolute nature of art 3' and proceeded to affirm its *Chahal* directions [38].

by a suspect must be balanced against the risk of harm to the community, since the two could only be assessed independently.[68]

Saadi makes it clear that notwithstanding the decision of a domestic court, each assurance will be subject to further judicial challenge in Strasbourg, which will assess all of the facts of the case[69] and determine whether sufficient safeguards have been provided.[70]Assurances given hurriedly are unlikely to suffice.[71] Such intervention into removal proceedings by the ECtHR has become increasingly prolific,[72] with Strasbourg frequently invoking its 'Rule 39' procedure[73] to stay extraditions or deportations.[74]

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[68] At [139]: 'Either the evidence adduced before the Court reveals that there is a substantial risk if the person is sent back or it does not. The prospect that he may pose a serious threat to the community if not returned does not reduce in any way the degree of risk of ill treatment that the person may be subject to on return. For that reason it would be incorrect to require a higher standard of proof, as submitted by the intervener, where the person is considered to represent a serious danger to the community, since assessment of the level of risk is independent of such a test.' There was a violation of Article 3 ECHR since there were substantial grounds for believing that Saadi would face a real risk of treatment contrary to Article 3.

[69] Ibid [147-148].

[70] In respect of which, see the House of Lords' affirmation of the MOU with Algeria and Jordan in *RB* (n 24).

[71] *Abdelhedi v Italy* App no 2638/07 (ECtHR, 24 March 2009); and see *Saadi* (n 49).

[72] The ECtHR has affirmed its *Saadi* precedent in several cases. In *Ismoilov v Russia* App No 2947/06 (ECtHR, 24 April 2008) [127], the court halted a Russian extradition since the assurances given were not considered to amount to a reliable guarantee against ill-treatment; and likewise this was the rationale for the court ruling with regard to an extradition to Turkmenistan in *Ryabikin v Russia* App No 8320/04 (ECtHR, 19 June 2008) [119]. In *N v Sweden* App no 23505/09 (ECtHR, 20 July 2010), the court held deportation of a female divorcee to Afghanistan would violate her Article 3 rights due to her personal circumstances; and similarly in *Klein v Russia* App no 24268/08 (ECtHR, 1 April 2010) [55], an extradition with assurances to Columbia was considered to violate Article 3 ECHR since the value of the assurances was questionable due to the documented instances of abusive practices by the Columbian authorities. In *Dauodi v France* App no 19576/08 (ECtHR, 3 December 2009), the ECtHR held that removal of the applicant from France to Algeria would breach Article 3 due to the documented conditions of detention and ill-treatment in Algerian prisons and in the absence of formal assurances.

[73] *Mamatkulov and Askarov v Turkey* App nos 46827/99 and 46951/99 (ECtHR, 4 February 2005). Rule 39 of the Rules of the Court allows interim measures to be taken by the court where there is a imminent risk of irreparable damage to life, or a threat of ill-treatment contrary to Article 3 ECHR, and may involve the court temporarily staying removal proceedings pending judgment.

[74] 'For those who might face a risk of violation of their human rights, the Court is often their ultimate hope to stop a forced return to a country where they could be exposed to treatment in violation of the European Convention on Human Rights' (Comment, *Human Rights Commissioner, European states Must Respect Strasbourg Court's Orders to Halt*

One of the most high-profile cases[75] has been the stay of extradition granted to Abu Hamza pending a ruling regarding the compatibility of the conditions of imprisonment with Article 3 ECHR. The ECtHR, in a judgment that is not yet final,[76] has ruled that there is no incompatibility and the extradition can proceed. Both the UK government and the US Justice Department have welcomed the decision.[77] Elsewhere, however, there have been a number of other such decisions in which the Strasbourg court has shown the impotence of the Rule 39 procedure.[78] The Human Rights Commissioner notes at least 4 occasions where Italy has ignored such interim measures.[79]

There are inherent tensions in reconciling Convention principles with national security in terrorist removal cases; the case law of the ECtHR shows various member States looking to challenge the *Chahal* and *Saadi* benchmarks. In *A v The Netherlands*,[80] the applicant complained of a risk of ill-treatment contrary to Article 3 ECHR if he was to be removed to Libya, and was granted a stay of removal pursuant to Rule 39. The respondent government argued that the 'mere possibility of ill-treatment' was

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Deportations (25 June 2010) <http://commissioner.cws.coe.int/tiki-view_blog_post.php?postId=52> accessed 30 July 2010).

[75] See, for example, Vikram Dodd 'Abu Hamza extradition to US blocked by European court' *The Guardian* (London, 8 July 2010); Philip Johnston, 'Abu Hamza extradition to US blocked on human rights grounds' *The Telegraph* (London, 8 July 2010); Dominic Casciani, 'Abu Hamza US extradition halted' *BBC News* (London, 8 July 2010) <http://www.bbc.co.uk/news/10551784.> accessed 9 July 2010.

[76] *Babar Ahmad and Others v United Kingdom* App nos *24027/07, 11949/08, 36742/08, 66911/09 and 67354/09* (ECtHR, 12 April 2012). On 9th July 2012, an application was lodged (on the eve of the 3 month deadline for such applications) for a referral to the Grand Chamber of the ECtHR. This is currently pending before the Grand Chamber.

[77] Martin Beckford, 'Abu Hamza extradition could take months as David Cameron welcomes European court ruling' *Telegraph* (London, 10 April 2012); John Burns and Alan Cowell, 'European Court Says Britain Can Send Terror Suspects to U.S.' *New York Times* (New York, 10 April 2012).

[78] See Human Rights Commissioner (n 74).

[79] Ibid and see *Ben Khemais v Italy* App No 246/07 (ECtHR, 24 February 2009) [64]. A violation of Article 3 ECHR was found when the interim measure was ignored and the individual deported to Tunisia, despite the fact that the Tunisian assurances were not considered by the ECtHR as sufficient to guard against ill-treatment.

[80] *A v The Netherlands* App No 4900/06 (ECtHR, 20 July 2010).

insufficient to assume that expulsion is incompatible with Article 3 ECHR.[81] A central tenet to the government's submissions was that:

> 'a thorough investigation was necessary not only to determine if the alien … has adequately established that he can expect to be subjected to treatment prohibited by Article 3 upon returning to his country of origin, but also because it was necessary to ensure that the State is not simply forced to resign itself to the alien's presence which may represent a threat to the fundamental rights of its citizens'.[82]

Lithuania, Slovakia, Portugal and the UK all intervened and argued that the rigidity of the *Chahal* principle was causing difficulty for States by preventing them from enforcing expulsion measures.[83] The interveners suggested that the *Chahal* benchmark should be altered in two significant ways. First, the threat presented by the person to be deported must be a factor to be assessed in relation to the possibility and the nature of the potential ill-treatment.[84] Next, national security considerations had to influence the standard of proof required of the applicant, so that if the sending State adduced evidence that there was a threat to national security, stronger evidence had to be adduced to prove that the applicant would be at risk of ill-treatment in the receiving country. In such instances, the interveners proposed that the individual must show they are 'more likely than not' going to be subjected to ill-treatment.[85] These arguments were countered by NGOs, who suggested that assurances did not suffice to offset a risk of torture[86] and that no balancing exercise should be, or

[81] Ibid [119].
[82] Ibid.
[83] Ibid [125].
[84] Ibid [130]. This argument would mean that the standard of proof adopted by the ECtHR in respect to Article 3 ECHR would mirror the standard of proof required in US deportation proceedings under CAT.
[85] Ibid.
[86] The submissions of Amnesty International and Human Rights Watch: ibid [137].

was, permissible under International Law or through the Strasbourg jurisprudence.[87]

Unsurprisingly, the court rejected the governments' submissions[88] and applied its earlier decision of *Saadi*: the prohibition against torture or ill-treatment applies irrespective of the conduct of the person concerned.[89] While it appears that the *Chahal* and *Saadi* benchmarks are intact and will continue to trouble the government, they do not preclude the operation of a DWA regime. The recent and seminal challenge by Abu Qatada[90] provides important guidance here. Qatada is a Jordanian national wanted for terrorism-related offences in several countries, and has been referred to by a Spanish Judge as Osama Bin Laden's right-hand man in Europe.[91] Qatada claimed asylum in the UK and was granted leave to remain in the UK until 1999. He had been convicted *in absentia* in Jordan as part of a conspiracy for various offences. Some evidence had come to light in the trials that Qatada's co-defendants had been subjected to ill-treatment and torture, but these allegations had not been fully investigated and were deemed unproven.[92] After being subjected to the UK's various counter-terrorism regimes of detention and control orders, Qatada was served with a deportation notice and was correspondingly detained for that purpose.

Qatada challenged the legality of his removal on the basis of the fact that the Human Rights situation in Jordan meant that there would be a real risk of being subjected to torture or ill-treatment upon his return, contrary to

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[87] See the submissions of Justice and Liberty: ibid [138-140].
[88] *A and Others v UK* App No 3455/05 (ECtHR, 19 February 2009).
[89] Ibid [126].
[90] *RB* (above n 24*); Qatada* (above n 23).
[91] See the opinion of SIAC that Qatada is 'described by many sources as a spiritual advisor to terrorist groups or individuals who have been reasonably suspected of having links to Al Qa'ida … It is not at all surprising that he has been believed by some to be the head of the Al Qa'ida organisation in Europe' *Qatada v SSHD* SC/15/2002 (8 March 2004) [15].
[92] *Qatada* (n 23) [272].

Article 3 ECHR, and that the assurances given by the Jordanian government to the contrary were insufficient to mitigate against that risk. He simultaneously argued that he faced a violation of his right to liberty and security, contrary to Article 5 ECHR, and his right to a fair trial, contrary to Article 6 ECHR. The ensuing appeals made their way through SIAC,[93] the Court of Appeal,[94] and the House of Lords, with their Lordships ruling that the deportation was lawful.[95]

The *Qatada* judgment will prove to be pivotal to the development of assurances both in Europe generally and in the UK specifically. The ECtHR held that the correct approach to take would be consistent with its previous decisions: Strasbourg would 'consider both the general human rights situation in that country and the particular characteristics of the applicant'.[96] Assurances would constitute a relevant factor for the court to consider, but 'are not in themselves sufficient to ensure adequate protection of ill-treatment … [t]he weight to be given to assurances from the receiving State depends, in each case, on the circumstances prevailing at the material time'.[97] Drawing on existing case law, the Court elucidated a variety of additional factors relevant to an assessment of the quality of assurances.[98]

Significantly for the government and for the pursuit of DWA strategies generally, the court held that 'the United Kingdom and Jordanian Governments have made genuine efforts to obtain and provide transparent and detailed assurances to ensure that the applicant will not

[93] *Qatada SIAC* (n 27).
[94] *Othman v SSHD* [2008] EWCA Civ 290.
[95] *RB* (n 24).
[96] *Qatada* (n 23) [187].
[97] Ibid.
[98] Some 11 criteria were examined that no doubt will inform future efforts of the FCO to conclude assurances that will be capable of withstanding future judicial scrutiny. See text to n 287, below.

be ill-treated upon return to Jordan';[99] the particular assurances were considered to be 'superior in both … detail and … formality to any assurances which the Court has previously examined'.[100] In light of all of the specific circumstances, deportation to Jordan would not violate Article 3 ECHR.[101] From this perspective, the judgment vindicated the DWA strategy of the UK government and effectively paves the way for more terrorist removals.[102]

Despite this partial victory, the alternative finding of the ECtHR that Qatada's return would violate Article 6 ECHR has caused considerable consternation.[103] Criticism has been aimed at a perceived diminution of national sovereignty vis-à-vis an increased willingness of the court to rule against offending domestic law.[104] Perhaps as a result of these altercations, the Grand Chamber of the ECtHR refused Qatada's application to overrule the decision, with the consequence that the judgment is now final and Qatada's individual case is proceeding through the UK courts.[105]

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[99] *Qatada* (n 23) [194]
[100] Ibid.
[101] Ibid [205].
[102] In fact, the ECtHR has gone further than a mere vindication of the regime: it has tacitly required that assurances should be sought in removal cases where there is a risk of ill-treatment: see the (not final) judgment in *M.S. v Belgium* App no 50012/08 (ECHR, 31 Jan 2012), which held that an individual returned to Iraq in the absence of assurances would suffer a violation of Article 3 ECHR.
[103] Above (n 23). The Prime Minister bemoaned that 'the judgment is difficult to understand, because British Governments … have gone to huge efforts to establish a " deportation with assurances" agreement with Jordan to ensure that people are not mistreated … [i]t is immensely frustrating (Hansard, HC Deb 18 January 2012, Col 748). The Home Secretary declared to the media that all the legal options would be examined, that it is 'not the end of the road' for the removal regime generally, but made clear in Parliament that the government 'disagreed vehemently' with the decision and that the correct place for Qatada was 'behind bars' (Hansard, HC Deb 7 February 2012, Col 165).
[104] Above ch 2 pp 71-74.
[105] The courts will now examine the fair trial implications of the Jordanian assurances in light of the ECtHR ruling, but deportation of Qatada is unlikely to be much before the end of 2012.

Application of the benchmarks to the ECtHR jurisprudence

The involvement of the ECtHR and judiciary in England and Wales has been significant in respect of the DWA regime. *Chahal* and much of the subsequent European jurisprudence posed a real problem to the Government. While the ECtHR was resolute and refused to acquiesce to some of the demands of the UK, Strasbourg did concede that the use of Special Advocates and judicial review through SIAC could render the system lawful and that in principle, there is no reason why a viable system of assurances could not be devised. The government adapted many of its executive practices without the implementation of legislation in an effort to comply with these rulings,[106] but the political pressure built until the ECtHR was coming under attack from several vantage points. Some elements of the media lambasted the ECtHR for ruling against the Government,[107] but the case actually represents ECtHR deferentialism to the UK executive and judiciary: it vindicates the DWA system and paves the way for more terrorist deportations. There remain numerous criticisms directed towards the DWA regime, many of which necessitate greater adherence to the constitutional benchmarks. Before these issues are examined, it is first worthwhile analyzing the regime that operates in the United States, to illustrate a mechanism that is the complete antithesis of the UK approach.

II. Removal from the USA: trusting the executive

Assurances are routinely sought by the US but their formulation and use is left largely to the executive branch; few specific details are released to the public regarding the content or compliance with such assurances following

[106] Although note that the SIAC Act 1997 was enacted in response to the *Chahal* judgment.
[107] See e.g. Tom Whitehead, 'Abu Qatada to be released within days' *Telegraph* (London, 6 February 2012).

their formulation.[108] Protection against ill-treatment and torture is analogous, yet not the same, as that in the UK; the European Commission on Human Rights has asserted the similarity between the 8th amendment to the US constitution and Article 3 ECHR in the context of the severity of treatment required to invoke its protection.[109] CAT was ratified by the USA in 1994 with the reservation attached that the prohibition was taken only insofar as it mirrored the protection afforded by the US Constitution.[110] Unsurprisingly this reservation has been criticized, since it could be argued that it is void and trumped by *jus cogens* principles of international law, and that it purports to imbue the US legal order with a lower standard of protection against torture and ill-treatment than that observed on an international arena.[111] Further implementation of CAT at a domestic level followed with the Foreign Affairs Reform and Restructuring Act (FARRA),[112] although the statute expressly prevented the courts from exercising jurisdiction over these cases.[113] The fact that FARRA was needed in the first place in order to give effect to CAT principles was largely the result of a US Senate determination that CAT was not 'self-

[108] See generally the excellent report by the Columbia Law School Human Rights Institute, *Promises to Keep: Diplomatic Assurances Against Torture in US Terrorism Transfers,* December 2010 <http://www.law.columbia.edu/ipimages/Human_Rights_Institute/Promises%20to%20Keep.pdf>.
[109] *Soering* (n 26) (496).
[110] US *Reservations, Declarations, and Understandings, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* 136 Cong Rec S17486-01 (1990).
[111] See, for example, Alice Farmer, 'Non-Refoulement and *Jus Cogens*: Limiting Anti-Terror Measures that Threaten Refugee Protection' 2008 *ExpressO* <http://works.bepress.com/alice_farmer/1> accessed 12 June 2010. See also Human Rights First, *Issues To Be Considered During the Examination Of the Second Periodic Report of the United States of America* (CAT/C/48/Add 3/Rev 1, 7 April 2006) <http://www.humanrightsfirst.info/pdf/06502-etn-hrf-cat-final-submitted.pdf> accessed 12 June 2010. Some school of thought states the non-refoulement obligation has acquired *jus cogens* status (see e.g. Bruin and Wouters (n 39) 29).
[112] FARRA, 8 USC § 1231 (a).
[113] Ibid § 1231 (d).

executing',[114] showcasing the relative impotence of the CAT framework as it currently stands.

In relation to CAT claims, there are distinct similarities between the US approach to extradition and deportation, and it is therefore appropriate to consider both of these in context. Regulations made by the executive branch under FARRA have made it explicit that it is the function of the Secretary of State to decide whether or not to extradite, and whether or not assurances are necessary; the courts have no role in this process.[115] Under CAT, the US government has an obligation to ensure an individual is not subjected to refoulement, but this obligation is discharged through a nexus of executive decisions and approvals, as opposed to through judicial scrutiny of the removal and/or commensurate assurances. This contention was challenged in the case of *Cornejo-Barreto*,[116] following which it appeared that an individual may be able to petition for *habeas corpus* notwithstanding the statutory and regulatory circumscription of judicial review.[117]

The Fourth Circuit did not endorse this position. In *Mironescu v Costner*,[118] the contention that the courts were barred through the rule of non-inquiry[119] from reviewing treatment concerns in *habeas* petitions was

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[114] 990 136 Cong Rec 36 198 (1990). The requisite background to the signing of CAT and the implementation of FARRA has been documented extensively but is neatly summarized by the Third Circuit in *Ogbudimkpa v Ashcroft* 342 F 3d 207 (3rd Cir 2003).
[115] The courts have previously considered that they are 'ill-equipped as institutions' to second-guess the executive's extradition decisions, *US v Smyth (In re Requested Extradition of Smyth)* 61 F 3d 711, 714 (9th Cir 1995). While this was rejected in *Mironescu v Costner* 80 F 3d 664 (2007), judicial involvement has since been circumscribed by FARRA (above).
[116] *Cornejo-Barreto*, 218 F 3d 1004, 1007 (9th Cir 2000).
[117] The appellate history is complex and the precedent is by no means certain. An appeal to the 9th Circuit did not clarify matters. The court in *Arambasic v Ashcroft* 403 F Supp 2d 951, 963 (DSD 2005) noted that the appeal decision had been vacated but that the original judgment had not been, and a similar approach was subsequently taken by the 9th circuit in *Prasoprat* 421 F 3d at 1011.
[118] Mironescu (n 115).
[119] '[U]nder what is called the `rule of non-inquiry' in extradition law, courts… refrain from

rejected.[120] In the same judgment, the court held that FARRA barred a *habeas* review of CAT proceedings.[121] The resulting position is woefully unclear. Deeks[122] observes that the US courts are increasingly reluctant to allow the executive branch to create assurances or MOU that are judicially untested, even where the legal basis to intervene is weak,[123] and postulates the possibility that the 9th circuit may soon find that an individual can obtain a *habeas corpus* review of the Secretary of State's decision to extradite him in the face of torture concerns.[124]

Lessons from America: deportation of terrorist suspects

Even with a shift in strategy resulting from a change in administration, with 'an end to United States exceptionalism and an acceptance of the international law framework,'[125] some of the war-related rhetoric continued under the Obama Presidency.[126] Despite similarities between removal strategies for non-Guantánamo detainees, the commensurate standard of legal protection is markedly different when assurances are sought. It is therefore necessary to first consider deportation of non-Guantánamo inmates, before turning to consider those detained in the 'legal black hole'.[127]

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examining the penal systems of requesting nations, leaving to the Secretary of State determinations of whether the defendant is likely to be treated humanely' *Lopez-Smith v Hood* 121 F 3d 1322, 1327 (9th Cir 1997).

[120] Mironescu (n 115).

[121] Ibid 674.

[122] Ashley Deeks, 'Promises Not to Torture: Diplomatic Assurances in US Courts', *ASIL Discussion Paper* (December 2008) <http://www.asil.org/files/ASIL-08-DiscussionPaper.pdf> accessed 13 June 2010.

[123] Ibid 10.

[124] Ibid 21.

[125] Róisín Pillay, *Current Challenges Regarding Respect of Human Rights In the Fight Against Terrorism*, European Parliament Briefing Paper (EXPO/B/DROI/2009/27, PE 410.208, April 2010) 14.

[126] Ibid 15.

[127] Lord Steyn, 'Guantánamo Bay: The Legal Black Hole' (2004) 53 International & Comparative Law Quarterly 1.

