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JoAnne M. Sweeny

*University of Louisville, Louis D. Brandeis School of Law*

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# Indefinite Detention and Antiterrorism Laws: Balancing Security and Human Rights

Dr. JoAnne M. Sweeny\*

## I. Introduction

In February 2013, over 100 of the 166 detainees at the United States' prison in Guantanamo Bay in Cuba staged a hunger strike to protest their detentions.<sup>1</sup> These hunger strikes led to a brief flurry of media and political detention but have resulted in no substantive changes to existing law or policy.<sup>2</sup> Although the detainees at Guantanamo Bay have received the most media attention, they are not the only "lifers" being indefinitely detained under the PATRIOT Act. Thousands are currently being held – because they are suspected terrorists or because they cannot legally be deported – in prisons or immigration detention facilities across the United States without any hope of release.<sup>3</sup> The United States is not the only country that responded to terrorist threats with indefinite detention of suspects. In the aftermath of September 11,

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\* Assistant Professor of Law, University of Louisville, Louis D. Brandeis School of Law. PhD, Queen Mary, University of London. A previous version of this paper was presented at the American Association of Law Schools Section on International Human Rights in January 2013, at the Junior Scholar's Virtual Colloquium in July 2013, and the Loyola Constitutional Colloquium in November 2013. Many thanks to the commentators at these conferences, particularly Professors Diane Marie Amann, Jessica Kiser and Kellen Zale. Additional thanks to Francesca Laguardia, Philip Heleringer and Martin French for their assistance with this article. Any remaining errors are solely the author's.

1. Peter Finn, *Number of Protesting Guantanamo Bay Detainees Being Force-fed Grows to 41*, WASH. POST, June 7, 2013, at A06, available at 2013 WLNR 13987748; Amy Goodman, *Guantanamo a Legal Morass*, SPOKESMAN-REV. (Spokane, Wash.), Mar. 15, 2013, at 11A, available at 2013 WLNR 6580493.

2. Jared Del Rosso, *What the Guantanamo Hunger Strikers Achieved*, HUFFINGTON POST, Aug. 8, 2013, available at 2013 WLNR 19583167; Peter Finn, *Hearings Open for 9/11 Suspects*, WASH. POST, June 18, 2013, at A03, available at 2013 WLNR 14852471; Finn, *supra* note 1; Goodman, *supra* note 1.

3. It is unclear exactly how many people are being detained under the PATRIOT Act. After the Department of Justice announced that it had detained 1147 persons seven weeks after it began investigating the events of September 11, it has refused to provide any updates to that total. Erwin Chemerinsky, *Losing Liberties: Applying a Foreign Intelligence Model to Domestic Law Enforcement*, 51 UCLA L. REV. 1619, 1634 (2004).

2001, the United Kingdom also enacted legislation to indefinitely detain terrorism suspects who could not be legally deported.<sup>4</sup>

Indefinite detention of suspected terrorists presents a unique conflict between the desire for security and preservation of constitutional or human rights. Both the United States and United Kingdom have struggled with how to balance these rights, and their respective government branches have engaged in repeated conflicts to find the right balance. The saga is still ongoing in both countries and represents a powerful look into how governments create and modify laws that deal with complicated political and moral issues. How these laws were made, the inter-governmental conflicts they create, and the way these conflicts are resolved – through compromise or “steamrolling” – provide unique insights into the working of the government itself.

Therefore, this article does more than describe British and American anti-terrorism laws; it shows how those laws go through conflicted government branches and the bargains struck to create the anti-terrorism laws that exist today. Instead of taking these laws as given, this Article explains why they exist. More specifically, this article focuses on the path anti-terrorism legislation followed in the United States and the United Kingdom, with particular focus on each country’s ability (or lack thereof) to indefinitely detain suspected non-citizen terrorists. Both countries’ executives sought to have that power and both were limited by the legislatures and courts but in different ways. These differences show the human rights concerns both countries grappled with when enacting anti-terrorism legislation and how the two governments approached balancing those concerns.

These anti-terrorism laws also show which government branches possessed the most power when creating the legislation, which branches dictated the terms of these laws, and which branches were forced to compromise. The different paths taken by the anti-terrorism legislation in both countries also show the different styles of the two governments. The branches of the United States government are more likely to openly defy each other, knowing that checks and balances will ensure that no branch dominates. In the United Kingdom, there is no strong tradition of checks and balances so informal bargaining and consulting among the branches is more common before legislation is proposed or amended. The United Kingdom’s Human Rights Act has, however, begun to

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4. *See generally* Anti-terrorism, Crime and Security Act, 2001, c. 21-35 (U.K.).

change the culture and has caused more open opposition among the three branches.

## II. Creating Antiterrorism Laws

The events of September 11, 2001 changed the way the world looked at terrorism.<sup>5</sup> Although many nations experienced terrorist attacks within their borders prior to 2001, many legislators argued that modern terrorists are fundamentally different and require a different legal response.<sup>6</sup> Both the United States and United Kingdom responded to the terrorist attacks on September 11 with harsh anti-terrorism measures that included the ability to effectively indefinitely detain suspected terrorists without trial. However, the journeys these countries took to reach this result were remarkably different. The United States PATRIOT Act and the United Kingdom's Anti-Terrorism, Crime and Security Act ("Anti-Terrorism Act") both contain provisions for potentially indefinite detention of suspected terrorists and, as shown below, the provisions have met with different levels of resistance by the courts and the legislature. The different journeys these laws took therefore give unique insight into the way these two countries' government branches make law.

### A. *The United States*

The United States' anti-terrorism policies were fundamentally altered by the attacks on September 11, 2001. Although the United States did have anti-terrorism policies in place before 2001, those laws were much less substantive and were primarily used to punish those who committed terrorist acts rather than trying to prevent terrorism.<sup>7</sup>

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5. Sarah Collerton, *Ten Years of Anti-terror Laws*, ABC NEWS, Sept. 12, 2011, <http://www.abc.net.au/news/2011-09-12/ten-years-of-anti-terror-laws/2881034>; Martha Mendoza, *Nations Turned to Anti-terrorism Laws as Shield — and Sword — After 9/11*, SEATTLE TIMES, Sept. 3, 2011, <http://seattletimes.com/text/201104402.html> ("[s]ince 9/11, almost every country has passed or revised anti-terrorism laws, from tiny Tonga to giant China.").