In terms of deportation practice, the US provides a comparably higher degree of judicial scrutiny, yet it still lacks the robust judicial safeguards found in England and Wales.[128] For individuals facing deportation, removal will be deferred if they are considered to be 'more likely than not' tortured upon their return,[129] and likewise the US Senate[130] has interpreted Article 3 CAT as requiring satisfaction to the same standard of proof.[131] If new evidence comes to light, or if the government negotiates arrangements with a receiving country, any deferral of removal can be terminated following a evidentiary hearing, with provision for appeal to the Board of Immigration Appeals (BIA).[132]

Generally, *habeas corpus* is available to a person held in custody 'in violation of the Constitution or laws or treaties of the United States.'[133] As is the case in an extradition context, there have been notable steps taken in immigration law to limit judicial involvement in removal cases in the context of CAT. If assurances are used, the Secretary of Homeland Security, in consultation with the Secretary of State, will undertake a determination as to their effectiveness and reliability in terms of discharging the CAT burden.[134] Once this claim has been lodged, an immigration judge, the BIA, or an asylum officer may give no further consideration of CAT.[135] Despite the limited use of assurances, there has been some litigation challenging these principles.

The key issues at play in this area are best illustrated with reference to the

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[128] See below for a discussion of the ways in which SIAC ensures compliance in a UK context.
[129] 8 CFR § 208.17.
[130] S Exec Rep No 101-30 (1990) (Resolution of Advice and Consent to Ratification).
[131] It is clear that this is substantially higher than that employed by the ECtHR, which merely requires a 'real risk' (*Chahal* (n 52)).
[132] 8 CFR § 208 17(d).
[133] 28 USC § 2241(c)(3).
[134] 8 CFR § 208.18(c).
[135] 8 CFR §§ 1208.18(c) and 208.18(c).

non-terrorism related case of *Khouzam v Hogan*.[136] Khouzam was an Egyptian national who was facing removal given the decision of an immigration judge that there were substantial grounds for believing him to have murdered a woman in Egypt. In accordance with the procedure above,[137] the USA government had obtained assurances from the Egyptian authorities. Accordingly, Khouzam's deferral of removal was terminated, and he petitioned the 2nd circuit for *habeas corpus*,[138] claiming that he faced removal pursuant to inherently unreliable diplomatic assurances from Egypt without any opportunity to challenge the reliability of such assurances, and that this violated the CAT, commensurate regulations and the Fifth Amendment's Due Process Clause. The respondent government argued that judicial review was exclusively limited to consideration of the final order of removal,[139] and that even if the court had jurisdiction, the petition represented a non-justiciable political question and the court should not intervene in what was a matter for executive determination.

The court, in granting a stay of removal, rejected the government's arguments.[140] Upon subsequent hearings,[141] the District Court granted a writ of *habeas corpus,*[142] holding that Khouzam had been denied due process. The District Court rejected the contention that assurances *per se* were not a viable option, but considered that the government had failed to provide the applicant with notice and meaningful opportunity to be heard in connection with the Government's reliance upon an Egyptian diplomatic

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[136] 529 F Supp 2d 543 (MD Pa 2008).
[137] 8 CFR §§ 1208.18(c) and 208.18(c)..
[138] *Khouzam v Ashcroft* No 02-4109 (2d Cir filed 30 May 2007)
[139] under 8 CFR § 1208.18(c).
[140] Ibid.
[141] The appellate history of this litigation is complex and the present work does not intend to examine the minutiae of the government challenges and court hearings. This discussion notes the key issues raised by the final *habeas corpus* petition.
[142] 529 F Supp 2d 543, 571 (MD Pa 2008).

assurance. Since there was no significant likelihood of removal in the reasonably foreseeable future,[143] release was ordered under reasonable conditions of supervision.

An appeal was quickly lodged to the Third Circuit and judgment was delivered in December 2008.[144] The Court of Appeals vacated the opinion of the District Court in respect to jurisdiction, but the judgment still delivered a blow to the US executive's deportation strategy. The court held that even if *habeas corpus* was circumscribed, there needed to be an alternative forum for judicial review,[145] and that the appeals court itself was the appropriate venue.[146] The court rejected the notion that the appeal represented a non-justicable political question, holding that the issues raised were fundamentally of 'statutory, constitutional, and regulatory interpretation'.[147] In terms of the due process argument, the result of this appeal is particularly significant. The court stated that the right to due process had not been either prescribed or circumscribed by the relevant statute,[148] that Khouzam had been entitled to the right, and that he had failed to receive any notice or hearing whatsoever.[149] Damningly, the court held that:

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[143] the same principle applies in the context of UK deportations. Detention pending deportation is dependent on the proceedings making satisfactory progress, and detention cannot be continued when proceedings have been discontinued (the requisite UK authority is *Chahal* and *R v Governor of Durham Prison ex parte Hardial Singh* [1984] 1 WLR 704; its USA counterpart is *Clark v Martinez,* 543 US 371, 386, 125 SCt 716, 160 Led 2d 734 (2005)).
[144] *Khouzam v AG & others* Nos 07-2926 & 08-1094 (2008).
[145] The court avoided the circumscription by holding that SCOTUS had established that a statute denying an alien the ability to test the legality of his detention through a habeas petition is subject to constitutional scrutiny, and may be invalidated failing such scrutiny. Therefore, since habeas corpus was not available, the court held that its own assessment would amount to an adequate and effective alternative (ibid 24).
[146] The judgment provides a lengthy and elaborate justification in terms of the statutory power to judicially review only the 'final order of removal' (ibid 27-32).
[147] Ibid 38.
[148] 'There is nothing in the diplomatic assurance regulations themselves that we could fairly construe as providing an alien with any process whatsoever, let alone the right to a hearing' (ibid 47).
[149] Ibid 52.

> 'beyond the Government's bare assertions, we find no record supporting the reliability of the diplomatic assurances that purportedly justified the termination of his deferral of removal.'[150]

Khouzam had had no opportunity to make arguments on his own behalf or to have an individual determination made by an independent decision maker. The commensurate lack of process was considered by the court to be inherently prejudicial,[151] and the court accordingly held that the order terminating the deferral of removal was invalid, and remanded the case back to the BIA in order that due process could be given. In so doing, the 3rd Circuit provided key criteria that it deemed necessary to provide to a deportee where assurances were obtained. Under these principles, an alien must therefore receive:

> 'notice and an opportunity to test the reliability of those assurances in a hearing;
> the opportunity to present, before a neutral and impartial decision-maker, evidence and arguments challenging the reliability of diplomatic assurances proffered by the Government, and the Government's compliance with the relevant regulations; and
> an individualized determination of the matter based on a record disclosed to the alien'.[152]

This approach resonates with aspects of the European model and it has been suggested that *Khouzam* represents a step in that direction.[153] The US government has thus been forced to adopt an alternative strategy for terrorism-related deportations.

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[150] Ibid.
[151] Ibid 53-54.
[152] Ibid 57.
[153] Deeks (n 122) 26. Note that this was in regard to the District Court hearing, rather than the appeal to the 3rd circuit.

Removal of 'high value' suspects: Habeas Schmabeas[154]

If the foregoing *Khouzam* safeguards in a non-Guantánamo context provide an indication of judicial assertiveness, the same is also true with regard to judicial challenges to removal brought by Guantánamo detainees. Guantánamo detainees have had to bridge an impasse of considerable magnitude in order to even assert their constitutional rights in the first place. In the context of the present discussion, two major issues present themselves: the practice of extraordinary rendition, which has attracted vitriolic worldwide condemnation,[155] and the otherwise rendering,[156] including through a deportation procedure, of Guantánamo Bay detainees to other countries.

Secret renditions pose a particular problem to the current task of forming a DWA regime compliant with multilateral human rights norms and domestic constitutional guarantees. The myriad allegations of complicity in torture by the USA (and indeed UK and other European governments),[157] operating outside international and domestic laws, overshadow any

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[154] The title of an award-winning episode of 'This American Life', which described the conditions of detention at Guantánamo Bay.

[155] A detailed review of these arguments, and indeed of extraordinary rendition generally, lies outside the ambit of this article. See UN Human Rights Council, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development 13th Session* (A/HRC/13/42, 19 February 2010). See in particular the Joint Study on Global Practices with regard to Secret Detention; the report of the Working Group on Arbitrary Detention; and the Working Group on Enforced or Involuntary Disappearances.

[156] Note that the term 'rendition' is often erroneously used to denote 'extraordinary rendition'. The former merely means 'handing over'; the latter has come to mean such transfers outside the usual legal framework (extra-judicial transfers) which allegedly have resulted in torture and ill-treatment. The European Parliamentary Assembly has referred to this as transferring terrorist suspects 'from one state to another on civilian aircraft, outside of the scope of any legal protections, often to be handed over to states who customarily resort to degrading treatment and torture,' Parliamentary Assembly, *Alleged secret detentions and unlawful inter-state transfers of detainees involving Council of Europe member states* (Resolution 1507, 2006) para 7.

[157] '[a]cross the world, the United States has progressively woven a clandestine "spiderweb" of disappearances, secret detentions and unlawful inter-state transfers, often encompassing countries notorious for their use of torture. Hundreds of persons have become entrapped in this web, in some cases merely suspected of sympathizing with a presumed terrorist organisation' Ibid para 5.

relatively modest ways in which the legal framework can be modified to ensure appropriate constitutionalism. This is a prevailing concern, yet it should not preclude an examination of ways in which the laws themselves can be modified so as to ensure future human rights compliance. The public eye has been very firmly turned towards the counter-terrorism strategy of the US since 9/11, and worldwide criticism has been forthcoming.[158]

Judicial challenges regarding alleged complicity in extraordinary rendition have been lodged,[159] and in the UK the Prime Minister has announced an independent inquiry to examine reports of complicity in torture and ill-treatment.[160] The practice of extraordinary rendition has captured the public interest. As a response to some of this pressure, the US government has stated that the policy of removal is not to deport where it is more likely than not that the individual will be subjected to torture or ill-treatment,[161] but has declined to make its assurances public and reiterated that the decision to deport should not be subject to judicial intervention, so

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[158] See, for example, Dana Priest, 'CIA holds terror suspects in secret prisons' *Washington Post* (Washington, 2 November 2005); David Johnston and Mark Mazzetti, 'Interrogation inc: A window into CIA's embrace of secret jails' *New York Times* (New York, 12 August 2009); Dick Marty, *Secret detentions and illegal transfers of detainees involving Council of Europe member states: second report* (CoE doc 11302, 11 June 2007); Amnesty International, *United States of America/Yemen: secret detention in CIA "black sites*". <www.amnesty.org/en/library/asset/AMR51/177/2005/en/3bbac635-d493-11dd-8a23d58a49c0d652/amr511772005en.html> accessed 10 March 2010; European Parliamentary Assembly, Resolution 1507 (n 156).

[159] Richard Owen, 'Italian court sentences 23 CIA agents over rendition flight.' *The Times* (London, November 5 2009) <http://www.timesonline.co.uk/tol/news/world/europe/article6903439.ece> accessed 1 June 2010.

[160] R. Norton-Taylor & I. Cobain, 'Government to compensate torture victims as official inquiry launched: PM moves to ensure courts will no longer be able to disclose evidence about British complicity in torture' *Guardian* (London, 6th July 2010) <http://www.guardian.co.uk/law/2010/jul/06/government-to-compensate-torture-victims-inquiry> accessed 7 July 2010.

[161] See District of Columbia, *Mahmoad Abdah, et al v George W Bush*, Civil Action No 04-CV-1254 (HHK), Respondents' Memorandum in Opposition to Petitioners' Motion for Order Requiring Advance Notice of any Repatriations or Transfers from Guantánamo, 8 March 2005, cited in *Human Rights Watch, Still at Risk: Diplomatic Assurances No Safeguard Against Torture* (Vol 17 No 4, April 2005) 31.

this should hardly be seen as capitulation.[162] Prior to *Boumediene* and *Khouzam*, the courts had produced a mismatched tapestry of uncertain precedent, which provided no clear indication as to whether assurances should be justiciable or not,[163] and further clarification and judicial involvement was direly needed.

The three Executive Orders signed by the Obama Administration in January 2009[164] heralded a change in terms of resettlement of Guantánamo Detainees, yet it has been seen that these resettlement policies have not secured closure of the camp. A report by the Special Task Force determined that the State Department should be responsible for evaluating assurances in all instances[165] and that monitoring mechanisms should be established or improved,[166] but meaningful changes are yet to be seen as a result of this policy.

Application of the benchmarks to the US removal strategy

The removal policies and practices of the USA remain mired in uncertainty, and the Obama administration has been repeatedly forced to capitulate to the demands of a recalcitrant Congress.[167] Statute did not prescribe an appropriate removal strategy, but instead allowed for significant executive

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[162] See §§ 9-11 of the *Declaration of Clint Williamson* pursuant to 28 USC § 1746. The Declaration was given by way of providing additional information regarding the use of assurances
< http://www.state.gov/documents/organization/116359.pdf> accessed 14 April 2010.
[163] See, for example*, Zalita v Bush* Case No 07-5129 (DC Cir); *Belbacha v Bush* 2007 WL 2422031 (DDC 2007).
[164] See Exec Order No 13491, 74 Fed Reg 4893 (27 Jan 2009), *Ensuring Lawful Interrogations*; Exec. Order No. 13492, 74 Fed Reg 4897 (27 Jan 2009), *Review and Disposition of Individuals Detained at the Guantánamo Bay Naval Base and Closure of Detention Facilities*;
Exec Order No 13493 74 Fed Reg 4901 (27 Jan 2009), *Review of Detention Policy Options.*
[165] Department of Justice, Office of Public Affairs, *Special Task Force on Interrogations and Transfer Policies Issues Its Recommendations to the President* (09-835, 29 August 2009).
[166] Ibid.
[167] Above ch 3 p 197-213.

discretion in the operation and oversight of the removal regimes. In some cases, the courts attempted to intervene, asserting *habeas* right for detainees, but these were inconsistently applied. The review of detainees at Guantánamo Bay has not led to the codification of a particular system. As was the case with the detention practices of the US, it is likely that America would benefit from an analysis of the UK provisions. Few substantive legislative or judicial oversight mechanisms operate in the US. Similarly, the approach of other States is by no means satisfactorily established; there is no real international consensus as to the use of DWA. Criticisms are ubiquitous and further guidelines are direly needed.[168]

In order to propose a way forward, this chapter will consider the nature of assurances themselves and their commensurate criticisms, together with ways in which adherence to the constitutional benchmarks will address these criticisms and pave the way for a viable DWA regime. Further international dialogue is essential, and it may be possible to make significant progress as to the use of DWA generally. This suggestion has arisen before but has never come to fruition at European or international levels.[169]

III. Addressing Criticisms of Assurances

With the experience of recent European jurisprudence, there is considerable merit in developing MOU or a regime that promotes the use of individual assurances. The *Chahal* and *Saadi* judgments cause problems for governments in terms of certainty of human rights

[168] While guidelines for the State Department appear to exist and exhibit similarities to the European and UK requirements, there are marked concerns as to their use in practice, particularly since there is no guaranteed of these executive practices.
[169] Ibid.

compliance,[170] and assurances have attracted fierce criticism from academics[171] and NGOs.[172] The Committee Against Torture has expressed concern regarding the UK use of assurances.[173] Before suggestions for change can be proposed, it is first necessary to address the detail of these varied, complex and overlapping criticisms. For the sake of clarity of analysis, such criticisms will be considered discretely, but this is an artificial exercise and a holistic view of the arguments should ultimately be taken.[174]

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[170] Richard Ford, 'European Judges thwart attempts to deport foreign terrorist suspects' *The Times* (London, 29 February 2008) <http://www.timesonline.co.uk/tol/news/politics/article3455996.ece> accessed 22 June 2010. The government expressed 'disappointment' with the *Saadi* ruling.

[171] See, for example, Martin Jones, 'Lies, Damned Lies and Diplomatic Assurances in Removal Proceedings' (2006) 8 European Journal of Migration and Law 9, 38: 'diplomatic assurances provide the worst of both a state-centered model of treaties and the modern human rights centred model'. See also David McKeever, 'The Human Rights Act and anti-terrorism in the UK: one great leap forward by Parliament, but are the courts able to slow the steady retreat that has followed?' (2010) Public Law 2010, 110; David Bonner, *Executive Measures, Terrorism and National Security* (Aldershot 2007). Conversely, see the supportive account of the UK deportation regime (largely from the perspective of HM Government) given by Jennifer Tooze, 'Deportation with assurances: the approach of the UK courts' (2010) Apr Public Law 362 and Kate Jones, 'Deportation with assurances: addressing key criticisms' (2008) 57 International and Comparative Law Quarterly 183.

[172] See, for example, the Liberty and Justice Joint Submission: *UK Compliance with the UN Convention Against Torture Joint Committee on Human Rights* (September 2005) <http://www.justice.org.uk/images/pdfs/CATsept05.pdf.> accessed 2 February 2008. At [7] the report states that 'a clear consensus among international legal experts that the use of diplomatic assurances is not an effective safeguard against the risk that a returned person will be subject to torture or inhuman or degrading treatment by or in the receiving state'. The relevant arguments propounded by Human Rights Watch, Liberty and Justice were summarized in a Canadian case by de Montigny J, sitting in the Federal Court of Canada, in *Sing v Canada (Minister of Citizenship and Immigration)* 2007 FC 361. See also the report by Amnesty International with Human Rights Watch and the International Commission of Jurists, *Reject Rather than Regulate: Call on Council of Europe member states not to establish minimum standards for the use of diplomatic assurances in transfers to risk of torture and other ill-treatment* (AI Index IOR 61/025/2005, December 2005).

[173] Committee against Torture, *Conclusions and Recommendations of the Committee against Torture: United Kingdom of Great Britain and Northern Ireland, Crown Dependencies and Overseas Territories* (UN Doc CAT/C/CR/33/3, 2004).

[174] Kate Jones (n 171) uses a similar format, defending such criticisms from the perspective of HM Government. The present work draws on wider research to examine many of these points in turn, as well as others exposed by the analysis. It should be noted that the conclusions drawn, particularly in relation to the first criticism, are markedly different to that of Jones; likewise, it should be observed that where appropriate, the key criticisms have been amalgamated so as to allow more detailed analysis.

Criticism 1: Assurances undermine the jus cogens nature of the prohibition of torture, inhuman and degrading treatment and punishment

It is first necessary to deal with this overarching criticism in relation to the use of DWA, since if justified, it would undermine any arguments around constitutional optimization that could be advanced. Justice and Liberty have drawn on considerable evidence to assert that 'the mere fact that such assurances are sought is arguably a tacit admission by the sending State that the transferred person is indeed at risk of being tortured or ill-treated',[175] and the UN Commissioner has stated that '[g]iven the absolute obligation of States not to expose any person to the danger of torture by way of extradition, expulsion, deportation or other transfer, diplomatic assurances should not be used to circumvent the non-refoulement obligation.'[176] There appears to be increasingly popular, political and judicial willingness to discuss possible exceptions to the prohibition.[177] In a UK context, this could be said to be reflective of the government's successive attempts to limit or reverse *Chahal* in order to allow the State to engage in a risk balancing exercise. Similarly, the approach of the US to require the likelihood of torture or ill-treatment to be established 'more likely than not' does not appear to represent an affirmation of the *jus cogens* doctrine. Perhaps even more significantly, the Supreme Court of Canada in *Suresh v Canada*[178] caused consternation[179] when it declared that a balancing act was appropriate between, first, the State's genuine

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[175] UN Commission on Human Rights, *Report of the Independent Expert on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism* (E/CN4/2006/98, 28 December 2005) [56] (Independent Expert Report).
[176] Ibid [60].
[177] Martin Jones (n 171) 9.
[178] *Suresh v Canada* [2002] 1 SCR 3.
[179] UN Special Rapporteur against torture, Manfred Nowak, 'Challenges to the Absolute Nature of the Prohibition of Torture and Ill-Treatment' (2005) 23 *Netherlands Quarterly of Human Rights* 674.

interest in combating terrorism and protecting public security, against second, a constitutional commitment to liberty and fair process.[180] The court iterated that usually the balance will 'come down against expelling a person to face torture elsewhere'[181] but did not conclude that the non-refoulement obligation had attained *jus cogens* status.[182] Instead, the court considered that the 'better view' was that international law rejects deportation to torture, even where national security interests are at stake.[183] The court continued to state that '[w]e do not exclude the possibility that in exceptional circumstances, deportation to face torture might be justified'.[184] This position was condemned internationally,[185] yet it nonetheless indicates an increasing willingness to overlook the *jus cogens* nature of the prohibition.