6. Edel Hughes, *Entrenched Emergencies and the "War on Terror": Time to Reform the Derogation Procedure in International Law?*, 20 N.Y. INT'L L. REV. 1, 1 (2007); see also Monica Hakimi, *International Standards for Detaining Terrorism Suspects: Moving Beyond the Armed Conflict-Criminal Divide*, 40 CASE W. RES. J. INT'L L. 593, 594 (2009) (describing how transnational jihadist groups do not operate on a traditional battlefield).

7. Andrew Peterson, *Addressing Tomorrow's Terrorists*, 2 J. NAT'L SECURITY L. &

# 1. Anti-terrorism Laws and Indefinite Detention Prior to September 11, 2001

One of the earliest uses of the term “terrorism” was an effort to exclude immigrants who engaged in terrorist activity.<sup>8</sup> Until the 1993 World Trade Center bombings, the United States did not have any substantive criminal laws generally addressing domestic terrorism and instead focused on using immigration laws to keep suspected terrorists out of the United States.<sup>9</sup> After the Oklahoma City bombing in 1995, there was an even greater push to implement anti-terrorism laws aimed at domestic terrorism.<sup>10</sup> The first of these statutes was the Anti-Terrorism and Effective Death Penalty Act (AEDPA).<sup>11</sup> Passed on the one-year anniversary of the Oklahoma City bombing, the AEDPA’s stated main purpose was to help prevent terrorist attacks by “streamlining” death penalty and habeas corpus proceedings.<sup>12</sup> More specifically, the AEDPA allowed states under some circumstances to “fast-track” death penalty proceedings, and forced federal courts to give more deference to state court decisions in habeas corpus proceedings.<sup>13</sup> In addition to removing procedural hurdles, the AEDPA also included a broad definition of what criminal behavior constituted “terrorism” and increased punishments for engaging in terrorist activity.<sup>14</sup> During this time, those who committed terrorist attacks against United States targets on foreign soil were often given fewer constitutional protections, even if they were being interrogated by American agents.<sup>15</sup>

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POL’Y 297, 301 (2008).

8. *Id.* at 306, 311.

9. *Id.* at 316, 318.

10. *Id.* at 319; Jacqueline Ann Carberry, Note, *Terrorism: A Global Phenomenon Mandating a Unified International Response*, 6 IND. J. GLOBAL LEGAL STUD. 685, 688-89 (1999); Patrick J. McDonnell, *Sentenced to a Life in Limbo*, L.A. TIMES, Sept. 9, 1998, at A1, available at 1998 WLNR 6365905.

11. Anti-terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214.

12. Charles V. Zehren, *Clearing the Hurdle: House Sends Anti-terrorism Bill to Clinton*, NEWSDAY, Apr. 19, 1996 at A20, available at 1996 WLNR 550302.

13. John H. Blume, *AEDPA: The "Hype" and the "Bite"*, 91 CORNELL L. REV. 259, 259-60 (2006).

14. Peterson, *supra* note 7, at 320.

15. *See, e.g.,* United States v. Bin Laden, 132 F. Supp. 2d 168, 196-97 (S.D.N.Y. 2001) (holding that detained suspects who were not notified of their right to notify their

The AEDPA also mandated that all lawfully-admitted convicted, aggravated felons be deported or, if they could not be deported, held indefinitely.<sup>16</sup> Aliens are usually detained indefinitely after a deportation order for two reasons: the Immigration and Naturalization Service (INS) “is unable to carry out the deportation because the alien’s country of origin refuses to readmit her . . . or the alien is generally considered ineligible for release because she is too dangerous to release or is likely to flee and frustrate deportation.”<sup>17</sup>

The INS’s ability to indefinitely detain aliens who cannot be deported was further codified in the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), also passed in 1996.<sup>18</sup> The IIRIRA’s main focus was immigration: it reinforced the U.S. Border Patrol, cracked down on the employment and smuggling of illegal aliens, and imposed new restrictions on the ability of legal immigrants to obtain government benefits.<sup>19</sup> Section 241.4 of the IIRIRA states that criminal aliens that have been ordered removed may be detained beyond the removal period if the alien demonstrates a serious risk of non-compliance with the removal order.<sup>20</sup> Under subsequent regulations, reviews of non-removable criminal aliens were to be held at least once a year.<sup>21</sup> After enactment, the AEDPA and IIRIRA were criticized for being unduly harsh towards immigrants<sup>22</sup> and the wrongly convicted.<sup>23</sup>

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consulates of their detentions—which violated the Vienna Convention—had no judicial, only a political, remedy for this violation).

16. Stacy J. Borisov, *Give Me Liberty or Give Me Deportation: The Indefinite Detention of Non-Removable, Criminal Aliens*, 13 U. FLA. J.L. & PUB. POL’Y 183, 191-92 (2001). Under the AEDPA, the INS no longer has discretion to admit these aliens even if the INS determines that they are not a danger to society. *Id.*

17. Alexandra E. Chopin, *Disappearing Due Process: The Case for Indefinitely Detained Permanent Residents’ Retention of Their Constitutional Entitlement Following a Deportation Order*, 49 EMORY L.J. 1261, 1274 (2000).

18. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546.

19. *Senate Votes, 97-3, to Tighten Borders: Bill also Limits Benefits for Legal Immigrants*, WASH. POST, May 3, 1996, at A01, available at 1996 WLNR 6473307.

20. Megan Peitzke, *The Fate of “Unremovable” Aliens Before and After September 11, 2001: The Supreme Court’s Presumptive Six-Month Limit to Post-Removal-Period Detention*, 30 PEPP. L. REV. 769, 776 (2003).

21. 8 C.F.R. § 241.4(k)(2) (2011).

22. Mary A. Mitchell, *Reforms Limit Immigrants’ Legal Options*, CHI. SUN-TIMES, Jan. 19, 1997, at 13, available at 1997 WLNR 7145872.

23. Editorial, *Basic Rights Are the Victims*, BOSTON GLOBE, May 9, 1997 at A22, available at 1997 WLNR 2355318.

As a result of these laws, by 2001, the United States was indefinitely detaining over 3,400 deportable aliens who had been rejected by their home countries.<sup>24</sup> Numerous habeas corpus petitions were brought by these detained aliens, which resulted in a circuit split between the Ninth and Fifth Circuits. In the Ninth Circuit, in *Ma v. Reno*,<sup>25</sup> the petitioner argued that the INS was violating his due process rights because he was being indefinitely detained after being ordered removed to Cambodia, which would not permit his return because Cambodia had no repatriation agreement with United States. The Ninth Circuit granted the petitioner's habeas corpus petition and held that the INS may "detain aliens only for a reasonable time beyond the statutory removal period."<sup>26</sup> If there is "no reasonable likelihood that a foreign government will accept the alien's return in the reasonably foreseeable future . . . the alien must be released subject to the supervisory authority provided in the statute."<sup>27</sup>

The Fifth Circuit took a different view. In *Zadvydas v. Underdown*,<sup>28</sup> a resident alien was being indefinitely held because he was "stateless" and had no other country to which he could be deported. The Fifth Circuit denied habeas corpus relief, reasoning that Zadvydas was not being indefinitely detained because he could "be released when it is determined that he is no longer either a threat to the community or a flight risk."<sup>29</sup> The Fifth Circuit also noted that Zadvydas's detention was reviewed every six months at which time he could present evidence that supported his release.<sup>30</sup> Finally, the Fifth Circuit held that, although finding a country to which the petitioner could be deported would be "difficult at best," the Fifth Circuit thought that more time should be given to the INS before deciding that such deportation would be

24. Carberry, *supra* note 10, at 688-89; Michelle Mittelstadt, *INS to Begin Releasing Long-Detained Immigrants*, CONTRA COSTA TIMES (Walnut Creek, CA), July 20, 2001.

25. *Ma v. Reno*, 208 F.3d 815 (9th Cir. 2000), *vacated sub nom. Zadvydas v. Davis*, 533 U.S. 678 (2001), *opinion modified sub nom. Kim Ho Ma v. Ashcroft*, 257 F.3d 1095 (9th Cir. 2001).

26. *Ma*, 208 F.3d at 821-22.

27. *Id.*

28. *Zadvydas v. Underdown*, 185 F.3d 279 (5th Cir. 1999), *vacated sub nom. Zadvydas v. Davis*, 533 U.S. 678 (2001), *opinion withdrawn and superseded sub nom. Zadvydas v. Davis*, 285 F.3d 398 (5th Cir. 2002).

29. *Zadvydas*, 185 F.3d, at 291.

30. *Id.*

impossible.<sup>31</sup>

In 2001, the Supreme Court consolidated *Ma* and *Zadvydas* and finally decided the issue.<sup>32</sup> The Supreme Court's primary concern was whether the statute actually permitted indefinite detention of an alien, because doing so would violate the Due Process Clause of the Fifth Amendment.<sup>33</sup> More specifically, the Court held that "government detention violates that Clause unless the detention is ordered in a *criminal* proceeding with adequate procedural protections or, in certain special and narrow nonpunitive circumstances where a special justification, such as harm-threatening mental illness, outweighs the individual's constitutionally protected interest in avoiding physical restraint."<sup>34</sup> The Court determined that the proceedings were civil and nonpunitive in purpose and effect but also held that there was no "sufficiently strong special justification . . . for indefinite civil detention."<sup>35</sup> The Government's two stated goals, ensuring that the alien appears at immigration proceedings and protecting the community, were held to be insufficient for two reasons.<sup>36</sup> First, once the alien cannot be reasonably deported, the reason for detaining her no longer exists.<sup>37</sup> Second, although the alien may still be a danger to the community no matter how long she is detained, whatever "danger" the alien poses does not rise to the level previously allowed by the Supreme Court, particularly with the small amount of procedural safeguards included in the statute.<sup>38</sup>

The Supreme Court also held that, under the statute, detention is potentially permanent and the length of detention is not determined by the alien's danger to the community but by whether the alien can be deported. The Court noted that "[t]he provision authorizing detention does not apply narrowly to a small segment of particularly dangerous individuals, say, suspected terrorists, but broadly to aliens ordered removed for many and various reasons, including tourist visa violations."<sup>39</sup> The procedural protections for the aliens were also

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31. *Id.*

32. 533 U.S. 678 (2001).

33. *Id.*

34. *Id.* at 690 (internal citations and quotation marks omitted).

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.* at 691.

39. *Id.* (internal quotation marks and citations omitted).



criticized because the alien bears the burden of proving he is not dangerous and there is no significant judicial review of the administrative proceedings.<sup>40</sup> To the Supreme Court, “[t]he Constitution demands greater procedural protection even for property.”<sup>41</sup>

Noting that the relevant statute, 8 U.S.C. § 1231(a)(6), contained no “clear indication of congressional intent to grant the Attorney General the power to hold indefinitely in confinement an alien ordered removed,” the Court held that § 1231 “contains an implicit ‘reasonable time’ limitation, the application of which is subject to federal-court review.”<sup>42</sup>

The Court then held that there should be a rebuttable presumption that six months is a “reasonable time:”

for the sake of uniform administration in the federal courts, we recognize that period. After this 6-month period, once the alien provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the Government must respond with evidence sufficient to rebut that showing. And for detention to remain reasonable, as the period of prior postremoval confinement grows, what counts as the “reasonably foreseeable future” conversely would have to shrink.<sup>43</sup>

The end result, according to the Court, is that “once removal is no longer reasonably foreseeable, continued detention is no longer authorized by statute.”<sup>44</sup>

In response to the Supreme Court’s holding in *Zadvydas*, the Attorney General directed the INS to implement regulations “that set forth a procedure for detained aliens to follow in presenting claims that they should be released from detention because there is no significant likelihood that they will be removed in the foreseeable future.”<sup>45</sup> The INS promulgated regulations that created a hearing procedure and

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40. *Id.* (internal quotation marks and citations omitted).

41. *Id.* (internal quotation marks and citations omitted).

42. *Id.* at 682.

43. *Id.* at 701.

44. *Id.* at 699.

45. *Attorney General Issues Interim Procedure for Post-Order Custody Review after Zadvydas*, July 30, 2001, 78 No. 29 Interpreter Releases 1228, 1228-29.

delineated factors that would enable the INS to indefinitely detain unremovable aliens.<sup>46</sup> Under 8 C.F.R. § 241.13, Aliens that are released are still under an order of supervision, which, among other things, requires them to report to INS officers periodically.<sup>47</sup> Under 8 C.F.R. § 241.14, the INS may continue to detain unremovable aliens if they 1) have “a highly contagious disease that is a threat to public safety;” 2) have been detained on account of “serious adverse foreign policy consequences of release;” 3) have been “detained on account of security or terrorism concerns;” or 4) are “determined to be specially dangerous” due to a history of violence, mental condition, or other factors that represent a danger to the public.<sup>48</sup>

There was mixed response to *Zadvydas* in the media. Supporters of existing immigration legislation thought that the Supreme Court was legislating by expanding the “rights of aliens” to be the same as citizens.<sup>49</sup> Others saw the Supreme Court decision as repudiating the former level of deference it had given to the government on immigration policies and emphasizing that Constitutional rights apply to all “persons” in the United States, whether there illegally or legally.<sup>50</sup> Favorable media reports also emphasized that the decision gave resolution to “lifers” who were being held indefinitely by the INS.<sup>51</sup> However, years after *Zadvydas*, criticisms still arise when the INS releases illegal aliens who cannot be deported.<sup>52</sup>

Unsurprisingly, several lawsuits were initiated after *Zadvydas*, some of which resulted in the release of detained immigrants. For example, in *Rosales-Garcia v. Holland*, 322 F.3d 386, 405-06 (6th Cir. 2003), the Sixth Circuit extended *Zadvydas* to inadmissible aliens, not just removable ones. Due to this decision, two Mariel Cubans<sup>53</sup> who had

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46. 8 C.F.R. §§ 241.13-14 (2013).