A further tenet to this first criticism relates to the fact that there are documented instances in which assurances have been given and individuals have allegedly been subjected to torture upon their return.[186]

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[180] In stark contrast to the approach adopted in *Saadi* (n 65) [58].
[181] Ibid.
[182] 'although this court is not being asked to pronounce on the status of the prohibition of torture in international law, the fact that such a principle is included in numerous multilateral instruments, that it does not form part of any known domestic administrative practice, and that it is considered by many academics to be an emerging, if not established peremptory norm, suggests that it cannot be easily derogated from,' *Suresh* (n 178) [65].
[183] Ibid [75].
[184] Ibid [78].
[185] Human Rights Committee, *Concluding Observations*: Canada (UN Doc. CCPR/C/CAN/CO/5, 20 April 2006), para 15. See also *Assessing Damage, Urging Action*, Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights (2009) <http://www.justice.org.uk/images/pdfs/EJPFullReport170209.pdf> accessed 2 December 2010: 'The Panel believes that governments claiming to "balance" the rights of the individual at risk of torture upon return and the supposed needs of society as a whole are working on a false promise… [the balancing of rights] is not … a relevant consideration when there is a risk of torture: all international law places an absolute prohibition on torture' [103].
[186] Liberty and Justice Joint Submission to the JCHR, *UK Compliance with the UN Convention Against Torture Joint Committee on Human Rights* (September 2005) http://www.liberty-human-rights.org.uk/pdfs/policy05/jchr-cat-submission.pdf, [12] (Liberty and Justice Joint Submission). See *Agiza v Sweden*, *Committee against Torture, Communication No 233/2003* (UN Doc CAT/C/34/D/233/2003, 2005) [13.8]–[13.15], in which the Committee Against Torture found that Sweden had violated the Convention.

These have been seized on by critics of the regime[187] and used to undermine its *jus cogens* attribute: if even one assurance has been broken, it could be argued that assurances do not provide a reliable mechanism for preventing ill-treatment or torture. There is a distinct tension as to how these two principles can be reconciled. On the one hand, it is argued that a State which recognizes that assurances have been breached and yet persists in their creation is not embracing the *jus cogens* nature of the prohibition of torture; on the other hand, it is contended that assurances themselves are designed to ensure that a State complies with its international obligations.[188] These principles appear to be mutually exclusive.

It is contended that the reason that these principles seem irreconcilable is as much due to political rhetoric as it is do to with legal norms. Condemnation of torture and ill-treatment by the State itself or its agents is prohibited *jus cogens erga omnes.*[189] By definition this means that the prohibition imposes obligations towards all members of the international community, whether or not they have ratified the relevant convention.[190] NGOs are understandably opposed to any notion of the prohibition of torture attracting a lesser degree of international protection[191] and a

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[187] See criticism #3 below.
[188] Kate Jones (n 171) 185. Jones opines that such criticisms are 'simply wrong. The UK's policy of DWA is a way of complying with its human rights obligations, not avoiding them'. See also the comments of SIAC in *Qatada* (n 23) [493].
[189] *Prosecutor v Furundžija*, International Criminal Tribunal for the Former Yugoslavia, 2002, 121 International Law Reports 213. As to the nature of peremptory norms, see J Paust, J Dyke and L Malone, *International Law and Litigation in the US* (2nd edn, Thomson West, 2005) 61–63.
[190] But note the exhaustive commentary as to *jus cogens* norms by Orakhelashvili, in particular with regard to the contention that all human rights are part of *jus cogens,* and one must differentiate between *jus cogens* rights and those which have acquired the status of a peremptory norm. Since a detailed analysis of these arguments is beyond the scope of this article, *jus cogens* will be used throughout to denote a *jus cogens* right that is also a peremptory norm (see Alexander Orakhelashvili, *Peremptory Norms in International Law* (OUP 2006) 59).
[191] Human Rights Watch (n 161).

departure from this stance would clearly be absurd and abhorrent.[192] As to the *jus cogens* status of the non-refoulement obligation, however, that is far less certain. NGOs have stressed that it is so.[193] Others have postulated that 'due to the absolute nature of the prohibition of torture or inhuman or degrading treatment, formal assurances cannot be sufficient to permit expulsions where a risk is nonetheless considered to remain'.[194] The opinion of academics generally appears to be that non-refoulement is emerging as a new *jus cogens* norm,[195] if it has not already assumed that status,[196] but this is by no means settled.

The Vienna Convention defines a 'peremptory norm', or *jus cogens* norm, as a 'norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character'.[197] A treaty which conflicts with such a norm is void.[198] Peremptory norms are unconditional in character,[199] link the entire international community and cannot be bilaterally limited.[200] While Orakhelashvili accepts that norms cannot be differentiated, it is suggested that the absolute character of such a norm relates not to its scope but to its normative quality.[201] By way of explanation: torture may be

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[192] Although note the (controversial) extensive work critiquing this position by Dershowitz, in particular making an argument for judicially-sanctioned torture (Alan Dershowitz, *Shouting Fire: Civil Liberties in a Turbulent Age* (Little, Brown 2002) 470-477).
[193] Human Rights Watch (n 161) 13. See also the submissions of Justice, Human Rights Watch and Liberty, intervening in the UK case of RB (n 24).
[194] Commissioner for Human Rights, *Report by Mr. Alvaro Gil-Robles, Commissioner for Human Rights, on his visit to the United Kingdom* (Comm DH (2005) 6) [28-30].
[195] Farmer (n 111) 2.
[196] Allain argues that it has (Jean Allain, 'The Jus Cogens Nature of Non-Refoulement' (2001) 13 International Journal of Refugee Law 533-558).
[197] Vienna Convention on the Law of Treaties 1969, Article 53. Of course, it would be misleading to state that no deviation from this stance has occurred since its inception. Some authors consider this definition incomplete for that reason (Farmer (n 111) 23).
[198] Ibid.
[199] Orakhelashvili (n 190).
[200] Ibid 38-40.
[201] Ibid 68.

prohibited absolutely, but the extent of the activity that comprises torture is open to interpretation. Through this line of argument, it has been suggested that non-refoulement has a similar basis,[202] and is 'firmly established' as a peremptory norm.[203] The fact that the non-refoulement obligation is underogable provides strong evidence, but not conclusive proof, that it constitutes a peremptory norm.[204]

Drawing on these principles, Farmer argues that the status of non-refoulement has now been widely accepted as a peremptory norm,[205] citing the advisory opinions of the United Nations High Commission on Refugees as affirmation of the point.[206] It has been contended that a *jus cogens* norm is such that is accepted by the international community as a whole and that no derogation is permitted from it,[207] but that rigorous conformity is not required in order for a *jus cogens* norm to emerge.[208] If the non-refoulement obligation is *jus cogens,* therefore, States cannot transgress it in any way;[209] this may imply that States cannot enact legislation that may result in refoulement.[210]

A less popular view amongst scholars is that it is uncertain whether the non-refoulement obligation has yet attained *jus cogens* status. It has been argued that little is 'likely to be achieved' by regarding the non-refoulement principle as peremptory.[211] This view has been criticized[212] since it implies that if the principle is not peremptory, 'States will be able to override it by treaties in which they will provide for the legality of the return of persons to

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[202] Ibid 69.
[203] Ibid 55.
[204] Ibid 58.
[205] Farmer (n 111) 28.
[206] Ibid.
[207] Allain (n 196) 538.
[208] Ibid 539.
[209] Ibid 553-554.
[210] Farmer (n 111) 30.
[211] Goodwin-Gill, *The Refugee in International Law* (3rd edn, OUP 2007) 168.
[212] Orakhelashvili (n 190) 55.

the countries where *serious violations* of human rights *may* be faced'.[213] But this criticism is self-defeating on the basis of its two central tenets. First, there is some latitude in terms of the nature of the ill-treatment itself vis-à-vis the distinction between ill-treatment and torture. Next, there is a varying degree of risk required, or varying standard of proof, before the non-refoulement obligation is triggered.

It is possible to draw a distinction between the principle of non-refoulement as it applies under the Refugee Convention and as it applies under other international documents, including CAT.[214] Following this reasoning,[215] the argument that it has acquired *jus cogens* status is 'less than convincing,'[216] since such a conclusion would suggest that 'no exceptions would be considered under any circumstance'[217] and this is clearly not the case.[218] There remain exceptions to the non-refoulement principle in the context of the Refugee Convention,[219] but there are also significant differences in interpretation of the obligation itself. Art. 3 CAT applies only to 'torture', not to other ill-treatment; and its interpretation by the ECtHR lacks universal application.[220] In order for treatment to be characterized as

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[213] Ibid. Emphasis added.
[214] Aoife Duffy, 'Expulsion to Face Torture? Non-refoulement in International Law' (2008) 20 International Journal of Refugee Law 373, 387. Duffy conducts a thorough analysis of international refugee law, various human rights treaties, UNHCR Conclusions, UN General Assembly Resolutions and other regional declarations, and concludes that the obligation forms part of customary international law. Duffy continues to state that 'A cynical response to the UNHCR policy *document* would question UN preoccupation with the principle of *non- refoulement* as defined by the Refugee Convention, which is obviously subject to significant exceptions and discriminations. Perhaps this is why some legal scholars push for its recognition as a principle of *jus cogens* - in order to liberate the principle of *non- refoulement* from its restrictive Refugee Convention definition.'
[215] WA Schabas, *Non-refoulement, Human Rights and International Cooperation in Counter-terrorism* (Liechtenstein 2006).
[216] Duffy (n 214).
[217] Ibid 389.
[218] As Orakhelashvili (n 190) 78 states, 'peremptory norms are peremptory and non-derogable not as aspirations, but as norms'.
[219] Farmer (n 111) for example, questions whether these exceptions have become obsolete as the non-refoulement obligation has ascended to jus cogens status. Note that this point is made in a refugee (non-terrorism related) context.
[220] Duffy (n 214) 389.

torture, the ECtHR will assess its degree of severity,[221] yet Article 3 CAT has attracted no such interpretive guidance. It has been seen that the ECtHR considered that ill-treatment other than torture that is nonetheless contrary to Article 3 ECHR will prevent removal,[222] but this is not the case under CAT.

The courts have accepted that a degree of risk is permissible before the non-refoulement obligation is triggered, which in itself could appear to contradict the contention that it has *jus cogens* status. It is instructive to note that NGO guidance and analysis tends to overlook the risk assessment criterion;[223] on occasion it is bewildering that the courts have not seen such a contradiction.[224] In terms of the standard of proof required before the non-refoulement obligation is triggered, again there is considerable variation in practice.[225] The European jurisprudence requires that there is the absence of a ‘real’ risk or torture or ill-treatment, and the US approach is predicated on a considerably higher standard, effectively the equivalent of the balance of probabilities. An alternative standard, that of a ‘real and substantial risk’,[226] has been proposed.

Despite such variance, the ECtHR has indicated that it accepts that assurances have the potential to satisfy the demands of Article 3

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[221] *Ireland* (n 46) [167].
[222] Above, p 271-272.
[223] See, for example, the approach taken by Amnesty International, *Dangerous Deals: Europe’s Reliance on Diplomatic Assurances Against Torture.* Amnesty International (April 2010) <http://www.amnesty.org.uk/uploads/documents/doc_20299.pdf> 22 July 2010, 6. The document refers to the fact that the non-refoulement obligation relates to a transfer where there is a ‘risk’ of torture, not a ‘real’ or ‘substantial’ risk. Implicitly it appears to suggest that *any* degree of risk is impermissible.
[224] In *Y v SSHD* SC/36/2005 at 390, SIAC held that the European jurisprudence shows that assurances can ‘reduce the risk of a breach of Article 3 to below the threshold level… a judgment as to [assurances’] effectiveness in the light of all the circumstances of the case and country is called for’. In *RB* (n 24) [114], Lord Phillips held ‘I do not consider that these decisions establish a principle that assurances must eliminate all risk of inhuman treatment before they can be relied upon.’ See also *Shamayev and others v. Georgia and Russia* App no 36378/02 (ECtHR, 1 April 2005) [352].
[225] Bruin and Wouters (n 39) 26.
[226] *Assessing Damage, Urging Action* (n 185) 190.

ECHR,[227] and there have been no ripples of dissent from the Supreme Courts of comparable jurisdictions in the USA, Canada or Australia. It is contended that the way in which the non-refoulement obligation has been applied, therefore, shows exactly the kind of 'differentialism' that cannot be representative of a peremptory norm.[228] Allied to this are other difficulties. The *raison d'etre* of OPCAT is to allow for monitoring to ensure that refoulement does not occur. OPCAT by its very nature lends little credence to the argument that non-refoulement is *jus cogens,* given the comparatively low extent of international ratification,[229] and the fact that, absurdly, the protocol is *optional.*[230]

These issues will no doubt continue to be disputed by jurists. Most scholars have argued that the principle of non-refoulement has *jus cogens* status,[231] and would contend that the 'existence of exceptions to the principle of non-refoulement indicate the boundaries of discretion as opposed to any fundamental objections to the principle itself'.[232] But there remains one, more obvious impediment to non-refoulement attaining peremptory status: extraordinary rendition has been castigated as an extra-judicial tool that has resulted in torture and ill-treatment. Complicity in its practice has been well documented in States across the world,[233] and this presents an impasse of considerable magnitude to those who would seek to argue for the current peremptory nature of *non-*

[227] Chahal (n 52) [147–148]; see *Mamatkulov v Turkey* (2005) 41 EHRR 494, and most recently *Qatada* (n 23) [188-205].
[228] Orakhelashvili (n 190) 68.
[229] Only 74 states have either signed or ratified OPCAT, and of those, only 54 have ratified (Optional Protocol to the Convention Against Torture and other Cruel, Inhuman or degrading Treatment or Punishment; <http://www2.ohchr.org/english/law/cat-one.htm>).
[230] The United Nations Human Rights Council has strongly stated that other states should ratify the Optional Protocol in its analysis of rendition and detention: above (n 155) 133.
[231] Allain (n 196).
[232] Goodwin-Gill (n 211).
[233] See generally Amnesty International, 'State of Denial: Europe's Role in Rendition and Secret Detention' (Index EUR 01/003/2008, June 2008) <http://www.amnesty.org/en/library/asset/EUR01/003/2008/en/2ceda343-41da-11dd-81f0-01ab12260738/eur010032008eng.pdf> accessed 02 December 2011.

refoulement.[234] It is extremely difficult to maintain the defence that such practices provide confirmation of the *jus cogens* rule; there must come a point when a plethora of exceptions, rather than confirm the existence of a rule, serve to terminally undermine it.[235]

The analysis of this part has identified several possibilities. First, the *non-refoulement* obligation may be classified as *jus cogens.* Accepting this in principle does not preclude the use of assurances, since it is argued that they have the potential to comply with the obligation: [236] some have suggested that the use of assurances adds a layer of protection over and above that offered by *jus cogens.*[237] Second, non-refoulement may be classified as *jus cogens* (as scholars and NGOs would advocate), but by recognizing the need and negotiating for assurances, it could be argued, as the Refugee Commission has done,[238] that recognition is given to the existence of the peremptory norm by these States. This argument may appear counterintuitive,[239] but many, including the UK government, have accepted it.[240] The third possibility is that the non-refoulement obligation has not yet fully ascended to *jus cogens* status, since there has been inconsistent observation of the norm in practice, and since there are

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[234] As Duffy suggests (n 214) 390.
[235] It should be observed here that taking this to its logical conclusion, an argument could be made that the prohibition of torture itself could not be *jus cogens*, particularly in light of the alleged activities of the US government since 9/11 at Guantánamo Bay and secret detention facilities (see, for example, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention, Conclusions and recommendations of the Committee against Torture USA*, CAT/C/USA/CO/2, at [14-18]). But the worldwide condemnation that such activities have attracted could perhaps confirm the existence of the rule under Allain's (n 196) and Goodwin-Gill's (n 211) analysis.
[236] Nina Larsaeus, 'The Use of Diplomatic Assurances in the Prevention of Prohibited Treatment'. RSC (Working Paper No 32, October 2006) 9.
[237] Ibid 8.
[238] UNHCR Refugee Policy and Practice, 'The Principle of *Non-Refoulement* as a Norm of Customary International Law' <http://www.unhcr.org/publ/RSDLEGAL/437b6db64.html.> accessed 14 July 2010.
[239] Duffy (n 214) 386.
[240] Kate Jones (n 171).

myriad examples of instances in which it has been ignored. Currently, this may be the most likely, even if it is the least politically palatable.

Taking these arguments to their logical conclusion, what is needed is further international consensus as to the standard of protection afforded by the non-refoulement principle. The obligation should be finally allowed to attain its status as a peremptory norm, yet this can only meaningfully be achieved when international agreement has been reached as to its definition. It should be possible to redefine non-refoulement obligation itself, from the current bar where there are 'substantial grounds for believing that he would be in danger of being subjected to torture'[241] to something that is universally interpreted.[242] There could be clear identification of the fact that the exceptions to the Refugee Convention have been trumped by this emerging norm. Considerable diplomatic pressure should be put on States to ratify OPCAT. The likelihood of this being achieved will increase when a final end is put to extraordinary rendition. The legal and political difficulties in reaching an agreement on such a definition are significant, and indeed may be insurmountable.[243] Nonetheless, this should not prevent States from attempting to reach some acceptable agreement.

Removal of an individual to a State to face torture is prohibited. But the legal reality is that not *all* risk of torture must be eliminated before a deportation can be said to comply with the non-refoulement obligation.[244]

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[241] Article 3(1) CAT.
[242] In terms of the existence of practical problems in respect to the burden of proof, this point is briefly alluded to in Bruin and Wouters (n 39) 26.
[243] Achieving even European consensus as to a framework for assurances has so far proven elusive; and clearly the ECtHR would be unwilling to lower the risk threshold to that, for example, of the US standard, since this was unsuccessfully argued in *A v The Netherlands*, App No 4900/06 (20 July 2010). With regard to the fact that a European framework may be poised for future development, see Pillay (n 125).
[244] See *RB* (n 24) [242]: 'In this field there can be no absolute guarantees that assurances, even at the highest level, will be adhered to. But the Strasbourg

This discussion therefore rejects the contention that assurances cannot be used without compromising international obligations around the prohibition of torture. Instead, what is proposed is a procedure for assurances that can be adopted in order to reduce this risk to an acceptable level. The standards required of such an assurance model can be particularly rigorous, and require assiduous legislative and judicial oversight, in accordance with the research hypothesis.[245]

Criticism 2: Non-legally binding assurances are not effective (or reliable) since they may not be observed by States

There have been criticisms that due to the political or quasi-legal nature of assurances, they are not legally enforceable,[246] and therefore do not offer adequate protection. Larsaeus gives a comprehensive account of the arguments around international enforceability and the difference between legally binding treaties and non-enforceable political promises.[247] It is common ground that assurances will be legally binding under international law if they amount to treaties.[248] Some academics have postulated that all MOU are treaties and therefore binding;[249] others are not so certain.[250] It

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jurisprudence does not require them to achieve that standard. The words “substantial” and “real risk” show that the court's approach is essentially a practical one that strikes a balance between the interests of the community and the protection of the individual.’

[245] States cannot balance the risk posed by an individual against the threat to the community (*Saadi* n 49); an individual cannot be deported where there is a ‘real risk’ of ill-treatment (*Chahal* (n 52)). In the SIAC judgment in *DD and AS v SSHD* Appeal no SC/42 and 50/2005, the court considered (at [275]) expert evidence that it was ‘w*ell-nigh unthinkable’* that the assurance would not be honoured by the Libyan government, but SIAC still reached the decision that based on all of the facts, there was a real risk of ill-treatment which precluded deportation. This was cited by the Court of Appeal, rejecting the appeal of the Secretary of State, and again by a later House of Lords (respectively [2008] EWCA Civ 289; *RB* (n 24)).

[246] Martin Jones (n 171) 28.

[247] Larsaeus (n 236) 22.

[248] art 2(1)(a) of the *Vienna Convention on the Law of Treaties*; a Treaty is a document ‘governed by international law’. There must be an intention to create obligations under international law.

[249] Jan Klabbers, *The Concept of Treaty in International Law* (Kluwer, 1996) 1–14, a point also supported by Gregor Noll, ‘Diplomatic Assurances and the Silence of Human Rights law’ (2006) Melbourne Journal of International Law 11.

has been contended that in order to be effective, assurances should be legally binding,[251] and NGOs such as Human Rights Watch have disputed the efficacy of mere political assurances, perhaps because there are no competitive market forces at play on an international stage, and the costs of noncompliance are therefore low or nonexistent.[252] From an analysis of the language of the UK assurances, there is broad agreement that they are not intended to be legally binding;[253] the UK government have not attempted to argue that the MOU that are currently in place have full legal force.[254] This does not necessarily mean that assurances are ineffective.

Even accepting that UK MOU are not intended to confer binding international legal principles on the sending or receiving State, it has been suggested that the reliance on assurances takes place at a level over and above that attained by the relevant international obligations under CAT.[255] There are two problems with this contention. First, it assumes that international obligations *viz* non-refoulement under CAT may be discharged without resorting to the use of assurances. The European jurisprudence has shown this to be questionable, if not unlikely. Next, it suggests that the assurances currently used by the UK comply with the non-refoulement obligation. Although the House of Lords has been satisfied,[256] even a more definitive ECtHR ruling has not finally settled the issue.[257] Equally, it does not follow that a similar approach would be

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[250] Anthony Aust, *Modern Treaty Law and Practice* (Cambridge University Press, 2000).
[251] Larsaeus (n 236) 22.
[252] Oona Hathaway, 'Do Human Rights Treaties Make a Difference?' (2002) 111 Yale Law Journal 1935, 1938, cited in *Human Rights Watch* (n 161) 21.
[253] Ibid. Note that this does not necessarily preclude the possibility that MOU are not legally binding, but it raises a significant doubt.
[254] SIAC acknowledged as much in the context of the Jordan assurance, since if the MOU amounted to a Treaty, and was therefore binding, it would have required Parliamentary approval by Jordan. The clear intention of both governments was therefore that it was not legally binding. See *Qatada SIAC* (n 27) [500].
[255] Larsaeus (n 367) 8.
[256] *RB* (n 24).
[257] *Qatata* (n 23).

adopted by States interpreting CAT on an international stage, given the very different standards of protection conferred by the respective Conventions. Rather than accepting that UK assurances offer protection over and above that available multilaterally, a more pertinent question would be whether there are appropriate enforcement mechanisms in place to ensure *compliance*.

Enforcement

One of the central criticisms regarding the use of assurances, and their corresponding ineffectiveness, is in relation to the lack of adequate enforcement mechanisms.[258] There is considerable evidence to suggest that States that had provided assurances still had a reputation for ill-treatment and/or torture.[259] The legal value of assurances is therefore questionable, and their justiciability on an international stage is even more so. Yet an assurance that lacks legal enforceability is not necessarily rendered redundant. It is important to differentiate between *legal* enforcement and enforcement by some other means, which may include political sanctions or other ramifications in the case of breach.

Central to the UK government's assessment of the potential value of assurances is the strategy of placing assurances at the heart of a bilateral relationship between States.[260] With regard to the argument that MOUs are inevitably created with States with questionable human rights records,

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[258] *UK Compliance with the UN Convention Against Torture Joint Committee on Human Rights* (September 2005) <http://www.justice.org.uk/images/pdfs/uncatsept05.pdf > accessed 9 June 2010, [17-20]; See also *Agiza v Sweden*, Case No 233/2003 (24 May 2005), [13.4]: 'The procurement of diplomatic assurances, which, moreover, provided no mechanism for their enforcement, did not suffice to protect against this manifest risk'.
[259] Ibid [21-33].
[260] Note that 'bilateral relationships' include relationships between states where there is one clear junior political (or economic) partner. It could be argued that the USA and the UK, for example, are in a very strong position to negotiate for forceful assurances with other states. The same may not be true of other (for example European) countries.

and that such States would not comply with non-legally binding rules, Jones responds by noting that compliance by such States will:

> 'depend less on the legal status of a commitment and more on reasons and incentives they have to comply. Failure to comply with formal political commitments in an MOU or similar international instrument can do serious damage to diplomatic relations between the signatory States'.[261]

In the UK, SIAC continues to scrutinize assurances on a case-by-case basis,[262] and it may be thought that there is considerable force in Jones' argument that with such factual determinations as to assurances' reliability,[263] and with the appropriate scrutiny, right of appeal and political and legal checks, assurances *can* be considered as reliable safeguards. Certainly the opinion of SIAC has been to consider that bilateral agreements do provide substantial protection against potential breaches, suggesting that the Commission considers, in a similar vein to Larsaeus,[264] that such agreements offer something over and above the existing multilateral rights protection stemming from international Law.[265] The ECtHR has added further support to this contention.[266]

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[261] Kate Jones (n 171) 188.

[262] Even though that scrutiny has been criticized: see Mark Elliot, 'The false promise of assurances against torture'. Justice Journal, <http://www.statewatch.org//news/2009/jun/The%20false%20promise%20of%20assurances%20against%20torture%20-%20uk-torture-assurances-eric-metcalfe-justice.pdf.> accessed 10 September 2010, 85.

[263] Kate Jones (n 171) 186.

[264] Larsaeus (n 236) 8.

[265] In *Qatada*, SIAC questioned why it was 'unclear why a bilateral agreement in the form of an MOU would be adhered to, where a multilateral human rights agreement with reporting arrangements has been breached,' and continued 'The answer here as set out above is precisely that it is bilateral, and is the result of a longstanding and friendly relationship in which there are incentives on both sides to comply once the agreement was signed. The failure of those who regard these arrangements as unenforceable, in some asserted but not altogether realistic comparison with international human rights agreements, is a failure to see them in their specific political and diplomatic context, a context which will vary from country to country.' *Qatada SIAC* (n 27) [508].

[266] *Qatada* (n 23) [188-207].

There is one criterion that must be considered on an international level before this can be achieved. Much has been said of a 'bilateral relationship' needed between sending and receiving State. In reality, in many situations one party to a removal is subordinate to another. A consistent approach internationally, which will require the existence of such 'bi-lateral' relationships over and above the multilateral framework, is impossible: political promises are only effective where there is a political sanction for breach, and the complex social, political and economic factors at play in an international arena preclude the formation of a wholly uniform rubric. Once a successful bi-lateral relationship can be shown, however, and provided the nature of this relationship adds a sufficient degree of *political* enforceability, an assurance may be upheld. A tribunal such as SIAC, together with a robust appeals procedure, should be able to carry out this exercise and uphold an assurance only where its effectiveness has been established.[267] SIAC has exposed assurances to intensive scrutiny in numerous cases.[268]

The effectiveness of assurances should therefore be questioned by an independent assessment of the political will and overall likelihood of a breach by either State. Thus 'enforceability' in international terms has a different meaning to strictly legal enforceability; a more fitting international term may be 'compliance',[269] which must be justiciable. Observing these differences, Larsaeus analyzes the ways in which international relations may ensure compliance with assurances, discussing the use of both incentives and threats as a means to facilitate such compliance.[270]

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[267] Kate Jones (n 171) 186.
[268] Numerous SIAC decisions are referred to in the following analysis. For a full list, see http://www.siac.tribunals.gov.uk/outcomes2007onwards.htm.
[269] 'whilst it is true that there are no specific sanctions for breaches, and the MOU is certainly not legally enforceable, there are sound reasons why Jordan would comply and seek to avoid breaches,' *Qatada SIAC* (n 27) [507].
[270] Larsaeus (n 236) 23.

Larsaeus also discusses the relevance of the degree of trust between sending and receiving States.[271] These considerations will clearly vary on a case-by-case basis and will be determined by a variety of factors that govern the political relationship between the two States.

A doctrine of 'compliance'

In order to ensure compliance, much will depend on the relationship between the sending and receiving State in terms of political will, trust, incentives and threats. It is instructive to examine some of the SIAC cases in which assurances have been challenged in order to examine the way in which weight has been given to the likelihood of compliance through an examination of the bilateral relationship. The 'strength, duration and depth'[272] of such a bilateral relationship are, of course, key factors. There is a requirement for a 'sound objective basis for believing that the assurances would be fulfilled'.[273] As Lord Phillips has stated, this requires a 'settled political will to fulfill the assurances allied to an objective national interest in doing so.'[274] Jones lists pertinent examples as to the approach of the UK Government and SIAC, and it is worth addressing these briefly in order to see the various ways in which compliance may be facilitated and in order to demonstrate their relative advantages.[275]

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[271] SIAC has demonstrated the importance of trust between the British Government and, for example, the Algerian Authorities: see *T v SSHD* SC/31/2005 (22 March 2010) [16]. This could be contrasted with the UK government's reliance on trust in the Libyan regime; SIAC held that particular assurance was insufficient (*DD and AS v SSHD* SC/42 and 50/2005 (27 April 2007) [334]. See also *Qatada SIAC* (n 27) [312].

[272] *Qatada SIAC* (n 27) [496]. See also the opinion of the ECtHR that 'The Court shares SIAC's view, not merely that there would be a real and strong incentive in the present case for Jordan to avoid being seen to break its word but that the support for the MOU at the highest levels in Jordan would significantly reduce the risk that senior members of the GID, who had participated in the negotiation of the MOU, would tolerate non-compliance with its terms' Qatada (n 23) [201].

[273] Lord Phillips, citing the test adopted by Mitting J in SIAC, *RB* (n 24) [23].

[274] Ibid.

[275] Kate Jones (n 171) 177- 188. Note that Jones's account lists six, but these have been combined into four for the sake of clarity. Jones' discussion is of the steps that are taken

First, there should be discussions between Heads of State or government. This criterion is particularly important where there is a risk of breach by the security services or other agents of a receiving State. By invoking a top-down approach, a clear message is sent to agents of the receiving State that a breach of the assurance will not be tolerated. Senior level discussions were advocated in the US case of *Khouzam v Ashcroft,* where the court held that '[t]he regulations require more than the mere forwarding of diplomatic assurances obtained by the State Department. They require *consultation at* the highest levels of the Departments of State and Homeland Security'.[276] While the actions of rogue security services or other personnel will remain a prevailing concern, and indeed represent a key consideration when it comes to the assessment of an assurance by the relevant tribunal,[277] adopting such an approach should help to minimize this risk.[278]

Second, there should be detailed discussions at ministerial and operational level as to the practical meanings of such assurances;[279] in this way, the literal 'black letter' of the assurances themselves is supplemented by myriad guarantees and understandings that form part of

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by the UK government, as opposed to suggestions for how to ensure compliance. SIAC is the arbiter in that case.

[276] 529 F Supp 2d 543, 558 (MD Pa 2008). Original emphasis.

[277] See, for example, the notice taken by SIAC of an 'isolated incident' in Algeria in which between 30 and 80 prisoners were stripped naked, beaten, kicked, beaten and threatened with sexual abuse: *QJ v SSHD*, SC/84/2009 (14 December 2009), [23].

[278] In the context of the Jordan assurances, for example, see the SIAC decision of *Qatada SIAC* (n 27) [362]. SIAC considered the actions of 'quite senior' officers, who had sanctioned or turned a blind eye to torture, but held that this was mitigated by the King's political power and prestige.

[279] This approach may be particularly important when dealing with states which are reluctant to 'go beyond that which was strictly agreed to initially': see the comments in respect of the Algerian promises of Mr. Layden, the Special Representative of the DWA regime for the Foreign and Commonwealth Office, summarized in the SIAC judgment *Sihali v SSHD* SC/38/2005 (26th March 2010) [22].

the agreement; the matrix is gelled together by trust.[280] This ensures that the existence of black letter promises does not result in a restrictive interpretation being placed on specific guarantees.[281] Allied to this should be a requirement to carry out a detailed inquiry as to what will happen to a deportee upon their return; this would help to remove any ambiguity as to a deportee's treatment immediately on their return, which is arguably the time in which a deportee is most at risk.[282] There is a clear need for justiciability of these issues.

The third criterion is critical to the success of the regime: assurances should be placed 'at the heart of a bilateral relationship' so as to reinforce the severity of the consequences of a breach. This draws on the issues identified above in relation to incentives and sanctions; these may be trade related or otherwise political in nature.[283] It is important that there is an independent arbiter in order to ensure that the issues are justiciable. One example would be the assurances provided by Algeria, which were upheld by SIAC and the House of Lords, partially due to the fact that Algeria

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[280] While this would therefore appear to question the validity of the Algerian assurances, it is submitted below that these already should fall below the required standard due to the absence of independent monitoring (at least until OPCAT is ratified).
[281] Or, in the words of SIAC, 'the assessment of the value and effectiveness of assurances is less a matter of their text … and more a matter of the domestic political forces which animate a government and of the diplomatic and other pressures which may impel its performance of its obligations, or lead to quick discovery and redress for any breach' *DD and AS v SSHD* SC/42 and 50/2005 (27 April 2007) [319]. *Qatada SIAC* (n 27) [495], '[t]he political realities in a country matter rather more than the precise terminology of the assurances'.
[282] See, for example, Open Society Institute, The Global Campaign for Pretrial Justice, *Pretrial Detention and Torture: Why Pretrial Detainees Face the Greatest Risk* (2010) <http://www.soros.org/initiatives/justice/focus/criminal_justice/articles_publications/publications/pretrial-detention-torture-20100409/summary-pretrial-detention-torture.20100409.pdf> accessed 19 July 2010.
[283] For reasons of diplomatic relations and national security, it is often difficult to categorize the ways in which such sanctions could be implemented; SIAC will consider the availability of such sanctions in a closed session if necessary, and such considerations will inform its overall judgment. See, for example, SIAC's assessment of the Jordan assurances, *VV v SSHD* SC/59/2006 (2 November 2007) [30].

wished to become a normally functioning civil society, and breaching solemn political promises would not be compatible with such an aim.[284]

Fourth and finally, the political relationship and potential ramifications of deportation to the individual should be considered. In some instances, the removal of individuals has attracted media scrutiny and/or captured the public interest;[285] this clearly may reduce the likelihood of a breach. There may also be accounts of treatment of previous deportees or detainees, which will naturally influence any decision.[286]

All of the abovementioned criteria have their place in ensuring an effective and broadly rights-compliant DWA regime, and the recent ECtHR judgment in Qatada has crystallized some 11 principles that no doubt will inform efforts of the FCO to conclude assurances that will be capable of withstanding future judicial scrutiny. These criteria may be summarized as: whether the assurances have been disclosed to the court; whether the assurances are specific or vague; who has given and received the assurances and whether they are binding; the nature of the bilateral relationship between the sending and receiving State, including the State's previous record in abiding by assurances; the requirement for objective verification of compliance with assurances; whether there is an effective system of protection against torture in the receiving State; whether the applicant has previously been subject to ill-treatment in the receiving

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[284] The court noted that very considerable efforts have been made at the highest political levels on both sides to strengthen these ties (*BB v SSHD,* SC/39/2005 at [18]).
[285]*Qatada SIAC* (n 27) [355-356]; see, however, the opinion of SIAC, which accepted that 'although publicity can provide a measure of protection for those suspected of terrorism, it is no guarantee of their safety' *Naseer et Al v SSHD* SC/77/80/81/82/83/09 [54].
[286] 'Political will apart, it seems to us that the best indicator of whether these assurances will be fulfilled is the experience of those who have been returned to Algeria,' *Sihali v SSHD* SC/38/2005 [52]. SIAC compared Sihali's potential treatment upon return to that of other deportees whom were higher in terms of threat hierarchy. In particular see [52-64] of SIAC's judgment, in which the Commission discussed the treatment of every deportee to Algeria and relevant detainee. See also *U v SSHD* SC/32/2005 [37].

State; and whether the reliability of the assurances has been examined by the domestic courts of the sending State.[287]

Other measures could also be implemented at an international level in order to ensure greater compliance or enforcement. Once a bilateral relationship is established, transparency at an international level will alleviate some of the concerns regarding secrecy.[288] Of real significance here are the myriad NGO reports, which facilitate appropriate international scrutiny. The publication of monitoring reports,[289] together with mandatory reporting to the Committee Against Torture on the use of assurances, will help to ensure compliance in such a manner. This is already a requirement to those States that have ratified OPCAT.[290] In this regard, much could be said for increasing the size and remit of the Committee Against Torture and to correspondingly require States to submit reports, again subject to full public and NGO scrutiny, on an annual basis. There is considerable time lag evident between recommendations of the Committee and the subsequent response and/or remedial action of the concerned State;[291] such time lag may be reduced by an implementation of these measures.

Each of the foregoing suggestions may help ensure greater compliance with assurances. Common to all of these suggestions, and clear from the jurisprudence of the UK courts and the ECtHR, is that the removal should

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[287] Qatada (n 23) [189].
[288] Noll (n 249).
[289] States are currently required to submit a report to the Committee Against Torture one year after acceding to the Convention and then at 4-yearly intervals. The Committee against Torture adopted a new optional reporting procedure, consisting of a list of issues to which states are required to respond (United Nations, *Report of the Committee Against Torture, Thirty Seventh Session, Thirty Eighth Session (*A/62/44, 2007) paras 23-24).
[290] Under Article 19 of the Convention. As to the significance of OPCAT in a monitoring context, see below p 328-329.
[291] The four-yearly requirement was not observed either by the USA or the UK. The last report of the USA was due in 2001 and submitted in 2005, completed in 2006; the last report of the UK was due January 2002 and submitted November 2003.

be subject to judicial oversight: an appropriate tribunal should have the power to scrutinize the assurance, rather than simply afford unfettered discretion to the executive, contrary to the current practice of the US government. It is therefore necessary to consider the ways in which this may be implemented.

Applying the benchmarks to the DWA regime

The refusal of the US government to allow the courts to intervene in these matters echoes UK concern voiced in 1971 during passage of the Immigration Act;[292] yet the experience of the UK since that time has shown that the courts have discharged their function remarkably well.[293] In terms of the composition and function of an appropriate tribunal, some lessons may be drawn from SIAC in the UK. Clearly there is tension between the requirement to protect national security when dealing with sensitive terrorism-related issues; there is also a pressing need to ensure secrecy in some cases in order to protect diplomatic relations with other States.[294]

The use of any DWA regime should be clearly prescribed by the legal system in a concerned State.[295] Lessons may be drawn here from the German system, which implements a formal administrative procedure to regulate the use of assurances;[296] establishing an assurance regime on a

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[292]'Whether an individual's presence in this country is a danger to this country is not a legal decision. It is not a justiciable issue or a matter of law; it is a matter of judgment. Judgment should be exercised by the Government, subject to the House of Commons, and not by a tribunal which is not under the control of the House' (HC Deb 15 June 1971, col 392).

[293] For a comprehensive historical account of deportation since the 1971 Act, see Bradley and Ewing (n 4).

[294] These issues were considered by the ECtHR in *Chahal* (n 52) [150-153], with the ECtHR criticizing the mechanisms for review. These criticisms led to the creation of SIAC.

[295] *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention, Conclusions and recommendations of the Committee against Torture USA*, CAT/C/USA/CO/2, at [22].

[296] Gemeinsames Ministerialblatt, 30 October 2009 (GMBl 42-61, S 877ff). Sections 60(2), (3), and (7) respectively.

statutory footing would have numerous advantages in terms of clarity and justiciability, whilst at the same time it would also encourage further debate during its legislative passage.

In terms of judicial oversight, a tribunal responsible for judicial oversight of a DWA regime must be adept at analyzing national security matters within a specific legal framework, as has been emphasized by the House of Lords:

> 'This is an expert tribunal charged with administering a complex area of law in challenging circumstances … the ordinary courts should approach appeals from [such tribunals] … with an appropriate degree of caution; it is probable that in understanding and applying the law in their specialized field the tribunal will have got it right.' [297]

SIAC holds closed hearings and gives closed judgments where appropriate, and it has been seen that the tribunal must be capable of assessing the political situation in the sending and receiving States.[298] The USA would benefit from an analysis of the Commission and the way in which it manages the sensitive issues at play in this area, since it is submitted that a lack of judicial oversight in a US context is a source of concern.[299]

One area in which the UK system is potentially deficient is the absence of an effective appeal route: once SIAC has reached a decision, the degree

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[297] See the approach of Lord Phillips in *RB*, citing comments made by Baroness Hale, in the context of the Asylum and Immigration Tribunal, in *AH (Sudan) v SSHD (UNHCR intervening)* [2007] UKHL 49 (*RB* (n 24)).
[298] The role of SIAC in assessing the viability of assurances was effectively vindicated by the ECtHR, which considered that SIAC was a 'fully independent court' with the power to conduct a 'full merits review' of the deportation, including the power to quash the deportation order (*Qatada* (n 23) [220]).
[299] For an examination of which, see Deeks (n 122) 74-79. The suggestion that the US policy should be different (i.e. not establish full judicial review) in light of the 'sense within the Executive Branch that the US role in the world may require a greater degree of discretion and confidentiality than that required by our Western allies' is particularly pertinent.

of appellate court scrutiny is limited. The ECtHR in *Chahal* has established that the test as to whether there is a 'real risk' that a deportee would be subject to ill-treatment is a matter of fact that will turn on the individual circumstances of the case,[300] and the provisions stipulate that an appeal lies only on a question of law.[301] As Lord Hoffmann has stated, '[t]he findings of SIAC on safety on return are therefore open to challenge only if no reasonable tribunal could have reached such a conclusion on the evidence'.[302] The House of Lords could perhaps have ruled that in determining an appeal, scrutiny was required of the factual matrix itself, but it declined to do so.[303] The current position in England and Wales is that SIAC conducts a detailed fact-based analysis and reaches a judgment; an appeal lies to the Court of Appeal only on a point of law, and the applicable principles are those of traditional judicial review. If a further application is lodged to Strasbourg, the ECtHR will examine the entire factual matrix in a similar manner to SIAC. There is much to be said for entrusting the initial task to a highly specialized tribunal notwithstanding the fact that an applicant is denied a meaningful reassessment of the factual situation pending a determination by Strasbourg.[304] It does, however, mean that any future attempts to limit ECtHR involvement in

[300] *RB* (n 24) [185] (Lord Hoffmann): 'There is in my opinion nothing in the subsequent jurisprudence of the ECHR to change the question or to convert it into a question of law'. See also Lord Hope, [214]: 'There is nothing in Convention law or section 6(1) of the [Human Rights] Act that requires SIAC's findings of fact on these issues, contrary to this provision, to be reopened on appeal'.