47. *Id.* §§ 241.13, 241.5.

48. *Id.* § 241.14.

49. Charles Lane & Hanna Rosin, *Court Limits Detention of Immigrants; Justices Rule Convicts Can't Be Held Indefinitely*, WASH. POST, June 29, 2001, at A01, available at 2001 WLNR 13187510.

50. Linda Greenhouse, *The Supreme Court: The Issue of Confinement; Supreme Court Limits Detention In Cases of Deportable Immigrants*, N.Y. TIMES, June 29, 2001, at A1, available at 2001 WLNR 3383917.

51. Lane & Rosin, *supra* note 49.

52. Rich Cholodofsky, *Inability to Deport 'Undesirable' Illegals Frustrates U.S.*, TRIB. REV. (Greensburg, Pa.), Mar. 27, 2011, available at 2011 WLNR 5951623.

53. “Mariel Cubans” refers to Cubans who mass immigrated to the United States on a boatlift from Mariel Harbor in 1980. *Rosales-Garcia v. Holland*, 322 F.3d 386, 390-391

served prison time for criminal convictions were released from INS custody because Cuba, the only country to which they could be deported, refused to accept them.<sup>54</sup>

8 C.F.R. § 241.14 has led to further litigation, which resulted in another Circuit split between the Fifth and Tenth Circuits. The Fifth Circuit held that 8 C.F.R. § 241.14 could not authorize indefinite detention for any aliens covered by its authorizing statute, 8 U.S.C. § 1231, because the Supreme Court had already held that indefinite detention was not permitted under that statute.<sup>55</sup> Conversely, the Tenth Circuit has allowed indefinite detention under 8 C.F.R. § 241.14 because the regulations limit indefinite detention to “special circumstances,” such as mental illness, that show that the alien represents a specific danger to the public.<sup>56</sup> The Tenth Circuit also noted that “the burden of proof is now on the agency to prove dangerousness, rather than on the alien to show non-dangerousness. In order to continue detention beyond the removal period because an alien poses a special danger to the public, the government must first demonstrate that there is ‘reasonable cause to go forward with a merits hearing.’”<sup>57</sup> According to the Tenth Circuit, the narrow set of “special circumstances” and reversed burden of proof in 8 C.F.R. § 241.14 comported with the Supreme Court’s holding in *Zadvydas*.<sup>58</sup>

## 2. Post-September 11 – The PATRIOT Act

As shown above, prior to September 11, 2001, existing terrorism laws were concerned with deporting aliens who had committed aggravated crimes.<sup>59</sup> Those concerns expanded after the attacks on the World Trade Center and resulted in new anti-terrorism legislation that impacts the detention of unremovable aliens. The PATRIOT Act was proposed in direct response to the terrorist attacks on September 11,

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(6th Cir. 2003).

54. *Id.* at 391-92; *see also, e.g.*, *Nadarajah v. Gonzales*, 443 F.3d 1069 (9th Cir. 2006); *Ly v. Hansen*, 351 F.3d 263 (6th Cir. 2003).

55. *Tran v. Mukasey*, 515 F.3d 478, 484 (5th Cir. 2008).

56. *Hernandez-Carrera v. Carlson*, 547 F.3d 1237, 1253-54 (10th Cir. 2008).

57. *Id.* (quoting 8 C.F.R. § 241.14(h) (2013)).

58. *Hernandez-Carrera*, 547 F.3d at 1253-54.

59. *See, e.g.*, Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996).

2001.<sup>60</sup> What became the PATRIOT Act was originally proposed by the Bush administration and championed by Attorney General John Ashcroft as necessary because of the “clear and present danger” of further terrorist attacks.<sup>61</sup> Ashcroft also warned that the United States faced a “serious threat” of additional terrorism, particularly after it launched retaliatory strikes.<sup>62</sup>

It is perhaps no wonder, then, that the PATRIOT Act was quickly passed by Congress. “One of the swiftest-moving bills in federal history, the law was proposed five days after the Sept. 11 terror attacks.”<sup>63</sup> September 11 brought bipartisan cooperation that would have been “inconceivable” before the attacks.<sup>64</sup> Due to this cooperation, the PATRIOT Act was passed on October 26, 2001, six weeks after September 11.<sup>65</sup> The PATRIOT Act was also passed with a sizeable majority; one senator voted against it<sup>66</sup> and sixty-six representatives (out of 432) voted against it.<sup>67</sup> September 11 was clearly on Congress’ mind as they considered the bill; many members of Congress had recently traveled to New York to view the devastation at the World Trade Center.<sup>68</sup> The speed with which the bill went through Congress caused some members to complain that “they had no idea what they were voting on, [and] were fearful that aspects of the . . . bill went too far—yet voted for it anyway, lest there be a further terrorist attack and they be accused of not having provided the government sufficient means to defend

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60. Dana Milbank, *House Bill Would Expand Federal Detention Powers*, WASH. POST, Oct. 2, 2001, at A01, available at 2001 WLNR 13155248.

61. *Id.*

62. Kevin Johnson, *Ashcroft: New Terror Likely*, USA TODAY, Oct. 1, 2001 at 01A, available at 2001 WLNR 3769313.

63. J. M. Lawrence, *War on Terrorism; Anti-terror Laws in Place; Feds Urgently Implement Crackdown*, BOSTON HERALD, October 27, 2001, available at 2001 WLNR 267021.

64. Zachary Coile & Elizabeth Fernandez, *Bill to Fight Terrorism Takes Shape: Extension of Police Powers Stops Short of Ashcroft’s Request*, S.F. CHRON., Oct. 2, 2001, at A1, available at 2001 WLNR 5723393.