[301] s. 7(1) Special Immigration Appeals Commission Act 1997.

[302] *RB* (n 24) [191] (Lord Hoffmann).

[303] pursuant to s. 6 HRA 1998. Ibid [189].

[304] Ibid [66] (Lord Phillips): 'There is good reason for this. The length of SIAC's decision in Qatada's case, and the time that it took to deliver, evidences the size of the task that a rigorous scrutiny of the material facts in a case such as this can involve. It makes sense to reserve such a task to a specialist tribunal without providing for a full merits review by an appellate court.' See also the comments of Lord Hoffmann at [190]: 'there is nothing in the Convention which prevents the United Kingdom from according only a limited right of appeal, even if the issue involves a Convention right. There is no Convention obligation to have a right of appeal at all.'

deportation cases should be closely scrutinized, since as a court of last instance, the UKSC will be concerned only with questions of law.

Despite the fact that SIAC provides detailed scrutiny of the key issues, criticisms levied at the Commission have been aimed at its deference to executive decision-making.[305] SIAC has rejected submissions on behalf of the Secretary of State that it was 'poorly equipped to review the assessments and decisions' in the field of international relations. Instead, the Commission has consistently held that it is for SIAC to decide how much weight to give to the Secretary of State's determination, forming its own view from all of the available evidence:[306]

> 'the Commission has not adopted a deferential approach, treating the SSHD as having a constitutionally allocated function or role, which requires us to defer to him … We do not deny that the Security Service has an expertise which we have to take into account but that is different from constitutional deference or respect for differently allocated roles.'[307]

The decision of SIAC regarding the insufficiency of the Libyan assurances adds further credence to the government's assertions that SIAC is suitably independent and capable of subjecting assurances to the appropriate degree of scrutiny,[308] given its constitution and expertise. The

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[305] Elliot (n 262).
[306] *Qatada SIAC* (n 27) [339]; *Y v SSHD* SC/36/2005, [324-326].
[307] *Y and Othman v SSHD* SC/36/2005 SC/15/2005, [59].
[308] Kate Jones (n 171) 193. Note that this is not without criticism: Elliot (n 262) 82-83, opines that 'A superficial consideration of SIAC's judgments might lead one to conclude that its rejection of the Libyan MOU was proof of the overall reasonableness of its approach. Nothing could be further from the truth. The fact that even SIAC found a promise from Colonel Gadaffi too weak an assurance against torture is proof only that its members are not entirely bereft of reason, not that their judgment is therefore to be commended.'

role of SIAC in this way has been vindicated by successive decisions of the ECtHR.[309]

A tribunal endowed with the appropriate powers of review, such as SIAC, is an essential prerequisite, particularly insofar as it encourages and assesses compliance with assurances. This would ensure constitutional optimization across the DWA regime. That is not to suggest, however, that assurances do not still pose problems. To do so would ignore myriad NGO criticisms and two significant indicators that demonstrate the potential fallibility of assurances: cases in which assurances have been breached and the subsequent impotence of the States in which breaches have occurred.

Criticism 3: There are examples of non-compliance and impotency if assurances are broken

NGOs and other bodies have repeatedly stressed reports of instances where assurances have been reneged upon.[310] In a recent report, Amnesty International documented several such instances, including returns from Italy to Tunisia, Spain to Russia, as well as the notorious Swedish-Egypt return.[311] Noll conducts a detailed analysis of the Swedish-Egyptian assurance which was breached, and concludes that in the aide-memoirs that were passed between Sweden and Egypt, Sweden was deferring to Egypt's reading of human rights principles,[312] rather than insisting on internationally approved norms.

The existence of such breaches may serve as affirmation of the observations above in relation to the nature of the bilateral agreement.

[309] *A and Others v United Kingdom*, App no 3455/05, 19 February 2009 (ECtHR, Grand Chamber) [219]; Qatada (n 23) [219-225].
[310] Liberty and Justice Joint Submission (n 186) [16].
[311] Dangerous Deals (n 223) 6.
[312] Noll (n 249) 15.

Assurances may work where there is such an arrangement, but the sending State must be careful not to acquiesce to myriad demands of the receiving State, particularly where that means deferring to the receiving State's interpretation of the scope of CAT protection. Various States took measures by which to limit the standard of protection against torture under CAT to that found in their own Constitutions,[313] and it has already been suggested that care must be taken in order to ensure consistent interpretation of the obligation. Much will again depend on the nature of the bilateral relationship. The UK has been careful to require from receiving States compliance in terms of the UK's obligations flowing from both European and International Law, despite Amnesty's report, which criticizes both the UK government's DWA policy and the jurisprudence arising from it.[314]

Even where a breach is suspected, it has been suggested that the deporting State may be powerless to take action.[315] The Director of Central Intelligence notoriously summarized this in 2005, stating to Congress:

> 'We have a responsibility of trying to ensure that they are properly treated, and we try and do the best we can to guarantee that. But of course once they're out of our control, there's only so much we can do'.[316]

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[313] United Nations, *Treaty Series*, vol. 1465, 85. The USA in particular lists such a reservation.

[314] Dangerous Deals (n 223) 30.

[315] Human Rights Watch (n 161) 26-27.

[316] Testimony of Porter J. Goss before the Senate Select Committee on Intelligence, "Global Intelligence Challenges 2005: Meeting Long-Term Challenges with a Long-Term Strategy," February 16, 2005, <http://www.cia.gov/cia/public_affairs/press_release/2005/pr02172005.html>, cited in Human Rights Watch (n 7) 37.

The evident concern with such a policy has been echoed by NGOs.[317] The obvious response to such criticism lies in the nature of the bilateral agreement. A carefully implemented DWA strategy, firmly entrenched in a bilateral relationship between States, is very different to that adopted in this statement, and it is also very different, as the SIAC analysis makes clear,[318] to the attitudes of the Swedish and Egyptian Governments in the case in which an assurance was breached.[319] Of course, it may be impossible for sending States to divulge the exact nature of the political or other sanctions that may be imposed should a receiving State renege on its assurances; but that does not preclude the possibility that an appropriate tribunal may provide adequate scrutiny, as SIAC has proven.[320]

A breach of assurance in the past should not preclude the possibility of effective and reliable assurances being propounded in the future. If one assurance is flawed, it does not necessarily follow that all assurances are flawed, since, as the courts have repeatedly stressed,[321] each case will turn on its own particular facts and each assurance needs to be assessed on its independent merits on the basis of the entire factual matrix. What is instead needed here is for lessons to be learned from those alleged cases in which assurances have been reneged upon,[322] and it is clear from the SIAC jurisprudence in the UK that this has been a prime concern. It should be possible to distill ways in which, with improved guidance[323]

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[317] Dangerous Deals (n 223) 9-10.
[318] *Qatada SIAC* (n 27) [496].
[319] *Agiza v Sweden, Communication* 233/2003 (UN Doc Cat/C/34 /D/233/2003, 2005).
[320] See, for example, *VV v SSHD* SC/59/2006 (2 November 2007), [30].
[321] *Saadi* (n 65) [147]–[148].
[322] *UNHCR Note on Diplomatic Assurances and International Refugee Protection*, Geneva (August 2006) <www.unhcr.no/Pdf/protect/Diplomatic_assurances_Int_Ref_protection.pdf>, accessed 22 July 2010, [22].
[323] Kate Jones (n 171) 36.

and procedure, future violations should be prevented. It is therefore suggested that this criticism does not provide substantial grounds for considering assurances to be incapable of satisfying obligations under CAT, provided an effective system of judicial oversight is implemented.[324]

Criticism 4: Lord Phillip's Catch-22:[325] if you need to ask for assurances, you cannot rely on them

The UN Special Rapporteur has stated that 'the very fact that such diplomatic assurances are sought is an acknowledgement that the requested State, in the opinion of the requesting State, is practicing torture'.[326] As long as a DWA regime of some sort is pursued, this criticism is unlikely to abate. It is difficult to deny the logic of the conundrum: why should a State, which has clearly been in breach of its (legally enforceable) international obligations surrounding torture, suddenly honour a non legally-binding political promise? Lord Phillips has made a similar observation, stating that there is an:

> 'abundance of material that supports the proposition that assurances should be treated with scepticism if they are given by a country where inhuman treatment by State agents is endemic'.[327]

This criticism directly correlates to the contention that assurances damage existing multilateral rights protection,[328] a notion reinforced by the Rapporteur: rather than using diplomatic and legal powers to hold

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[324] JCHR, *Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters*, (HL 75-I HC 561-I, 2005) [142].
[325] *RB* (n 24) [115] (Lord Phillips).
[326] UN Commission on Human Rights, *Report of the Special Rapporteur on the question of torture*, 62nd session (E/CN4/2006/6, 23 December 2005) [31] (Special Rapporteur Report).
[327] *RB* (n 24) [115] (Lord Phillips).
[328] 'damage will be done, either to the diplomatic assurances, or to multilateral treaties protecting human rights. Or, one may add, to the coherence of international law' Noll (n 249) 18.

offending States to account for their violations, a requesting State through an assurance seeks only an exception for the practice of torture for a few individuals. This leads to double standards.[329] The UN High Commissioner for Human Rights has likewise raised this argument[330] but the obverse, that assurances actually weaken individual human rights protection, has similarly been made.[331]

Against this backdrop of criticism, it has been argued on behalf of the UK government that the existence of bilateral agreements actually serve to strengthen the multilateral rights framework.[332] Bilateral agreements that have been in place and subject to judicial scrutiny in the UK may well have caused further scrutiny of the receiving States' compliance with multinational rights norms.[333] It is, for example, possible to identify States that have substantially improved their reputation, despite prior firmly entrenched notoriety for breaching their international obligations.[334] It would be impossible for a State with a notable reputation for violating its obligations under CAT to suddenly accede to international pressure, renounce its old ways, and ratify OPCAT. Interim diplomacy is vital, and the UK experience with the Algerian authorities has shown that long-term international compliance may follow once bilateral obligations have been successfully negotiated.

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[329] See *Human Rights Watch* (n 161) 23: 'If the international community as a whole were to endorse assurances to protect one person, it would be perceived as ignoring those systematic failings, neglecting the obligation to address the endemic nature of the problem, and providing abusive governments with a device to falsely flaunt their human rights credentials without having to abide by their general legal obligations on torture.'

[330] UN High Commissioner for Human Rights, *Statement before the Council of Europe Group of Specialists on Human Rights and the Fight against Terrorism*, 29-31 March 2006.

[331] In the context of *Agiza v Sweden,* it has been suggested that the assurances at play fell short of those required by CAT: Noll (n 249) 12.

[332] Kate Jones (n 171) 190.

[333] Ibid.

[334] See, for example, the Algerian and Jordan assurances.

Criticism 5: It is in the interests of no party to the assurance to report a breach

One of the central difficulties with the implementation and monitoring of assurance lies in the fact that secrecy is paramount. Noll observes a 'double secret' which conceals each source of terror on behalf of both the individual and the State, and observes that assurances negatively circumscribe this fear since details cannot be released due to security imperatives.[335] A breach of an assurance, it is argued, cannot be articulated as a human rights violation since this would jeopardize the position of the State. Indeed it could be stated that it is in the interests of no party to an assurance to find a breach. The State seeks to avoid a breach for reasons relating both to politics and security, as well as its international law obligations.[336] A body monitoring the use of assurances may be under pressure by virtue of the relationship between the monitoring agency and the sending and receiving countries, since continued access to deportees will require ongoing compliance and dialogue.[337] A receiving State obviously does not wish to have their assurance brought into disrepute, particularly where it involves negotiations undertaken at the highest level of government, and likewise has international obligations and politics to consider. Finally, the deportee himself may not wish to draw attention to any mistreatment for fear of secretive repercussions and further

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[335] Noll (n 249) 11.

[336] Human Rights Watch (n 161) 4; Dangerous Deals (n 223) 9; Rebekah Braswell, 'Protection Against Torture in Western Security Frameworks: The Erosion of Non-Refoulement in the UK-Libya MOU' (University of Oxford Refugee Studies Center Working Paper No 35, Oct 2006) 17.

[337] It is easy to see how this could apply to the QDF, the body which was notionally responsible for monitoring compliance with the Libyan assurances, given its perceived lack of complete independence (see *DD and AS v SSHD* SC/42 and 50/2005 (27 April 2007)).

mistreatment.[338] Similar criticisms have also been provided by the UN Special Rapporteur,[339] and voiced by the UN High Commissioner for Human Rights:

> '[s]hort of very intrusive and sophisticated monitoring measures, such as around-the-clock video surveillance of the deportee, there is little oversight that could guarantee that the risk of torture will be obliterated in any particular case. While detainees as a group may denounce their torturers if interviewed privately and anonymously, a single individual is unlikely to reveal his ill-treatment if he is to remain under the control of his tormentors after the departure of the "monitors"'.[340]

Allied to this is the concern specific forms of ill-treatment and torture may not leave physical marks, and therefore may be extremely difficult, if not impossible, to detect. This issue was highlighted by SIAC in *Qatada.*[341]

Jones' response to these arguments is that steps are taken for independent monitoring, ensuring that ill-treatment should not be kept secret once a deportee was returned.[342] It has been disingenuously argued that it is not in the UK's interest for breaches of assurances to be hidden, since it is UK policy not to deport where there is a real risk of ill-

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[338] This particularly may be the case if the sending state has no enforcement mechanism or system in place in case of breach of the assurance: see eg *Agiza v Sweden* Communication (n 186).
[339] Special Rapporteur Report (n 326) [31].
[340] UN High Commissioner for Human Rights, Human Rights Day Statement, *On Terrorists and Torturers* (7 December 2005)< http://pacific.ohchr.org/arbour_07122005.htm> accessed 3 April 2010.
[341] 'It is, of course, true that a detainee could be tortured by the chiffon method, and refuse to say anything about it afterwards but such an event could occur even under a monitoring regime,' *BB v SSHD* SC/39/2005 (5 December 2006), [21]. The *chiffon* method of torture is essentially the practice of 'waterboarding', where a rag is forced into the victim's mouth and water, urine or chemicals are poured on to it to induce the sensation of drowning. SIAC in *Othman* stated that expert training in detection methods would offset the risk of such treatment by monitoring staff *(Qatada SIAC* (n 27) [515-516]).
[342] Kate Jones (n 171).

treatment,[343] yet this argument is at odds with the UK's 'aggressive' promotion of DWA generally.[344] Secrecy remains a prevailing concern regarding breaches of the CAT obligation, yet it is suggested that through independent monitoring and wider international cooperation, this should not represent an insurmountable hurdle for a rights-compliant DWA regime to overcome. By importing effective monitoring mechanisms, the risk of torture or ill-treatment may be brought below the requisite threshold to comply with the non-refoulement obligation. Black-letter assurances (*a priori* MOUs) offer only one side to a multifaceted DWA regime; compliance with such assurances relies not only on the black letter of the agreement but also on the associated political will, verbal agreements and trust between the parties.

Championing international law as the sole arbiter in non-refoulement instances, as has been seen, leads to problems with regard to enforceability and State compliance. What is needed, it is suggested, is a twin-track approach: the establishment in States' domestic law of a clear, robust and justiciable DWA framework (allied with the principles of constitutional optimization), together with a more robust international stance, to allow for greater enforcement, independence and sanctions for breach.

Criticism 6: monitoring is ineffective

A recent JURISTS report concludes that:

> 'in principle and practice … there are serious problems with diplomatic assurances. In principle, reliance on diplomatic assurances is wrongly

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[343] Ibid 192.
[344] Dangerous Deals (n 223) 27.

> being used as a way of 'delegating' responsibility … to the receiving country alone. That undermines the truly *international* nature of the duty to prevent and prohibit torture.'[345]

In answer to such criticisms, Jones mounts a robust defence of the system of assurances adopted by the UK government,[346] stating that the differing approaches taken by the government and SIAC illustrate that each assurance is objectively assessed for reliability, and that the government does believe that the governments who have provided it with assurances will comply with them.[347] It should be noted that many of Jones' arguments are predicated (and reliant on) the rigour and independence of a monitoring body following removal, despite the fact that a monitoring body is not an essential prerequisite.[348] The foregoing criticisms have also highlighted the need for independent monitoring in a rights-compliant DWA regime; there is a need for international cooperation and discussion as to how consistent monitoring may be implemented.

A mandatory independent monitoring mechanism

The Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) was designed to facilitate inspections so as to prevent violations of CAT. The relevant provisions of OPCAT are found in Part IV and *inter alia* allow for independent monitoring through the establishment of 'national preventive mechanisms'. Under Article 23, parties to the Convention undertake to

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[345] *Assessing Damage, Urging Action* (n 185) 105.

[346] Jones (n 171) 189 contends that the system of assurances by the UK government complements existing Multilateral Human Rights Treaties and does not weaken them; that out of control security forces are not a prevailing concern in Algeria, Jordan or Libya (ibid 190); and that that the use of assurances does not result in a two-tier system, whereby insistence on compliance with human rights in some instances impliedly condones human rights abuses in others (ibid 192).

[347] Ibid 189. Itself, this contention is hardly surprising, since to state otherwise would be a tacit admission that the UK government was in breach of its international obligations under CAT.

[348] Ibid 177-178.

publish annual reports of such mechanisms. The UN High Commissioner for Human Rights has stated that countries that have not accepted independent monitoring under OPCAT cannot give credible assurances.[349] It is certainly true that this will be one factor for consideration when making an assessment as to an assurance's reliability. The reality, however, is that there are many States that have not ratified OPCAT,[350] and the very States to which a sending country may which to deport are invariably not parties to it.[351] In theory, of course it is desirable that an individual should not be deported to a State that has not ratified OPCAT. But this has not been the case in reality, and adopting the stance supported by the High Commissioner would preclude deportation to each of the States with which assurances have been developed and upheld by the courts.

Nonetheless, the requirement for monitoring has been widely accepted. The UN Rapporteur has stressed the need for prompt, regular, independent monitoring, together with private interviews in order to ensure that the assurance is being complied with and that there is no resulting ill-treatment.[352] Monitoring by competent and independent personnel appears to be a requirement realized by the Committee Against Torture.[353]

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[349] UN High Commissioner for Human Rights, *Statement before the Council of Europe Group of Specialists on Human Rights and the Fight against Terrorism*, 29-31 March 2006.

[350] Only 74 states have either signed or ratified OPCAT, and of those, only 54 have ratified (Optional Protocol to the Convention Against Torture and other Cruel, Inhuman or degrading Treatment or Punishment <http://www2.ohchr.org/english/law/cat-one.htm> accessed 19 June 2010).

[351] For example, in a UK context, Jordan, Libya, Lebanon, Ethiopia and Algeria, 5 of the states from which assurances or MOU have been sought by the UK, have not signed or ratified the treaty.

[352] Special Rapporteur of the UN Commission on Human Rights on torture and other cruel, inhuman or degrading treatment or punishment, *Report submitted pursuant to General Assembly resolution 58/164* (UN doc A/59/324, 1 September 2004) [42].

[353] *Agiza v Sweden* Communication (n 186) [13.8]–[13.15]; *Report of the High Commissioner for Human Rights on Protection of human rights and fundamental freedoms while countering terrorism to the UN Commission on Human Rights* (UN doc E/CN4/2006/94, 16 February) [56].

The practice of the UK has not been entirely consistent with this guidance. SIAC and the (then) House of Lords have stopped short of requiring monitoring *per se*, instead requiring only that effective verification should take place; monitoring merely provides one means of achieving this aim.[354] Other courts, including the ECtHR, have stressed the importance of monitoring,[355] but there remains no developed legal practice as to minimum requirements for monitoring provisions.[356] The UK's assurances with Algeria, Jordan and Libya provide some pertinent illustrations here.

Independence of the monitoring body is an essential requirement[357] and it is generally accepted the more independent the monitoring body, the stronger the assurance will be, for two reasons. First, compliance with transparent monitoring mechanisms would act as a more effective deterrent against ill-treatment to the receiving State. Next, potential ill-treatment following return may be more likely to be uncovered by an independent team of expertly-trained investigators.[358] While the foregoing concerns regarding secrecy and transparency remain applicable, such monitoring may go some way to assuage these considerations. This reasoning resonates with the attitude of the UK government.[359]

The UK's assurances from Algeria are not predicated on the basis of full MOU and indeed there is no provision for independent monitoring,[360] yet

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[354] Lord Phillips, citing the test adopted by Mitting J. in SIAC: *RB* (n 24) [23].
[355] *Agiza v Sweden* Communication (n 186).
[356] Larsaeus (n 236) 18.
[357] See particularly *DD and AS v SSHD* SC/42 and 50/2005 (27 April 2007), [329-331], in which SIAC held that the body responsible for monitoring the Libyan assurance was not sufficiently independent of the Libyan regime. The SIAC decision was upheld by the Court of Appeal: [2008] EWCA Civ 289.
[358] Larsaeus (n 236) 18.
[359] 'The more independent the monitoring body, the more HMG can rely on them to report breaches and not to hide them, regardless of whatever perception they may have of HMG's underlying interests' Kate Jones (n 171) 192.
[360] *RB* (n 24) [193] (Lord Hoffmann): 'In this particular case the Algerian government regarded external monitoring as inconsistent with its sovereign dignity'.

both the SIAC and the House of Lords have upheld these.[361] Other arrangements made by the UK have used local organizations for monitoring; indeed this represents a key strand of the UK government's strategy of 'enhanced assurances'.[362] From this perspective, one of the key criticisms levied at the UK relates to the monitoring of the MOU between the UK and Jordan, since it relies on a local human rights charity acting without statutory mandate.[363] Nonetheless, the ECtHR gave scrutiny to the monitoring arrangements in place and it is clear that whilst the charity 'does not have the same expertise or resources as leading international NGOs such as Amnesty International, Human Rights Watch or the International Committee of the Red Cross',[364] it nonetheless was capable of verifying compliance with the assurances, was independent of the government, and its limitations had been realistically appraised by SIAC.[365] Conversely, the Libyan MOU was held to be insufficient by SIAC and the Court of Appeal, not least because the 'independent' monitoring body was headed by the son of Colonel Gaddafi, allegations of ill-treatment in Libya were commonplace, and Gaddafi himself was known to be unpredictable and so there was a real risk the assurance could be reneged upon.[366]

It is contended that the UK courts' requirement for only 'effective verification' of an assurance falls far short of the standard required of such

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[361] See [98] of the closed judgment (made open), *Y v SSHD* SC/12/2005, in which SIAC held that the reason Algeria had refused monitoring was not because of fear as to what would be revealed or prevented by monitoring but rather 'The assessment of a sensitive, rather prickly state, seeing NGO monitoring, UK monitoring, bilateral monitoring agreements as a public slur on its record (however true in substance), and thus as a public humiliation at the hands of a Western former colonial power which has not been notably friendly or helpful to it in the past'.
[362] Kate Jones (n 171).
[363] Dangerous Deals (n 223).
[364] *Qatada* (n 23) [203].
[365] Ibid [203-204].
[366] *DD and AS v SSHD* SC/42 and 50/2005; *DD and AS v SSHD* [2008] EWCA Civ 289.

a regime, even though the House of Lords was satisfied.[367] This has the consequence of perhaps undermining the sufficiency of the Algerian assurances, despite the fact that SIAC has accepted that there is a 'continuum of developing understanding…between the two countries',[368] and that SIAC appears to be suggesting that these agreements in principle are sufficiently robust.[369] Strasbourg's ruling on the Qatada assurances amounted to a partial vindication of the UK government's policy but the situation may have been very different had independent monitoring arrangements not been in existence.

A strong case can be made for mandatory independent post-return monitoring in order to comply with the non-refoulement obligation. Amnesty International reject this contention, stating that 'sporadic monitoring alone cannot eliminate the risk of torture or other ill-treatment that a particular person would otherwise face - and no reputable independent monitoring body has ever made that claim.'[370] It is acknowledged that even the best monitoring mechanisms do not provide 'watertight' safeguards against torture.[371] As the NGO has stated:

> 'ad hoc monitoring schemes necessarily omit the broader institutional, legal, and political elements that can make certain forms of system-wide monitoring of all places of detention (and therefore all detainees) in a country one way, in combination with other measures, of potentially reducing the country-wide incidence of ill-treatment over the long-term.'[372]

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[367] *RB* (n 24).
[368] *Sihali v SSHD* SC/38/2005, [41].
[369] There were 11 cases, all substantially similar in result with regard to the sufficiency of the assurance, from August 2006 to 2010 (these were briefly discussed in *Sihali* (n 368) [40]).
[370] *Dangerous Deals* (n 223) 6.
[371] *Special Rapporteur Report* (n 326) [31].
[372] *Dangerous Deals* (n 223) 10.

But it has already been seen above that the non-refoulement obligation is not absolute; a degree of risk of ill-treatment remains permissible.[373] The approach of SIAC has been to require only that independent monitoring should ensure that there is no 'real risk' of ill-treatment, even in circumstances where an individual felt inhibited from speaking out about ill-treatment upon their return.[374] It would be irrational to preclude the use of assurances in some form or another in order to reduce this risk of ill-treatment to permissible levels.

As to the form that such international monitoring should take, eminent international NGOs, including the International Committee for the Red Cross, Amnesty International or Human Rights Watch, may be best placed to act as an independent arbiter and monitor compliance with assurances following removal.[375] The JCHR has suggested a similar proposal.[376] All of these organizations have already refused to serve in this function as a matter of course in DWAs,[377] seeing this as tacit affirmation as to the human rights compatibility of the assurance regime generally, rather than as a means of preventing a future violation.[378] It is unfortunate that such

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[373] See the approach of SIAC in *Qatada* (n 27) [509]: the Commission 'ascribe real significance to that point' with respect to Qatada, but observed that the issue had arisen elsewhere.

[374] Ibid. SIAC considered that the monitoring would not be wholly ineffective for this reason; first, in other instances allegations of torture had routinely been made (and therefore the deterrent factor did not seem to be an issue) and second, the existence of MOU would reduce the threat of reprisals since there was a known disapproval of such acts higher up in government.

[375] Ibid. 'very careful scrutiny which Special Rapporteurs, NGOs and others will give to these deportations means that not only are abuses in these cases unlikely but that any abuses that may occur are likely to be detected sooner rather than later, even if notice of them comes to HMG in less direct ways, including through rumour. This is a valuable additional safeguard.'

[376] JCHR, *The UN Convention Against Torture (CAT)*, *19th Report of Session 2005-06* (HL 185 HC 701-I, 2006) [116].

[377] James Sturke, 'Amnesty refuses involvement in UK deportations' *Guardian* (London, 26 August 2005); as to the refusal of the Red Cross, see *Youssef v Home Office* [2004] EWHC 1884, [26].

[378] See, for example, Amnesty International's conclusion that 'monitoring mechanisms that are not part of an established framework with a proven track record not only in detecting cases of abuse, but also consistently bringing all perpetrators fully to justice and

NGOs have chosen to maintain their principled opposition against the use of assurances, despite overwhelming evidence that assurances continue to be sought.[379] Opposition in theory is laudable but hardly pragmatic, particularly where further NGO involvement could offer a further valuable safeguard as part of a package of monitoring measures.

OPCAT in its current form does not provide the degree of support required due a low ratification rate by signatories; international pressure should ensue in order to increase the number of States that have ratified the protocol. Facilitating assurances in the first instance requires a significant degree of diplomacy; there is no reason why such pressure and diplomacy, reciprocated at an international level, cannot result in a higher ratification rate of OPCAT. The UK's experience with the Algerian DWA provides such an illustration: Algeria refused to acquiesce to demands for independent monitoring, seeing it as encroaching on its national sovereignty. Yet the political importance of the UK-Algerian relationship was examined by SIAC, and 'top-level green light' for the ratification of OPCAT by the Algerian authorities was said to exist, pursuant to the appropriate mechanisms being in place.[380]

The longevity of the post-return monitoring obligation may give cause for concern. The risk to a deportee is greatest immediately following their return;[381] it is unrealistic to expect a sending State to ensure monitoring occurs for the lifetime of the concerned individual. In *Ben Khemais v*

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immediately stopping all further abuse, and in actually reducing the incidence of torture, cannot seriously be considered as having any significant preventive or deterrent effect' (*Dangerous Deals* (n 223) 11).

[379] Ibid. Amnesty International draws on considerable European research, concluding that Denmark, France, Italy and Sweden either considered the use of assurances or were undecided. Germany and the UK remain strong progenitors of a DWA regime.

[380] *Y v SSHD*, SC/12/2005, [84] (paragraphs from closed judgment made open).

[381] 'experience has shown that the risk of ill-treatment of a detainee is greatest during the first hours or days of his or her detention' *Qatada* (n 23) [198].

Italy,[382] the court held a diplomatic assurance insufficient to comply with the demands of Article 3 ECHR, since there was no reliable system of accountability for torture in the receiving State (Tunisia) and there had been difficulties in accessing detainees in Tunisian prisons.[383] This was notwithstanding the fact that the deportee in that case had not complained of ill-treatment following his return: the court held the assurance insufficient due to the inability to verify or challenge the situation as it developed in the future.[384] It should be noted that a three-year post-return monitoring deadline was set in the MOU between the UK and Jordan, and this assurance was upheld by the House of Lords and the ECtHR.[385] Crucially, Strasbourg held that subsequent diplomatic notes had made clear that monitoring would continue potentially indefinitely while the deportee was in detention, provided that detention began within the first three years of return.[386] SIAC has observed that it cannot be concerned with long-term political speculation and that it must evaluate conditions over the medium term.[387] Nonetheless, it appears inevitable that future assurances will incorporate lengthy periods of post-return monitoring if they are to be upheld. The imposition of a lifetime monitoring requirement would pose an unacceptable, if not insurmountable, burden on returning States, but it would appear sensible to create an umbilical link between

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[382] *Ben Khamais v Italy* App no 246/07 (ECtHR, 25 February 2009).
[383] Italy had ignored the advice of the ECtHR Court, pursuant to Rule 39, which had indicated that it should stay removal proceedings pending a full hearing. Statewatch reports that the Italian government's response made it clear that it preferred to deport where its national security was threatened, rather than wait for a 'slow' ECtHR to make a judgment (*Italy repeatedly ignores ECtHR orders to suspend expulsions to Tunisia*, (Statewatch), <http://www.statewatch.org/news/2009/sep/italy-echr-tunisia.pdf> accessed 15 March 2011.
[384] *Ben Khamais v Italy* (n 382) [61].
[385] See *Memorandum of Understanding between the government of the United Kingdom of Great Britain and Northern Ireland and the government of the Hashemite Kingdom of Jordan regulating the provision of undertakings in respect of specified persons prior to deportation*, <http://www.statewatch.org/news/2005/aug/uk-jordan-MOU.pdf> accessed 10 March 2010.
[386] Qatada (n 23)[202].
[387] *Y, BB and U v SSHD* SC/32/36/39/2005 (2 November 2007), [22].

detention upon return and the temporal duration of a monitoring requirement.

A further criticism that has been forthcoming relates to the lack of post-return remedies[388] once an assurance is breached. Diplomatic sanctions may provide an appropriate response at State level, but an individual who suffers refoulement should also have an adequate remedy. One suggestion has been to impose an obligation to return the deportee to the sending State where monitoring reveals an indication of human rights violations.[389] This issue may be worthy of further exploration, but there are likely to be substantial practical difficulties with such an approach, not least of which is the additional credence given to the criticisms around secrecy in a DWA regime. It is not difficult to see why a sending State may be reticent to acknowledge the breach of an assurance if it means that it then faces the return of a known terrorist onto home soil.

IV. Conclusions: application of the benchmarks to the DWA regime

The use of assurances has proven to be, and is set to continue to be, a cornerstone of the new counter-terrorism policies of the UK and US governments. A more consistent international approach could be taken *viz* non-refoulement, assurances and the prohibition on torture and ill-treatment generally. It is contended that there is no consistent principle of international law that prohibits the use of assurances in removal cases. Criticisms that continue to be directed towards a DWA regime are

[388] Larsaeus (n 236) 22.
[389] Noll (n 249) 3.

surmountable through adherence to the benchmarks of constitutional optimization.

Benchmark 1: certainty

There is an obvious need for States to establish, within their domestic law, a clear, robust and justiciable DWA framework, building on principles of international law. This framework has tripartite foundations: there is a need for judicial oversight, effective compliance and independent monitoring of assurances. The UK's practical experience could also be codified in order to increase transparency and certainty in the operation of a removal regime. A variety of considerations are relevant to ensuring compliance with assurances and would be suited to incorporation within a Code of Practice, or set of guidelines. Such a Code of Practice should require: [390]

- Consideration of the prevailing political will in the recipient state
- An assessment as to the trust that is placed in the recipient state's compliance with assurances, together with an assessment as to the bilateral nature of the relationship
- An account of the available incentives in order to facilitate compliance
- Dialogue to take place at senior levels to reduce the risk posed by rogue security forces
- Discussion as to the practical meanings of assurances with the recipient state, including an assessment of the treatment immediately on return
- Transparent negotiation with the recipient state (as far as practicable); assurances should not be entirely propagated in secret; media involvement may help ensure compliance

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[390] Above, p 307-312.

- Assurances should not be sought where there are consistent, flagrant or gross violations of human rights in a recipient state
- Consideration should be given as to previous accounts of detainee treatment by the recipient state.

In this way, the considerable experience amassed through the work of the UK's Foreign and Commonwealth Office, SIAC and judgments of the appellate courts could be harnessed to inform developments. The executive practices of the United States, if more openly discussed and examined, may also have a marked impact on the formulation and enhancement of new assurances.

Benchmark 2: legislative oversight

Codifying removal procedures in statute would allow for initial and continuing scrutiny by the legislative branch. Since immigration control has always been an important Prerogative power, there is no need for temporal limitation of the regime. There remains, however, a need for greater transparency and continuing legislative oversight. In England and Wales, expanding the role of the Independent Reviewer to include the DWA regime would be a germane development.[391] Parliamentary Committees, including the JCHR, should scrutinize its operation. This conclusion has synergies with those reached previous chapters.[392]

Benchmark 3: judicial oversight

In terms of judicial oversight, the judiciary should play a central role in ensuring oversight of executive-based removal strategies. The use of a highly specialized tribunal, such as SIAC, has been key to the success of the DWA regime in England and Wales. Attention should be given to the

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[391] See the conclusions in ch 6 p 352-353 .
[392] Above, ch 3 and ch 4.

role of the ECtHR, since it is undesirable that reexamination of the factual matrix is possible with general applications, but not with immigration or terrorism-related applications. The USA has yet to implement an appropriate oversight mechanism, and a suitable starting point for such a tribunal will be the four yardsticks adopted by SIAC, subsequently upheld upon appeal to the House of Lords:[393]

1. ‘the terms of the assurances have to be such that, if they are fulfilled, the person returned will not be subjected to [ill treatment or torture]…;
2. the assurances have to be given in good faith;
3. there has to be a sound objective basis for believing that the assurances will be fulfilled;
4. fulfillment of the assurances has to be capable of being verified.’[394]

As SIAC suggested, the first two of these requirements are ‘axiomatic’, but the subsequent comments of Lord Phillips, accepting the judgment of SIAC in the House of Lords, are of considerable importance:

> ‘The third (test) require[s] a settled political will to fulfil the assurances allied to an objective national interest in doing so. It also require[s] the state to be able to exercise an adequate degree of control over its agencies, including its security services, so that it would be in a position to make good its assurances. As to verification, this could be achieved by a number of means, both formal and informal, of which monitoring [is] only one. Effective verification [is], however, an essential requirement.’[395]

The terminology of ‘fulfillment’ here is consistent with the observations of this chapter; *enforcement* is not so much an essential prerequisite as is effective *compliance.*

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[393] *RB* (n 24).
[394] Lord Phillips, citing the test adopted by Mitting J in SIAC, *RB* (n 24) [23].
[395] Ibid.

Integral to Lord Phillips' fourth criterion is the need to ensure that assurances are not entirely propagated in secret.[396] Respectfully, it is argued that this requirement does not go far enough. The House of Lords,[397] Court of Appeal[398] and ECtHR[399] have all indicated that independent monitoring is an important but not an essential prerequisite for the current development of assurances. It would be sensible for States to adopt a system of monitoring as a minimum threshold for all assurances, given the uncertainty around their use[400] and the robust judicial scrutiny to which all such arrangements should be subjected.

Mandatory independent post-return monitoring should operate in conjunction with any other operable verification measures. Imposing such a requirement will help to assuage many of the various criticisms that have been levied against assurances generally, particularly those in relation to compliance and secrecy. The refusal of international NGOs to partake in such independent monitoring is disappointing; in developing a DWA regime, States should consider the possibility of using suitable smaller independent NGOs, which may report directly to the Committee Against Torture and the receiving State. Over time it is possible that larger NGOs will follow suit. It is equally possible that smaller NGOs will expand their

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[396] See the (probably obiter) remarks in *RB* (n 24) [102] (Lord Philips); this was applied at in *Naseer et al v SSHD* SC/77/80/81/82/83/09, [36].
[397] *RB* (n 24) [23].
[398] The Court of Appeal has recently denied that there is a rule of law that requires post-return monitoring: *MS (Algeria) v Secretary of State for the Home Department* [2011] EWCA Civ 306, [26].
[399] *Qatada* (n 23) [189].
[400] Strasbourg has confirmed that what is required is an assessment of 'whether compliance with the assurances can be objectively verified through diplomatic or other monitoring mechanisms, including providing unfettered access to the applicant's lawyers' (Ibid). But the Jordanian assurances rest in part upon the use of an independent organization (the Adaleh Centre for Human Rights Studies) to monitor and report on the treatment of deportees and compliance with assurances generally. The door is therefore left open to further challenges *inter alia* where such independent monitoring mechanisms are not in place.

scope and remit with the appropriate funding and support.[401] SIAC is reasonably well placed to provide judicial scrutiny and monitor the efficacy of such a regime; the United States would undoubtedly benefit from an analysis of the approach of England and Wales in this respect.[402]

Benchmark 4: proportionality

Deportation is usually precluded on the grounds of the absolute prohibition on torture and ill-treatment, and it is unlikely that proportionality will extensively feature in individual judicial determinations in this area. Verification of compliance with assurances will invariably be the principal focus. Where challenges to deportation are mounted on the basis of other ECHR rights, proportionality may be an issue in some limited future cases, for example involving challenges based on the right to respect for private and family life pursuant to Article 8 ECHR.

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[401] This certainly appeared to be the case with the Jordanian monitoring body, as was observed by the ECtHR in *Qatada* (n 23) [203].
[402] As has been argued elsewhere: see Ben Middleton, 'Deporting Terrorist Suspects With Assurances: Lessons From The United Kingdom' (2012) Vol 10 Connecticut Public Interest Law Journal Vol 10 (forthcoming).

Chapter 6

Conclusions and recommendations

This thesis has examined strategies available in England and Wales and the USA to deal with terrorist suspects when prosecution is not a viable option: detention, control and removal. All three mechanisms have been subjected to considerable constitutional vilification. Criticisms relate to a lack of certainty and precision in the powers,[1] an absence of effective legislative and judicial oversight of executive action,[2] and the need for proportionality in the mutable dynamic between national security and human rights.[3] Following the quadripartite aim of constitutional optimization that was established in chapters 1 and 2, benchmarks in each of these areas have been applied to each of the regimes.

Three recommendations may be extrapolated from the analysis. Some of these relate to enhanced or additional constitutional oversight mechanisms.[4] Changes may accordingly be advocated in a terrorism-related context that could have implications for other areas of law. Where this is the case, further research may be needed in order to evaluate their broader impact. Nonetheless, the majority of the conclusions are specific to the counter-terrorism regimes analysed in this investigation, and provide

[1] See the uncertainty surrounding the use of detention in the USA: ch 3 p 165; for the uncertainty generated by the use of detention post-9/11, see ch 3 p 169-171. For uncertainty in the control order and TPIM regimes, see ch 4 p 220-221, 228, 233, 257. For the removal regime, see ch 5 p 290-291, 333.
[2] For oversight of the Northern Ireland detention measures, see ch 3 p 126, 133; for oversight in a US detention context, see p 148-149, 151, 156. For judicial oversight of detention, see ch 3 p 169-171. For oversight of pre-charge detention, see ch 3 p 173, 176, 177-183. In relation to control orders, see ch 4 p 212-215; for judicial challenges see ch 4 p 222-224; and see generally p 236-237. For TPIMS, see ch 4 238, 239, 252-255. For removal strategies, see ch 5 p 289-290, 312-114, 334-335.
[3] In a detention context, see ch 3 p 136, 156, 159, 161, 172, 176. In the context of control strategies, see ch 4 219-224, 239-241, 245, 252-256.
[4] See ch 2 p 109-110.

a consolidated framework upon which it is possible for future terrorism legislation to build.

Recommendation 1 is concerned with the provision of legal certainty and advocates statutory codification and specific amendments to the detention, control and removal regimes. Recommendation 2 advocates a bipartite strategy for the enhanced provision of legislative oversight in both emergency and non-emergency contexts. Recommendation 3 offers suggestions designed to promote judicial muscularity and enhance the efficacy of the juridical oversight mechanism. Since proportionality of the measures is a key prerequisite, each of these suggestions are designed to help maintain an acceptable balance between security concerns and the protection of human rights.

Recommendation 1: legislative codification, certainty and proportionality

Three areas have been identified in which statutory codification is needed and specific amendments to executive measures should be made. Codification would have several advantages. In addition to imbuing much needed certainty into provisions that have been compromised by discordant judicial decisions and executive practices, it would also provide additional opportunity for legislative oversight through the variety of mechanisms suggested by recommendation 2 below.