65. *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001*, Pub. L. No. 107–56, 115 Stat. 272.

66. UNITED STATES SENATE, U.S. SENATE ROLL CALL VOTES 107TH CONGRESS-1ST SESSION, [http://www.senate.gov/legislative/LIS/roll\\_call\\_lists/roll\\_call\\_vote\\_cfm.cfm?congress=107&session=1&vote=00313](http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=107&session=1&vote=00313) (last visited Apr. 25, 2014).

67. UNITED STATES HOUSE OF REPRESENTATIVES, FINAL VOTE RESULTS FOR ROLL CALL 398, <http://clerk.house.gov/evs/2001/roll398.xml> (last visited Apr. 25, 2014).

68. Milbank, *supra* note 60.

against it.”<sup>69</sup>

The Bush Administration hoped that the aftermath of September 11 would cause Congress to pass the legislation it wanted without much debate.<sup>70</sup> However, despite the Bush Administration’s pressure, Congress did amend provisions of the bill.<sup>71</sup> Members of Congress were particularly wary of some of the powers that Ashcroft sought such as wiretapping and indefinite detention of suspected terrorists. Representative Robert L. Barr Jr., a conservative Republican from Georgia, noted that “the department has sought many of these authorities on numerous other occasions, has been unsuccessful in obtaining them, and now seeks to take advantage of what is obviously an emergency situation to obtain authorities that it has been unable to obtain previously. . . .”<sup>72</sup> For example, the PATRIOT Act allows “enemy combatants” to be held indefinitely, as long as some procedural safeguards (such as habeas corpus) are provided to them.<sup>73</sup>

The PATRIOT Act also allows the government to detain any foreigners suspected of terrorist activity for up to seven days without filing charges or giving them an opportunity to ask a judge to release them.<sup>74</sup> Civil libertarians complained about this provision, but some had to admit that it was a lot better than the original version of the bill – Attorney General John Ashcroft had sought indefinite detention of immigrants without a hearing if they were suspected of involvement in terrorist acts.<sup>75</sup> Still, indefinite detention is possible under the PATRIOT Act: the Attorney General has the power to detain both legal and illegal immigrants until they are deported, as long as he or she has “reasonable

69. *Stamped in the House*, WASHINGTONPOST.COM, Oct. 16, 2001, available at 2001 WLNR 13691967.

70. Neil A. Lewis & Robert Pear, *Bill to Expand Wiretap Rules but House Scales Back Other Requests for Expanded Powers*, PITT. POST-GAZETTE, Oct. 2, 2001, at A1, available at 2001 WLNR 3442295.

71. John Lancaster & Walter Pincus, *Proposed Anti-Terrorism Laws Draw Tough Questions; Lawmakers Express Concerns to Ashcroft, Other Justice Officials About Threat to Civil Liberties*, WASH. POST, Sept. 25, 2001, at A05, available at 2001 WLNR 13162112.

72. *Id.*

73. David Cole, *Out of the Shadows: Preventive Detention, Suspected Terrorists, and War*, 97 CAL. L. REV. 693, 702 (2009); Hope Metcalf & Judith Resnik, *Gideon at Guantanamo: Democratic and Despotism Detention*, 122 YALE L.J. 2504, 2517 (2013).

74. Chemerinsky, *supra* note 3, at 1629.

75. Coile & Fernandez, *supra* note 64; Milbank, *supra* note 60.

grounds to believe” that they may be involved in terrorism.<sup>76</sup>

More specifically, § 412 of the PATRIOT Act requires the Attorney General to “take into custody any alien who is certified” as a terrorist suspect or “is engaged in any other activity that endangers the national security of the United States.”<sup>77</sup> If removal to another country is unlikely to occur in the near future, this section allows the Attorney General to detain the alien for up to six months, with renewable six-month terms.<sup>78</sup> These six-month detentions can go on indefinitely.<sup>79</sup> The PATRIOT Act does allow for judicial review in the form of habeas corpus proceedings, first to any district court having jurisdiction and then (via appeal) to the D.C. Circuit, which is statutorily limited to using only D.C. Circuit or U.S. Supreme Court cases as precedent.<sup>80</sup>

### 3. Media Response

The media harshly criticized the PATRIOT Act for the wide and largely unreviewable powers it granted to the executive. According to one newspaper, the PATRIOT Act “[p]ermits the attorney general to incarcerate or detain foreigners based on mere suspicion.”<sup>81</sup> Other media sources noted that the Bush administration also originally wanted the power to hold non-U.S. citizens suspected of engaging in terrorist activities indefinitely without being formally charged, but members of Congress forced the administration to make concessions.<sup>82</sup> The PATRIOT Act was also criticized for not providing sufficient judicial

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76. Milbank, *supra* note 60.

77. 8 U.S.C. § 1226(a) (2012). However, the Attorney General must begin removal proceedings within seven days of detention. *Id.* See also Tung Yin, *The Impact of the 9-11 Attacks on National Security Law Casebooks*, 19 ST. THOMAS L. REV. 157, 171-72 (2006).

78. 8 U.S.C. § 1226(a).

79. *Id.* The Attorney General must review the detention every six months to make sure it satisfies the requirements of Section 1226(a). *Tran v. Mukasey*, 515 F.3d 478, 485 (5th Cir. 2008); *Nadarajah v. Gonzales*, 443 F.3d 1069, 1079 (9th Cir. 2006).

80. 28 U.S.C. § 2241, *held unconstitutional* by *Boumediene v. Bush*, 553 U.S. 723 (2008).

81. *Terror Bill: Fear Wins, Rights Lose*, WISCONSIN STATE J., Oct. 28, 2001, at B2, available at 2001 WLNR 8774605.

82. Kelly Wallace, *Bush Signs Anti-Terrorism Bill Into Law*, CNN, Oct. 26, 2001, <http://transcripts.cnn.com/transcripts/0110/26/se.01.html>. As a compromise decision, the PATRIOT Act allows prosecutors to hold these suspected terrorists for up to seven days without filing charges against them, which concerned some media outlets. *Id.*

review when federal agents “indefinitely detain hundreds of non-citizens whether or not they are here legally.”<sup>83</sup> Despite these criticisms, 2001 polls showed that fifty-eight percent of the population approved of the way George W. Bush handled the terrorist attacks.<sup>84</sup>

#### 4. The Supreme Court’s Influence on the PATRIOT Act

The Supreme Court’s influence on the PATRIOT Act began as it was being drafted. It is evident that Congress looked at prior Supreme Court precedent for indefinite detention of non-nationals when drafting § 1226a of the PATRIOT Act. The six-month time limit on detention of non-nationals suspected of terrorism appears to have been taken directly from the Supreme Court’s holding in *Zadvydas v. Davis*<sup>85</sup> in order to comply with *Zadvydas*’s holding that an alien who is held for more than six months has presumptively had his or her due process violated.<sup>86</sup>

In fact, the Supreme Court noted Congress’ adoption of *Zadvydas*’s six-month presumption in the PATRIOT Act in *Clark v. Martinez*.<sup>87</sup> *Clark v. Martinez*, like the Sixth Circuit case of *Rosales-Garcia v. Holland*, extended *Zadvydas* to inadmissible aliens instead of just removable ones.<sup>88</sup> In response to the Government’s argument “that the security of our borders will be compromised if it must release into the country inadmissible aliens who cannot be removed,” the Supreme Court noted that Congress could amend § 1231 to allow for indefinite detention under special circumstances, as it had with the PATRIOT Act.<sup>89</sup> Congress’ acquiescence to the Supreme Court’s six-month renewable detention periods has led other courts to apply *Zadvydas* in other situations. For example, courts have used the PATRIOT Act’s six-month review period to grant habeas to other kinds of unremovable aliens<sup>90</sup> who

83. Susan Goering, *Anti-terrorism Act Imperils Liberties*, BALT. SUN, Oct. 30, 2001, at 15A, available at 2001 WLNR 1048504. The PATRIOT Act allows habeas corpus petitions only for those who are indefinitely detained. 8 U.S.C. § 1226a(a)(1) (2012).

84. Jane Lampman, *Muslim in America*, CHRISTIAN SCI. MONITOR, Jan. 10, 2002, available at 2002 WLNR 1563069.

85. 533 U.S. 678 (2001).

86. *Id.* at 701.

87. *Clark v. Martinez*, 543 U.S. 371, 386 n.8 (2005).

88. *Id.* at 378.

89. *Id.* at 386 & n.8.

90. One example involves an alien convicted of a crime of violence who was unremovable because the two countries to which he could be deported refused to accept

did not explicitly benefit from the PATRIOT Act's procedural safeguards.<sup>91</sup>

Congress' acceptance of *Zadvydas*'s six-month detention limit is also evident in its subsequent creation of 8 C.F.R. § 241.14, which allows for continuing detention of aliens who meet specific criteria (including being suspected of terrorism) if proper review and hearings are conducted.<sup>92</sup> These aliens are also entitled to petition for a writ of habeas corpus.<sup>93</sup> This regulation has not been reviewed by the Supreme Court but has been upheld by the Eighth Circuit.<sup>94</sup> However, no court has determined whether § 1226a's indefinitely renewable six-month terms would violate Due Process. The Supreme Court noted in *Zadvydas* that "[a] statute permitting indefinite detention of an alien would raise a serious constitutional problem"<sup>95</sup> but *Zadvydas* also explicitly did not apply to aliens that pose national security risks.<sup>96</sup> It is unclear what the result of any litigation on this issue would be but, for now, the state of the law appears to be stable.

The interplay between the three branches of government in the United States shows that these branches are comfortable with the explicit dialogue they traditionally share. The legislature resisted the executive's initial legislative proposal and amended it in several respects. The fact that the media was also critical of the bill likely reinforced the legislature's resolve. In addition, the executive was willing to use existing Supreme Court cases (*Zadvydas* in particular) to draft some of the terms of the PATRIOT Act. In response, the Supreme Court has noted that the PATRIOT Act followed its prior rulings and indicated that Congress should follow the PATRIOT Act as a model when drafting other legislation. The long-standing tradition of separation of powers appears to be alive and well in these interactions. In contrast, as shown

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him. *Tran v. Mukasey*, 515 F.3d 478, 480 (5th Cir. 2008).

91. *Mukasey*, 515 F.3d at 485 ("In particular, in the field of national security, Congress enacted the Patriot Act which authorizes detention beyond the removal period of any alien whose removal is not foreseeable for additional periods of up to six months if the alien presents a national security threat. Thus, not only are the Government's concerns properly directed to Congress, but importantly Congress has shown that it has the authority and willingness to address these concerns." (internal footnote and citation omitted)).

92. 8 C.F.R. § 241.14 (2011).

93. *Id.*

94. *Hernandez-Carrera v. Carlson*, 547 F.3d 1237, 1255 (10th Cir. 2008).

95. *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001).

96. *Id.* at 696.



below, the interactions of the government branches in the United Kingdom are far from set.

### B. *The United Kingdom*

In contrast to the dearth of inter-governmental conflict seen in the United States, the path taken by the United Kingdom's anti-terrorism legislation after September 11, 2011 is much more complex and involves several amendments in response to objections from Parliament, British Courts and the European Court of Human Rights. The United Kingdom's government structure and familiarity with terrorism are major causes of these differences. In contrast, the enactment of the United Kingdom's first codified bill of rights, the Human Rights Act, allowed the government branches to come into conflict in a more direct, "American" way that would not have been possible only two years earlier.

In 2001, the Human Rights Act had only recently come into effect. In addition to incorporating the rights contained in the European Convention on Human Rights, the Human Rights Act gave new powers to the judiciary and created a new parliamentary committee to review legislation that impacted human rights. Because the Human Rights Act is a fairly recent statute, the Anti-Terrorism Act is one of the few pieces of legislation that was proposed and enacted before the Human Rights Act was in place, was reviewed by the Joint Committee on Human Rights while it was still going through Parliament, and was later declared incompatible with the European Convention on Human Rights. The Anti-Terrorism Act is therefore an excellent case study of how the three British branches of government work together or against each other to create and change laws.