(i) Pre-charge detention

This area remains controversial given the pre-legislative oversight that has been conducted by the Joint Committee[5] and the prevailing orthodoxy that the 14-day limit on pre-charge detention is sufficient to deal with the

[5] Joint Committee on the Draft Detention of Terrorist Suspects (Temporary Extension) Bills, Draft Detention of Terrorist Suspects (Temporary Extension) Bills (HL 161 HC 893, 23 June 2011) (Joint Committee Report).

current terrorism threat.[6] The 14-day limit should be revisited by Parliament and in future rights audit in the form of a further Counter-Terrorism Review. In this way, a reduction may be achieved to the previous (and arguably more proportionate) 7-day maximum.[7] A requirement could be created for the Independent Reviewer to report on every case in which pre-charge detention exceeded a set level: 7 days appears to represent a suitable limit. Statistics on the use of such powers[8] suggest that this would not create an undue administrative burden and would be commensurate with the observation that a 14-day maximum does not represent a 'normal' detention power. Consideration should also be given as to whether making bail available to individuals arrested for terrorism-related offences would decrease reliance on pre-charge detention.[9] If the exigencies of a future situation require it, a formal derogation should precede the reintroduction of an extended period of pre-charge detention.

(ii) TPIMs

Many of the potential human rights issues in relation to TPIMs were addressed in a series of disputatious court judgments on the control order regime, and the TPIM regime made some progress in terms of providing greater statutory precision.[10] There are several areas in which further codification would be welcome. Specific TPIM conditions could be

[6] David Anderson QC, *The Terrorism Acts in 2011: Report of the Independent Reviewer on the Operation of the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006* (June 2012, LSO) 7.71-7.73 (2011 Review).
[7] Above, ch 3 p 185-186.
[8] See 2011 Review, above (n 6).
[9] Ibid; ch 3 p 186.
[10] Some of these proposals were argued in Ben Middleton, 'Rebalancing, Reviewing or Rebranding the Treatment of Terrorist Suspects: the Counter- Terrorism Review 2011' (2011) JCL 75(3) 225–248 and published ahead of the Terrorism Prevention and Investigation Measures HC Bill (2011) 193 in order to inform pre-legislative debate and scrutiny.

exhaustively categorized.[11] There may be merit in the outright abolition of the curfew or 'overnight residence requirement', but since it has been retained, it should be statutorily limited.[12] An 8 hour limit would be commensurate with the ideology that the new measures are designed to ensure that a controlled individual is required to return to their specified residence to sleep and is *prima facie* Article 5 ECHR compliant.[13] There is also scope for the fair trial requirements established in *F* to be codified in statute.[14]

If not precluded by operational requirements, the use of a higher standard of proof should be considered across all TPIMs.[15] The potential introduction of 'enhanced' TPIMs, in the event of a serious terrorism threat, is likely to see TPIMs bearing much more resemblance to their control order predecessors, but the heightened standard of proof and control order jurisprudence is unlikely to render their introduction disproportionate.[16] There would appear to be the need for greater oversight of the 'trigger' mechanism used to introduce such powers,[17] and strict legislative and judicial controls, in accordance with recommendations 2 and 3 below.

(iii) The DWA regime

The current UK and US practices are initially predicated on executive interpretations of immigration laws and court judgments. Since the US removal strategy is not fully established in statute and has no guarantee of

[11] ch 4 p 240-241.
[12] ch 4 p 247-248. The attempts at judicial clarity were not helpful: see Lord Brown's 16 hour limit (ch 4 p 226, 233), which has now been overtaken by the 'overnight' statutory requirement.
[13] Ibid.
[14] ch 4 p 238.
[15] ch 4 p 243-244.
[16] ch 4 p 252-255.
[17] In an emergency context, see ch 3 p 144-159. For pre-charge detention, see p184-185; for the use of Draft Bills to introduce Enhanced TPIMs, see ch 4 p 252-255, and in particular p 253, 258.

judicial oversight (subject to individual *habeas* challenges), some of the recommendations may be suited to trans-Atlantic application and warrant further study in that context.[18]

A clear and justiciable DWA framework, which draws upon the jurisprudence of the House of Lords, should be established in statute.[19] Three essential factors for assurances are required: judicial oversight, effective compliance and independent monitoring. The first two of these factors stem from existing jurisprudence and can easily be codified into statute (indeed the role of SIAC in removal proceedings is already established).[20] The requirement for independent monitoring does not currently feature in the UK DWA regime. Although its implementation will no doubt be problematic for the operational development of future assurances, it will assuage myriad criticisms directed at the DWA regime and is likely to result in a greater proportion of assurances being upheld by the courts.[21] This guidance is consistent with the final ruling of the ECtHR in *Othman*.[22] The expertise that has been developed by the UK government in formulating assurances could be codified in a Code of Practice in order to inform and regulate the future development of assurances. Such a Code of Practice could draw on previously established principles in order to ensure compliance.[23] This suggestion may provide an intermediary step towards consensus at a European (and ultimately international) level as to the required minimum content for assurances.

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[18] See ch 5 p 334, 337.
[19] ch 5 p 333-334.
[20] ch 5 p 305, 307, 312-316.
[21] ch 5 p 326-330.
[22] *RB (Algeria) and another v. SSHD; OO (Jordan) v SSHD* [2009] UKHL 10.
[23] See ch 5 p 308-310.

Recommendation 2: enhancing legislative oversight mechanisms

The foregoing analysis has shown that there is scope for a more formalised oversight procedure in relation to terrorism emergencies.[24] Aside from this approach, it is also necessary to ensure ongoing legislative oversight of the detention, control and removal strategies where the terrorism threat perpetuates, notwithstanding the absence of a formally declared emergency.[25] A bipartite approach is required.

(i) Towards a Parliamentary procedure for terrorism emergencies

As has been established, a formal declaration of emergency should be terminated at the earliest opportunity in order to reassert conventional criminal justice principles; the perils associated with a permanent emergency have been identified.[26] Once a terrorism regime is established in statute, it may be very difficult to secure recalibration of the powers and increase legislative oversight after the event.[27] It is necessary to delineate special powers in advance of an emergency.[28]

The current mechanism for derogation from the relevant principles of the ECHR has proven to be ineffective at temporally limiting an emergency.[29]

[24] For contextual theory, see ch 2 p 105-110; for analysis of emergencies in a Northern Ireland context, see ch 3 p 132-133; for the emergency response to 9/11, see ch 3 p 155-157, 171, 185-186. In relation to control orders and TPIMs, see ch 4 p 212, 263.
[25] For contextual theory, see ch 2 p 108, 110; in relation to the normalization creep of detention powers, see ch 3 p 176, 184. In relation to normalization of the TPIM regime, see ch 4 p 250-251.
[26] ch 2 p 107-110.
[27] In England and Wales, see the way in which the control order renewals operated (ch 4 p 213, 215, 229, 250). In the United States, it was seen that attempts to increase oversight of the USA PATRIOT Act once it was passed, were repeatedly rejected (ch 3 p 156).
[28] Clive Walker, *Blackstone's Guide to the Anti-Terrorism Legislation* (2nd edn, OUP, 2009) 21.
[29] In relation to the Northern Ireland emergency, see ch 3 p 132; in relation to the attitude post-9/11, see ch 3 p 161 and ch 4 p 229-231.

The ECtHR has been reticent in curtailing emergency powers, awarding a wide margin of appreciation to states in such cases.[30] The courts have indicated reluctance to embark on macro-analyses as to the legality of a counter-terrorism regime, preferring instead to conduct procedural micro-analysis of each case.[31] In order to abrogate such provisions, Parliamentary oversight should provide the initial avenue for restraint. Ackerman proposes a model for such a mechanism in a US context: a 'supermajoritarian escalator' procedure.[32]

The Supermajoritarian Escalator

Ackerman proposes a model in which a simple majority of Parliamentary votes would be required in order to continue the existence of emergency beyond an initial 7 day period, which would be authorized by the executive in the wake of a terrorist attack.[33] Following such confirmation, a continually increasing majority in Parliament would be required to maintain the period of emergency, with a vote occurring every 2 months.[34] As Ackerman states, '[b]y subjecting these decisions to increasing supermajorities, the constitutional order places the extraordinary regime on the path to extinction'.[35] A requirement for increasing Parliamentary majorities would urge caution on the part of the executive,[36] and when the emergency is finally terminated, a public report on the operation of the entire mechanism should be due within a year.[37]

[30] Ibid.
[31] ch 3 p 163, and in relation to missed opportunities, p 171. In relation to the control order jurisprudence, see ch 4 p 219-224.
[32] Bruce Ackerman, 'The Emergency Constitution' (2004) 113 Yale Law Journal 1029, 1047.
[33] Ibid 1060.
[34] Ibid 1047-48.
[35] Ibid 1048.
[36] Ibid.
[37] Ibid 1053. Note that Ackerman's model also espouses juridical and financial checks: compensation is to be provided to those detained in an emergency period and the

Adopting this approach would resonate with a number of principles that have been established in this thesis: a formal emergency would be temporally limited;[38] the review would be able to take account of rights-based considerations and proportionality;[39] and any visceral reaction to a terrorism trigger would be better managed.[40] This scheme would operate alongside, not in place of, broader powers allowing the declaration of an emergency in other contexts.[41] It would be used to set the parameters that allow for a designated derogation from Article 5 ECHR.

In order to implement a supermajoritarian escalator scheme, there are constitutional hurdles to overcome,[42] aside from consideration of the appropriate voting thresholds and timescales.[43] The passage of the Bill creating the supermajoritarian escalator itself would probably require the use of the Parliament Acts and should be considered in advance.[44] It has been established that this approach is possible.[45]

A Bill could allow the Secretary of State to declare an emergency for the purposes of derogation from Article 5 ECHR, which would lapse after 7 days. Parliament would be recalled to vote as to the existence of an emergency; in the first instance a simple majority in the House of

judiciary would exercise immediate microanalysis of each detention following its termination. Complete adoption of that model is not proposed here.

[38] In relation to Northern Ireland, see ch 3 p 132-133. For the criticisms directed at the inadequate temporal limitation of the response to 9/11, see ch 3 p 154-158. For the temporal limitation of the control order and TPIM regimes, see ch 4 p 250-251.

[39] CP Walker, 'Constitutional Governance and special powers against terrorism' (1997) 35 Columbia Journal of Transnational Law 1.

[40] This 'knee-jerk' reaction was exemplified in relation to the Northern Ireland troubles (ch 2 p 132-133) and the response to 9/11 (ch 3 p 154-158).

[41] The formal mechanism that allows for the declaration of an emergency in the Civil Contingencies Act 2004 would be unaffected (see below), though a new statute should make explicit that the 2004 Act should not apply to terrorism-related emergencies.

[42] Although Ackerman's model in a US context is proposed by means of a framework statute rather than constitutional amendment (Ackerman (n 32) 1053).

[43] It may be necessary, for example, to devise the appropriate thresholds in light of the composition of each Parliament, following each General Election.

[44] Circumscription of the remit of the House of Lords is unlikely to gain its support: see for example the passage of the Parliament Act 1949 (see generally House of Commons Library Standard Note, *The Parliament Acts* (SN/PC/675, 23 March 2007).

[45] Above, ch 2 p 68-70.

Commons would suffice. Subsequent votes would require higher majority to continue the emergency. It may be necessary to restrict the voting power to the House of Commons or to amend the Parliament Acts in order to give primacy to the lower chamber and remove the Lords' power of delay in this case.[46] Additional powers requested by the government (for example detention or internment) would be passed in the normal way but made contingent upon the emergency and derogation. The courts would scrutinize individual applications for judicial review or *habeas corpus* (ordering the release of an individual if the emergency was terminated).

No mechanism can defeat the doctrine of Parliamentary sovereignty and achieve full entrenchment, since a simple majority vote in Parliament could repeal the entire system.[47] Attention should be drawn here to the dicta of the House of Lords in *Jackson*.[48] Their Lordships in that case contemplated the possibility of Parliament 'redesigning itself upwards', including requiring a specified majority in future Parliamentary votes.[49]

This novel development would almost certainly be litigated when the regime was first used,[50] but judicial intervention would take time and hence the emergency regime may already have served its purpose.[51] If a Supermajoritarian escalator procedure was adopted and a subsequent statute was not passed in the stipulated 'manner and form', the courts could rule it invalid.[52] Judicial acceptance of this procedure would last only for the duration of each Parliament[53] and it would be necessary to renew the provisions in each Parliament. This would by no means be a

[46] Ibid.
[47] Above, ch 2 p 65-74.
[48] Above, ch 2 p 68-70.
[49] Ibid.
[50] Above, ch 2 (text to n 92).
[51] Equally, in the event of a terrorism threat requiring derogation from Article 5 ECHR, it is unlikely that the Courts will run roughshod over the government's assessment of the emergency and any new regime contemplated in advance by a sovereign Parliament.
[52] Above, ch 2 p 69.
[53] Ibid.

problematic requirement; indeed, it would allow for considered review of the provisions that should take place in any case.[54]

In other areas, dangerous modifications to the doctrine of Parliamentary sovereignty have been previously suggested, and abandoned.[55] Yet even though full entrenchment is impossible, there are several ways in which a new emergency regime could be politically entrenched.[56] No attempt has previously been made to entrench constitutional legislation, and these statutes remain intact.[57] The new mechanism would be exempted from the doctrine of implied repeal.[58] A new Bill of Rights would provide an ideal opportunity for the inclusion of such a framework, but this is unlikely given the current political landscape.[59] If the supermajority procedure remains untested for several years, the likelihood of subsequent repeal will diminish. Even where a government wishes to repeal the escalator in a period of emergency, public opinion and political pressure may be brought

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[54] As to the requirement for a rights audit, see below p 355-356.

[55] The UK Parliamentary Sovereignty HC Bill (2011) 26, cl 4 directed that Royal Assent should not be provided to any future Bill that contravened its provisions. The Bill attracted little support and was rejected at Second Reading (HC Deb 18 March 2011 col 652). An equally concerning measure was the proposed requirement for a 55% no confidence vote in order to defeat the government (although the provision was dropped from the Fixed-Term Parliaments Bill during Committee Stage, Fixed-Term Parliaments HC Bill (2010-11) 119).

[56] In this context, political entrenchment simply means that there are political limits placed on issues around which Parliament can legislative (see e.g. AW Bradley & KD Ewing, *Constitutional and Administrative Law* (15th edn, Pearson, 2011*)* 75-76).

[57] As the government stated in proposals for the passage of the HRA, '[it is not] necessary or … desirable to attempt to devise such special arrangements for this Bill,' Home Office, *Rights Brought Home* (Cmd 3872, 1997) para 2.13.

[58] *Thoburn v Sunderland City Council* (2003) QB 151, 186-187. Laws LJ held that certain 'constitutional statutes', including the HRA and the European Communities Act 1972, were awarded a higher status and were not subject to the doctrine of implied repeal. See ch 2 p 67-68.

[59] A UK Bill of Rights Commission has been established and has heard preliminary evidence, but early reports are that its members are evenly split on retaining or repealing the HRA 1998 (Alan Travis and Patrick Wintour, 'Deadlock likely on commission pondering a British bill of rights' *Guardian* (London, 18 March 2011) <http://www.guardian.co.uk/law/2011/mar/18/deadlock-bill-of-rights-commission> accessed 15 June 2011).

about by this very action. It is possible that excessive executive powers could be attenuated.[60]

Civil Contingencies Act 2004: A Generalist Panacea?

An alternative mechanism to be used in terrorism-related emergencies has been suggested by NGOs and Walker and Home.[61] The former advocate the use of the CCA 2004 as a means of introducing exceptional powers.[62] The CCA 2004 provides a broad definition of emergency covering the threat of serious damage to human welfare, the environment, war or terrorism that threatens serious damage to the national security of the United Kingdom.[63] A minister of the Crown may declare the existence of an emergency by Order, and then may make emergency Regulations by Order in Council. A 'triple-lock' of safeguards, including Parliamentary scrutiny, are built in to the regime.[64] Independent Reviewers have denounced the potential use of the CCA in this way as problematic or a 'non-starter',[65] and the DPP has stated that the CCA was not designed for this purpose and is more suited to epidemics and strikes.[66] Indeed, it is for this very reason that Walker would prefer to rely on the CCA, since the

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[60] Ackerman (n 32) 1090.
[61] Clive Walker and Alexander Home, 'The Terrorism Prevention and Investigation Measures Act 2011: one thing but not much the other?' [2012] Crim LR 421; Liberty, 'Charge or Release: Terrorism Pre-Charge Detention Comparative Law Study' <http://www.liberty-human-rights.org.uk/policy/reports/comparative-law-study-2010-pre-charge-detention.pdf>.
[62] Ibid 12-13.
[63] Respectively s. 19(1)(a), (b) and (c) Civil Contingencies Act 2004 (CCA). For a complete discussion of the Act, see C Walker and J Broderick, *The Civil Contingencies Act 2004: Risk, Resilience and the Law in the United Kingdom* (OUP 2006).
[64] Ibid; s. 1(4)(a) CCA 2004.
[65] David Anderson QC, *Evidence to the Joint Committee on the Draft Enhanced Terrorism Prevention and Investigation Measures Bill* (HC 491-I, 11 July 2012); Lord Carlile, *Fifth Report of Independent Reviewer Pursuant to s. 14(3) of the Prevention of Terrorism Act 2005* (1 February 2010) 28.
[66] Joint Committee On The Draft Detention Of Terrorist Suspects (Temporary Extension) Bills: Oral and associated written evidence < http://www.parliament.uk/documents/joint-committees/detention-terrorists-suspects-bills/DTSoralwrittenev.pdf>114-115.

substantial preparation needed to ensure its effective use would mean that it would be a tool of last resort.[67]

It is certainly worth considering the use of the CCA in a terrorism-related emergency, for example where urgent measures are needed to secure the required infrastructure to maintain law and order. In the context of a series of terrorist attacks such as those seen in recent years, however, use of the CCA would be inappropriate. A supermajoritarian escalator procedure would represent a more strictly limited, and by definition proportionate, response. Limits could be set on the terrorism-related powers available during the derogation, rather than placing reliance on the sweeping powers potentially given to senior ministers under the CCA.[68] Bespoke safeguards relevant to terrorism-related legislation could be incorporated. Supervision by Independent Reviewer and relevant Parliamentary committees could be ensured, which would not operate under the CCA. It is therefore appropriate to legislative separately for a terrorism-related emergency. These issues deserve further study and review and should be considered by the House of Lords Constitution Committee.[69]

(ii) Towards enhanced Parliamentary oversight mechanisms for 'normal' terrorism-related powers

In the absence of a formal terrorism emergency, it remains essential to incorporate enhanced legislative oversight mechanisms.[70] Although it is accepted that the reasons for dedicated terrorism detention and control-related legislation have cogency, a variety of concerns have been expressed regarding the permanence of new measures. Many of the

[67] Ibid 84-86.
[68] s. 20(1) CCA 2004.
[69] These issues are within the competence and terms of reference of the committee: see above ch 2 p 83 and see generally House of Lords Constitution Committee, *First Report*: *Reviewing the Constitution: Terms of Reference and Method of Working* (HL 11, 2001).
[70] See ch 2 p 110; ch 3 p 155, 178-180; ch 4 p 236-237, 250.

excesses of Northern Ireland-related terrorism have indeed been curtailed, but some remain.[71] New terrorism-related powers have emerged that blur the distinction between emergency and permanent legislation.[72] A variety of enhanced oversight mechanisms have been noted and warrant closer analysis. There is an inherently symbiotic relationship between these suggestions; optimal oversight will be achieved by a confluence of each of the following.

Provision of sunset clauses that require primary legislation

Sunset clauses have operated in respect of emergency legislation for decades and their use has been documented across preventive detention,[73] pre-charge detention[74] control order and TPIM regimes.[75] Limiting Parliamentary oversight of a terrorism-related regime to a short annual debate that may come late in the day or accompany consideration of alternative counter-terrorism related provisions is inherently undesirable.[76] Sunset clauses should be used to engender meaningful debate and operate bilaterally: not only do they ensure that a potentially rights-limiting regime continues to have approval of Parliament, they also drastically increase the effectiveness of other essential oversight mechanisms,[77] providing an opportunity for focused and detailed analysis of a particular regime.

Clauses that require primary legislation for renewal will prove more effective than their secondary counterparts, and would encourage fuller participation of the bicameral Parliament, since their burden would not be

[71] Particularly in relation to the normalized pre-charge detention limits: see ch 3 p 207.
[72] See, for example, the analysis of TPIMs and ETPIMs: ch 4 p 241-256.
[73] ch 3 p 155, 159.
[74] ch 3 p 126, 180, 184, 185, 191.
[75] ch 4 p 212, 234, 236, 249-251.
[76] ch 4 p 213, 215, 228, 251.
[77] Above, ch 2 p 76-87. In particular, a sunset clause engenders Parliamentary debate and allows for consideration of Select Committee reports and reports of the Independent Reviewer.

simply discharged by an affirmative vote in both Houses.[78] The temporal duration of such provisions before sunset should be proportionate to their human rights implications. A 2-year sunset clause may be suited to the TPIM regime,[79] but a 30-day clause may be warranted where particularly draconian powers are sought.[80] In order to prevent extended normalization of emergency provisions, primary sunset clauses should be a feature of all counter-terrorism detention legislation where it represents a departure from powers conventionally available under the criminal justice system. The use of these provisions would allow for amendments to be considered and may help to ensure proportionality of the measures.