#### 1. Government Structure

Although the United States' government structure partially comes from its historical ties to the United Kingdom, the two countries' current government structures are remarkably different. Instead of co-equal branches of government with a strong separation of powers and checks and balances, the British government branches are more integrated with no emphasis placed on having branches with equivalent powers or the

ability to “check” each other.<sup>97</sup> Instead, the British executive branch – the Prime Minister and his or her cabinet<sup>98</sup> – dominates Parliament by introducing the majority of Bills for consideration by the legislature and ensuring that its bills are passed through strong party control over the Commons. Unlike in the United States, British Members of the House of Commons almost invariably vote along party lines which means that the Prime Minister, who, by definition is the leader of the party with the majority of seats in the House of Commons, is virtually guaranteed that his or her legislation will pass.<sup>99</sup>

Moreover, domination of Parliament essentially means domination of the judiciary because the judiciary usually defers to Parliament under the doctrine of parliamentary sovereignty.<sup>100</sup> According to the doctrine of parliamentary sovereignty, Parliament in the United Kingdom is supreme and no other power can overrule it, including the judiciary.<sup>101</sup> Due to the importance of this doctrine, the British judiciary has traditionally deferred to Parliament when reviewing statutes.<sup>102</sup>

Since the enactment of the Human Rights Act 1998, the branches of government in Britain have become more co-equal. In order to help Parliament meet its obligations under the Human Rights Act, the Joint Committee on Human Rights was created. The Joint Committee on Human Rights has the power to question the executive on the terms of a bill and even propose amendments to that bill that Parliament can use in its debates.<sup>103</sup> Over time, this committee has become more powerful and

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97. MALCOLM WALLS, *BRITISH AND AMERICAN SYSTEMS OF GOVERNMENT* 78 (1988).

98. The Monarch is considered the symbolic head of the executive but he or she has no real power to block the actions of the Prime Minister. WALLS, *supra* note 97, at 78.

99. WALLS, *supra* note 97, at 78; R. M. PUNNETT, *BRITISH GOVERNMENT AND POLITICS* 189 (5th ed. 1987). The House of Lords does not have strong party affiliations but it cannot block legislation, it can only delay it. David Williams, *The Courts and Legislation: Anglo-American Contrasts*, 8 *IND. J. GLOBAL LEGAL STUD.* 323, 333 (2001).

100. PETER LEYLAND, *THE CONSTITUTION OF THE UNITED KINGDOM: A CONTEXTUAL ANALYSIS* 147 (2012).

101. See generally A.V. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* (1885). For an electronic version of this literature, visit [http://www.constitution.org/cmt/avd/law\\_con.htm](http://www.constitution.org/cmt/avd/law_con.htm).

102. See, e.g., *R v. A*, [2001] UKHL 25 [58] (Lord Hope) (“[I]t is appropriate in some circumstances for the judiciary to defer, on democratic grounds, to the considered opinion of the elected body as to where the balance is to be struck between the rights of the individual and the needs of society”).

103. Janet L. Hiebert, *Parliament and the Human Rights Act: Can the JCHR Help Facilitate a Culture of Rights?*, 4 *INT’L J. CONST. LAW* 1, 18-19 (2006).

its well-written reports have become a tool for members of Parliament during debates,<sup>104</sup> the judiciary<sup>105</sup> and human rights advocates in the United Kingdom.<sup>106</sup> These groups use the Joint Committee on Human Rights' reports to put pressure on the executive to change its policies and legislation.

In addition, the British judiciary has been less likely to defer to Parliament after the enactment of the Human Rights Act. The primary purpose of the Human Rights Act was to incorporate the rights contained in the European Convention on Human Rights into British law so that those rights may be enforceable by British courts. To fulfill this purpose, the Human Rights Act also gives new powers to the British judiciary so it may ensure that the rights of British citizens are protected. Under the Human Rights Act, the British judiciary can now creatively interpret statutes or issue a Declaration of Incompatibility if creatively interpreting a statute would mean effectively rewriting it.<sup>107</sup>

Section 3 of the Human Rights Act empowers British courts to interpret all legislation to be compatible with the European Convention on Human Rights insofar as it is "possible" to do so.<sup>108</sup> Interpretative techniques such as narrowing the applicability of the statute, "reading it down" so it applies more narrowly, or reading terms into a statute are now available to the judiciary even when the statute being interpreted is not ambiguous.<sup>109</sup> This means that British judges can even alter the statute's wording if doing so would make the statute compatible with the European Convention on Human Rights.<sup>110</sup>

104. Janet L. Hiebert, *Interpreting a Bill of Rights: The Importance of Legislative Rights Review*, 35 BRITISH J. POL. SCI. 235, 251 (2005).

105. See, e.g., *R. (Animal Defenders Int'l) v. Sec'y of State for Culture, Media & Sport*, [2008] UKHL 15 [14-21] (Lord Bingham) (agreeing with the Joint Committee on Human Rights that the Communications Act 2003's ban on all political advertising was incompatible with the European Convention on Human Rights).

106. See, e.g., LIBERTY, LIBERTY'S EVIDENCE TO THE JOINT COMMITTEE ON HUMAN RIGHTS' INQUIRY INTO THE GOVERNMENT'S JUSTICE AND SECURITY GREEN PAPER, Feb. 2012, available at <http://www.liberty-human-rights.org.uk/pdfs/policy12/liberty-s-evidence-to-the-jchr-inquiry-into-the-government-s-justice-and-sec.pdf> (last visited Apr. 24, 2014).

107. Human Rights Act, 1998, c. 42, §§ 3 & 4 (U.K.), available at <http://www.legislation.gov.uk/ukpga/1998/42/data.pdf>.

108. *Id.* § 3.

109. Alison L. Young, *Judicial Sovereignty and the Human Rights Act 1998*, 61 CAMBRIDGE L.J. 53, 62 (2002).

110. David Bonner, et al., *Judicial Approaches to the Human Rights Act*, 52 INT'L & COMP. L.Q. 549, 556 (2003). It arguably even requires judges to do so. Lord Lester of

Under § 4 of the Human Rights Act, higher British courts can issue a Declaration of Incompatibility if they cannot interpret a statute creatively.<sup>111</sup> This declaration has no legal effect – the litigant before the court has no immediate remedy – but a Declaration of Incompatibility does put political pressure on Parliament and the executive to remedy the incompatible legislation.<sup>112</sup> The executive has responded to every Declaration of Incompatibility issued by the British courts, although perhaps not as fully or quickly as some would like.<sup>113</sup> Laws that affect human rights can also bring the European Court of Human Rights into play, which, under the European Convention on Human Rights, has the power to rule that a British law is inconsistent with the European Convention on Human Rights.<sup>114</sup> Such an incompatibility requires the United Kingdom, under its treaty obligations, to amend the offending law.<sup>115</sup>

Despite these obstacles, due to its party control over Parliament and the judiciary's continued deference to Parliament, the British executive has less reason to compromise or anticipate resistance from either the legislature or judiciary than its American counterpart. This is particularly true for anti-terrorism legislation, for which the judiciary has historically deferred to the executive.<sup>116</sup>

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Herne Hill, *The Art of the Possible - Interpreting Statutes Under the Human Rights Act*, 1998 EUR. H.R. L. REV 665, 669.