Scrutiny by Joint Committees and the Independent Reviewer

The utility of Parliamentary oversight by the JCHR has been identified through the control order and pre-charge detention debates, yet its advice has not always been followed.[81] Walker has stressed the need for 'a need for more structured linkage between reviewers and Parliament.'[82] Ewing goes further, advocating that there should be 'an expectation that JCHR reports should be formally considered at some stage of the legislative process in both Houses, with MPs and peers being required directly to confront human rights issues as part of the enactment of legislation.'[83] This would seem to be a germane development that would aid further legislative scrutiny alongside the recommendation for the inclusion of an

[78] As was the case with the control order renewal debates or with extensions to pre-charge detention: ch 4 p 212, ch 3 p 177-178.
[79] ch 4 p 256.
[80] The 30-day figure was suggested during the passage of the CTA 2008: ch 3 p 179-180.
[81] See ch 3 p 185; ch 4 p 234, 237, 238, 258.
[82] Walker (n 28) 55.
[83] KE Ewing, Bonfire of the Liberties: New Labour, Human Rights, and the Rule of Law (OUP 2010) 277.

appropriate sunset clause.[84] Such a conclusion would be synergic with other suggestions to enhance legislative oversight.

Bespoke Select Committees have recently been deployed to conduct detailed scrutiny of draft bills.[85] This development has both advantages and disadvantages. It may increase the efficacy of the legislative oversight mechanism in the wake of a terrorism incident or during a sustained period of terrorist threat, which would be welcome.[86] It should not, however, be a substitute for proactive legislation, subjected to consultation, scrutiny and passed in the usual way.[87] This is a difficult balance to strike. A more desirable solution would be for Select Committees to conduct pre-legislative scrutiny on draft provisions, following a full consultation period, which are then put through their Parliamentary passage in the usual way before they are needed. The problem with this approach, as with retaining the draft Bills on file, is that both mechanisms create a presumptive emergency power that could be too easily introduced in an emergency. Emphasis should be placed on Parliament to strictly scrutinize the proportionality of the emergency powers if and when the draft Bill is introduced.

Where there is a duty on the Home Secretary to report to Parliament on the operation of a terrorism-related provision, Parliamentary time should be devoted to proper discussion and such reports should not be

[84] Ewing's 'radical' second suggestion is to establish constitutional oversight through a powerful committee akin to the position in Sweden, which may 'hold in abeyance' a bill thought to be contrary to the provisions of the ECHR for a period of up to 12 months (ibid 277-278).
[85] Joint Committee on the Draft Detention of Terrorist Suspects (Temporary Extension) Bills (ch 3 p 188-190); Joint Committee on the Draft Enhanced Terrorism Prevention and Investigation Measures Bill (ch 4 p 259-261).
[86] Particularly given Parliament's reticence to oppose executive requests following a terrorism emergency: for the response in Northern Ireland, see ch 3 p 126, p 130; in relation to the response to 9/11, see ch 3 p 154-159.
[87] Above ch 4 p 254-256.

supplanted by alternative reviews.[88] This is particularly true for the TPIM regime; in the absence of annual renewal, the utility of the Home Secretary's quarterly statements to Parliament is clearly compromised.[89]

The role of the Independent Reviewer could be strengthened, since the government inevitably cherry-picks which proposals it wishes to implement.[90] Walker suggests that 'Independent review schemes are … muddled … more could be achieved by a structure which relied less upon happenstance and the capacity of just one person, no matter how able'.[91] Advocating a panel of experts, independent of Parliament, to carry out the role of Independent Reviewer, producing regular advice, would seem to represent a nuanced and laudable innovation.[92] A further innovation could lie in one of the rejected safeguards of the CTA: a report by the review panel could be required in respect of the use of specific counter-terrorism provisions, such as every case in which pre-charge detention exceeded a set level, when a TPIM is issued or when resort is had to the DWA regime.[93]

These recommendations should be conflated in order to provide meaningful and detailed scrutiny: the Independent Reviewer's report could form part of the required consultation process during the passage of a terrorism-related statute, as well as forming part of an annual review process.[94] Select Committees, including the JCHR, should continue to provide detailed pre-legislative scrutiny of the provisions. The same Committees could conduct sustained annual or biannual reviews of any new regime. This approach would be warranted in terrorism-related cases

[88] Walker (n 28) 57.
[89] See ch 4 p 236-237 and in particular p 250-251.
[90] See ch 3 p 177; ch 4 p 228, 237.
[91] Walker (n 39) 302.
[92] Ibid.
[93] Respectively ch 3 p 185-186; ch 4 p 251; ch 5 p 334-335.
[94] This would fit with the suggestions of David Anderson in relation to the TPIM regime: ch 4 p 251.

given the unique expertise and security clearance possessed by the Independent Reviewer, and would help to avoid the normalization creep of exceptional terrorism-related powers.

Legislative consideration of terrorism-related judgments

The control order jurisprudence (*a fortiori* the American detention cases) has shown the difficulties created by narrowly predicated decisions.[95] Remedial legislative intervention did not follow each case.[96] In England and Wales this is particularly evident in relation to the use of s. 3 HRA in preference to s. 4 HRA; the judiciary effectively amended the legislation to ensure that it remained rights compatible, but this came at the expense of lasting clarity and precision.[97] As Tomkins states, 'an over-use of section 3 will lead to the Human Rights Act becoming a greater restriction on the sovereignty of Parliament.'[98]

One way in which this could be improved would be a requirement for the Secretary of State to report to Parliament on each judicial use of s. 3 HRA in a terrorism-related context, together with an assessment as to whether remedial legislation should be introduced for the sake of legal certainty.[99] No statutory amendment to s. 3 is required for this recommendation; the report could form part of a wider audit of terrorism-related provisions. An even simpler alternative could be a requirement placed on the Home Secretary to produce a quarterly report to Parliament on each terrorism

[95] As to the US detention cases, see ch 3 p 163-169. For the control order jurisprudence, see ch 4 p 219-224.
[96] With the exception of *Belmarsh*, which precipitated the control order regime: ch 3 p 169-170, and see ch 4 p 209.
[97] ch 4 p 219-224.
[98] Adam Tomkins, 'The Rule of Law in Blair's Britain' (2007) 26 University of Queensland Law Journal 255, 267 (original emphasis).
[99] ch 4 p 224.

detention, TPIM or DWA challenge,[100] since this is likely to facilitate debate and may lead to legislative intervention.

A periodic rights audit

Walker's suggestion for a 'rights audit' of terrorism-related provisions[101] is germane as a means to prevent the creep of extended powers,[102] to allow for reflection on discordant judicial decisions[103] and to attract political attention to the need for rebalancing of the counter-terrorism armoury in future Parliaments. Walker suggests a judicial analysis of the doctrine of proportionality in human rights law,[104] although an audit could be more tightly defined. It should operate in both emergency and non-emergency contexts and be established interdependently of any debate during the passage or renewal of relevant counter-terrorism legislation. It could include public release of statistics on the use of the relevant provisions, together with a summary of the key findings of the JCHR, Independent Reviewer and NGOs.

The Counter-Terrorism Review has shown that, with the prevailing political will in favour, it is possible to audit (and purportedly 'rebalance') the counter-terrorism and human rights dynamic.[105] Any future audit is not guaranteed,[106] and indeed may prove difficult to implement in the

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[100] As was suggested by David Anderson QC in the context of the TPIM regime: see ch 4 p 251.
[101] Walker (n 39) 18.
[102] See ch 3 p 177, 186.
[103] See, in particular, the uncertainty generated by the control order cases: ch 4 p 216-219.
[104] Walker (n 39) 18.
[105] For a discussion of which, see ch 4 p 237-239; and see generally Ben Middleton, 'Rebalancing, Reviewing or Rebranding the Treatment of Terrorist Suspects: the Counter-Terrorism Review 2011' Journal of Criminal Law (2011) Vol 75(3) 225.
[106] See the comments of the counter-terrorism minister during second reading: 'It would not be appropriate for me to suggest or require that a future Government act in a particular way … It would be reasonable and appropriate, however, to consider these matters carefully and in a measured and appropriate way, examining the security issues at that point in time in the same way as this Government sought to do in our counter-terrorism review… We consider that a five-year renewal period, allowing each Parliament the opportunity to take a view on this important issue, strikes the right balance' HC Deb 5

aftermath of a future terrorist attack.[107] Legislation should be brought forward that guarantees a periodic rights audit of terrorism-related powers. A mandatory statutory requirement for an overarching review in every Parliament should be imposed; this could coincide with the introduction of a supermajoritarian escalator. An audit should be triggered automatically following the termination of an emergency.[108] While the problems posed by the doctrine of Parliamentary sovereignty would apply here, they may be discharged using the same approach advocated above.[109]

Facilitation of multi-partisan politics

There have been some examples of proactively passed legislation in which effective Parliamentary scrutiny has been forthcoming.[110] One of the difficulties in securing effective Parliamentary oversight lies in the nature of the whipped voting that takes place.[111] A government with a commanding majority in Parliament can choose to be complacent about voting on renewal debates, as was seen in relation to ATCSA,[112] or about the passage of new counter-terrorism provisions, as was seen in relation to the PTA.[113] Alternatively, opposition parties may choose to abstain from votes, as has similarly been the case.[114] These practices are a current reality of the workings of Parliament; there are two remedial proposals that merit further consideration.

September 2011.

[107] Given the acquiescence of the legislature to the demands of the government: see e.g. the passage of the Prevention of Terrorism (Temporary Provisions) Act 1974 (above ch 3 p 126) or the passage of the Anti-Terrorism Crime and Security Act 2001 (above ch 3 p 152, 153, 155).

[108] Ackerman (n 32) 1053.

[109] Above p 346-347.

[110] In the context of the passage of TACT 2000, see above ch 3 p135-136, 142; in the context of the Terrorism Act 2006 see ch 3 p 174.

[111] See ch 2 p 78-79.

[112] In relation to ATCSA, see ch 3 p 155. In the context of pre-charge detention, see ch 3 p 177-178, and p 129.

[113] For control order renewals, see ch 5 p 213-214, 225, 228-229.

[114] See, for example, the Conservative abstention from the PTA renewal in 2008 (HC Deb 21 February 2008, col 585), following its affirmation the previous year (HC Deb 22 February 2007, col 457).

The first proposal is to allow for Parliamentary free votes in renewal debates on terrorism-related statutes.[115] This would force the government to openly engage in 'public deliberate justification',[116] although it might subvert the ability of the executive to reenact measures that it considers to be necessary. Allied with the above requirements for JCHR and reviewer scrutiny, this suggestion may alleviate some of the problems that stem from heavily whipped voting. The second proposal should be developed in order to support (but not wholly supplant) the first, and concerns the efficacy of scrutiny provided by the Official Opposition. Consideration should be given as to whether senior opposition members, (including, perhaps, Select Committee chairs),[117] should be fully security vetted and cleared so that they may be in a position to make an informed decision on behalf of their party.[118] In the absence of a free vote, this would provide an additional layer of protection. The constitutional ramifications of these suggestions require further study and analysis, including an assessment as to the practical viability of their implementation.

Recommendation 3: promoting judicial muscularity and respecting the will of Parliament

There have been numerous examples of cases in which the judiciary have sought to attenuate executive power.[119] There have also been several instances in which the utility of the judicial oversight mechanism has been compromised. Scrutiny has been restricted to procedural issues;

[115] Fiona de Londras, 'Can Counter-Terrorist Internment Ever Be Legitimate' (forthcoming in HRQ, 2011) (33); and see Fiona de Londras and Fergal Davis, 'Controlling the executive in times of terrorism: competing perspectives on effective oversight mechanisms' (2010) 30(1) Oxford Journal of Legal Studies 19, 35-36.
[116] Ibid.
[117] Ackerman suggestes that opposition parties should form a majority on, and chair, such standing committees in order to promote oversight (Ackerman (n 32) 1053).
[118] Lord Carlile, *Sixth Report of the Independent Reviewer pursuant to section 14(3) of the Prevention of Terrorism Act 2005* (3 February 2010) 20.
[119] See, in particular, the discussion of *Belmarsh* (ch 3 p160-163), *JJ* (ch 4 p 217), *F* (ch 4 p 229), *Boumediene* (ch 3 p193-196), *Hamdan* (ch 3 p188-189), *Chahal* (ch 5 p 270-271), *Saadi* (ch 5 p 272-273).

discordant judgments have often been provided.[120] Parliamentary sovereignty is a common law concept;[121] there remains a residual possibility that the courts could be more assertive if drastic executive action is taken at some future juncture, but this is unlikely in the extreme.[122] Across the regimes of terrorist detention, control and removal, the courts have been restrained in their muscularity.[123]

Judicial macro-analysis versus micro-analysis

Alongside the legislative suggestions that have been advocated, domestic and European courts could also take a more robust, muscular approach. Judicial oversight of the existence of an emergency could be explored,[124] but is not currently a realistic suggestion.[125] As Walker has stated:

> 'judicial review, whether international or domestic, tends to be most sure-footed, firm and convincing when it is confined to due process concerns for procedural fairness and participation rather than questions of a substantive nature, such as whether an emergency exists or not.'[126]

[120] In relation to Belmarsh, see ch 3 p 169-170. In relation to the control order cases, see ch 4 p 219-224.
[121] '[a]s both Parliament and the courts derive their authority from the rule of law, so both are subject to it and cannot act in a manner which involves its repudiation' Lord Woolf, 'The Importance of the Principles of Judicial Review' (1996) Law Lectures for Practitioners, Hong Kong Journals Online 61, 75. <http://sunzi.lib.hku.hk/hkjo/article.jsp?book=14&issue=140018>
[122] This would require the courts to repudiate the doctrine of Parliamentary supremacy on the basis of an alternative principle of constitutionalism: see the dicta of Lord Steyn discussed above, ch 2 p 69-70.
[123] Vermeule, 'Holmes on Emergencies' (2009) 61 Stanford Law Review 163, 175-178.
[124] See, for example, the suggestion of Heymann that 'a court should have to approve a president's personal determination that a thousand or more lives are at risk in a particular situation where he seeks emergency powers. Perhaps the legislature should be able to revoke that decision. It may be desirable to limit the powers to a relatively short period of time,' Philip Heymann, 'Civil Liberties and Human Rights in the Aftermath of September 11' (2002) 25 Harvard Journal of Law & Public Policy 441, 451.
[125] This ambitious and radical change would involve a fundamental recasting of the constitutional role of the judiciary (see generally ch 2 above), and the legislative emergency procedure advocated above is preferable.
[126] Walker (n 61) 49.

One of the safeguards rejected during the passage of the CTA 2008 was for the courts to make an independent assessment as to whether extended detention powers were necessary.[127] In the context of TPIMS, some have suggested that the courts should conduct a 'merits review' of the regime rather than the lower standard of judicial review.[128] The implementation of a similar judicial mechanism in the future will prove challenging but should not be discounted if additional executive powers are sought. Following the advice of the Select Committee, statutory recognition of the stringent judicial tests deployed in pre-charge detention cases may help.[129]

Application to Strasbourg

A further suggestion to improve judicial oversight relates to the assertiveness of the domestic court hierarchy and its relationship with the ECtHR. Strasbourg could undoubtedly have been more assertive at reining in emergency powers, and there have been recent attempts made by European governments to further limit the remit of the ECtHR.[130] The relationship between the UKSC and the ECtHR should be re-examined. Currently, the UKSC is aware that the government cannot apply to Strasbourg if unsuccessful in the UKSC. Perhaps the court would be more assertive in its rulings if it knew that the government did have this right, but this suggestion is inconceivable given the politics surrounding the ECtHR and its backlog of cases.[131] Conversely, circumscription of the remit of the ECtHR could have the unintended consequence of promoting domestic

[127] Counter-terrorism HL Bill (2008) 5, cl 27.
[128] Above ch 4 p 224.
[129] In terms of codification, a variety of specific amendments to the detention provisions of Schedule 8 TACT 2000 were suggested by the Select Committee in order to ensure compliance with Article 5 ECHR (Joint Committee on the Draft Detention of Terrorist Suspects (Temporary Extension) Bills, Draft Detention of Terrorist Suspects (Temporary Extension) Bills (HL 161 HC 893, 23 June 2011) (Joint Committee Report) 45).
[130] Above, ch 2 p 72-74.
[131] Ibid.

judicial muscularity: the UKSC may be more assertive if it is aware that it is truly the court of last instance. Transformative modifications to the role of the ECtHR appear inevitable and should be kept under review since the impact on counter-terrorism powers could be marked.[132]

Judicial activism and the dichotomy between ss. 3 and 4 HRA 1998

Judicial muscularity may also be encouraged through a re-evaluation of the use of statutory interpretation by the courts in terrorism-related cases. The House of Lords generated uncertainty by its capricious use of s. 3 HRA in the control order litigation.[133] Lord Millett has stated that 'any change in a fundamental constitutional principle should be the consequence of deliberate legislative action and not judicial activism, however well meaning.'[134] But the House of Lords in *F* adopted a curious sort of activism, refusing to declare the relevant provisions to be incompatible with Article 6 ECHR and stretching their powers of statutory interpretation well beyond breaking point.[135]

A preferable alternative would have been a declaration of incompatibility pursuant to s. 4 HRA, although this could have resulted in Parliament recasting the provision in different (perhaps more rights-limiting) terms, or ignoring the declaration altogether.[136] Kavanagh suggests that the use of s. 3 should be tempered with judicial deference.[137] Since the protection of human rights through constitutional dialogue is a cornerstone of the HRA itself,[138] the legislative/judicial dialogue could be improved where s. 3 is deployed in terrorism-related cases. A move away from sole reliance on

[132] Ibid. The impact on other areas of law will also be significant.
[133] Above, ch 4 p 219-224.
[134] *Ghainan v Godin-Mendoza* [2004] 2 AC 557, [57] (Lord Millett).
[135] Above, ch 4 p 220.
[136] Although this is unlikely, since no declarations of incompatibility to date have been ignored in this way: Aileen Kavanagh, *Constitutional Review under the UK Human Rights Act* (Cambridge University Press 2009) 201.
[137] Ibid 403.
[138] Ibid 412.

the judiciary[139] may have helped to catalyse approbative legislative intervention in the control order cases. The above recommendation for a report to Parliament on relevant terrorism-related cases and/or each use of s. 3 HRA would achieve this aim. If broader changes are contemplated to the powers of statutory interpretation under the HRA 1998, there would need to be full consideration as to their constitutional impact. This appears to be unlikely, in the short-term at least.[140]

Concluding Remarks

Constitutional optimization does not lie in the exclusive domain of any single oversight mechanism. It has been argued throughout this thesis that a confluence of legislative and juridical checks must operate within the political constitution in order to scrutinize and limit executive power. Proactive augmentation of terrorism laws is preferable to hastily drafted, reactive legislative responses that exceed their mandate.

No panacea for executive counter-terrorism measures has been provided; pre-existing scholarship and jurisprudence suggests that none is available. This investigation has analyzed the most recent constitutional developments as they operate in the oversight of terrorist treatment strategies. A variety of original recommendations have been made. Many of these suggestions are suited to immediate implementation within the legal framework of England and Wales. Others, particularly in relation to the TPIM and DWA regimes, merit consideration for transposition into the American legal order. It has been shown that the US would benefit from an

[139] Helen Fenwick, *Civil Liberties and Human Rights* (Routledge-Cavendish, 2007) 189.
[140] The current political situation (August 2012) and abandonment of the plans for an elected House of Lords have destabilized the Coalition Government and it is unthinkable that the Government will push for a repeal of the Human Rights Act 1998. See e.g. BBC News, 'Home Secretary Theresa May wants Human Rights Act axed' (London, 2 October 2011) < http://www.bbc.co.uk/news/uk-politics-15140742>; Robert Winnett, 'Lords reform: Nick Clegg blocks boundary reforms sparking Coalition crisis' *Telegraph* (London, 6 August 2012) < http://www.telegraph.co.uk/news/politics/liberaldemocrats/9456170/Lords-reform-Nick-Clegg-blocks-boundary-reforms-sparking-Coalition-crisis.html>.

analysis of many of the provisions of England and Wales, yet there is little to be gained from a transatlantic shift in the opposite direction.

The real challenge lies in the ability of the constitution to cope with a future terrorism incident. Should a terrorist atrocity ensue, the government may find it impossible to rely on the current counter-terrorism armoury and resist its augmentation with emergency measures. The recommendations made in this thesis will help to preserve constitutionalism following the prescient warning given by Lord Hoffmann in the *Belmarsh* case: often, the real threat comes not from terrorism but from laws such as these.

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