111. Human Rights Act, 1998, c. 42, § 4 (U.K.).

112. Unfortunately, this does nothing to help the litigant, who is still bound by the incompatible statute. For this reason, two commentators have noted that it is actually better for the litigant if the court attempts to interpret the statute, which will have a positive effect on the litigant, than to issue a Declaration of Incompatibility. Ian Leigh & Laurence Lustgarten, *Making Rights Real: The Courts, Remedies, and the Human Rights Act*, 58 CAMBRIDGE L. J. 509, 538 (1999) (“Issuance of a [Declaration of Incompatibility] means that, in practical terms, the plaintiff has lost.”).

113. See, e.g., *Liberty and JUSTICE Submission to the United Nations Human Rights Committee: Response to the United Kingdom's Sixth Periodic Report Under the International Covenant on Civil and Political Rights* [27] (the executive “waited until shortly before the annual deadline for renewal to force alternative measures through without sufficient time for the matter to be debated by Parliament”), available at [http://www2.ohchr.org/english/bodies/hrc/docs/ngos/liberty\\_justice\\_UK93.pdf](http://www2.ohchr.org/english/bodies/hrc/docs/ngos/liberty_justice_UK93.pdf) (last accessed November 12, 2013).

114. Alyssa King, *A Supreme Court, Supreme Parliament, and Transnational National Rights*, 35 YALE J. INT'L L. 245, 246 (2010).

115. JOINT COMM. ON HUMAN RIGHTS, SIXTEENTH REPORT OF SESSION 2006-07: MONITORING THE GOVERNMENT'S RESPONSE TO COURT JUDGMENTS FINDING BREACHES OF HUMAN RIGHTS, HL 128, HC 728 at [46, 49] (U.K.).

116. Lord Phillips of Worth Matravers, *Impact of Terrorism on the Rule of Law*, 43

## 2. History of Terrorist Attacks and Legislation

In addition to government structure, the United Kingdom also differs from the United States because of its familiarity with terrorist attacks. The terrorist violence in Northern Ireland reached a peak in the 1960s and 1970s but even before then, the United Kingdom had dealt with terrorist attacks, guerrilla warfare, and insurgency in its colonies.<sup>117</sup> In 1922, the government of Northern Ireland authorized its police force to arrest without warrant and then indefinitely detain “any person whom he or she suspected of acting, or of having acted, or of being about to act, in a manner prejudicial to the preservation of the peace or maintenance of order.”<sup>118</sup> These powers were upheld by the United Kingdom’s highest court.<sup>119</sup> The violence of the Irish Republican Army (IRA), however, spurred the United Kingdom to re-introduce Internment (mass detentions in camps) in 1971 and withdraw Home Rule from Northern Ireland in 1972, which had allowed Northern Ireland to have an independent Parliament.<sup>120</sup>

The first comprehensive pieces of anti-terrorism legislation were the Northern Ireland (Emergency Provisions) Acts, which were passed as temporary measures from 1973 to 1978, against the backdrop of increased bombing in Northern Ireland by the IRA.<sup>121</sup> One of these laws, the Prevention of Terrorism (Temporary Provisions) Act in 1974, permitted detention of suspects for questioning for up to seven days without trial or any other outside assessment.<sup>122</sup> The Detention of

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INT’L LAW. 13, 13-14 (2009).

117. Leandro Martínez-Peñas & Manuela Fernández-Rodríguez, *Evolution of British Law on Terrorism: From Ulster to Global Terrorism (1970-2010)*, in POST 9/11 AND THE STATE OF PERMANENT LEGAL EMERGENCY 201, 202 (Ancieto Masferrer ed., 2012).

118. Brice Dickson, *The Detention of Suspected Terrorists in Northern Ireland and Great Britain*, 43 U. RICH. L. REV. 927, 931 (2009) (citing Civil Authorities (Special Powers) Acts (Northern Ireland), 1956 S.R. & O. No. 1956/191, 11(1) (N. Ir.)).

119. *Liversidge v. Anderson*, [1942] A.C. 206, 213.

120. Martínez-Peñas & Fernández-Rodríguez, *supra* note 117, at 203; Dickson, *supra* note 118, at 931.

121. Clive Walker, *Clamping Down on Terrorism in the United Kingdom*, 4 J. INT’L CRIM. JUST. 1137, 1137-38 (2006). Prior to these “troubles,” the United Kingdom was already familiar with terrorism in colonial conflicts in places like Palestine, Kenya, Malaysia, Cyprus and Aden. *Id.* at 1137.

122. Fionnuala Ní Aoláin, *The Fortification of an Emergency Regime*, 59 ALB. L. REV. 1353, 1361-62 (1996).

Terrorists (NI) Order 1972 allowed the Secretary of State for Northern Ireland to make an “interim custody order,” which permitted detention for twenty-eight days and, with the approval of an independent Commissioner, the prisoner could be subject to indefinite detention under a “detention order.”<sup>123</sup>

The British police practices under Internment led to several cases before the European Court of Human Rights.<sup>124</sup> Article 5 of the European Convention on Human Rights permits a deprivation of liberty, including detention, only under specific circumstances. Among those is detention as part of criminal proceedings or “with a view to deportation.”<sup>125</sup> Moreover, detention is lawful for immigration purposes as long as the deportation proceedings are diligently pursued and there are procedural safeguards in place to ensure that the decision to detain is not arbitrary.<sup>126</sup> Generally speaking, the European Court of Human Rights will not make an independent inquiry into whether the detention is justified.<sup>127</sup>

However, the interim custody orders were not justiciable under the European Convention on Human Rights because the United Kingdom had derogated from Article 5 of the European Convention on Human Rights due to its “public emergency.”<sup>128</sup> Under Article 15 of the European Convention on Human Rights, a state may derogate from certain Articles, including Article 5, if there is a “war or public emergency threatening the life of the nation” but the derogation may not go further than what is “strictly required by the exigencies of the situation” and the derogation may not be inconsistent with the state’s other international law obligations.<sup>129</sup>

According to the European Court of Human Rights, a state of public

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123. Dickson, *supra* note 118, at 932 (citing Detention of Terrorists Order (Northern Ireland), 1972, SI 1972/1632 (N. Ir. 15), art. 4.).

124. Diane Webber, *Preventative Detention in the Law of Armed Conflict: Throwing Away the Key?* 6 J. NAT’L SECURITY L. & POL’Y 167, 171 (2012).

125. Hakimi, *supra* note 6, at 618-20.

126. *Chahal v. United Kingdom*, 23 Eur. H.R. Rep. 413, 465-66 (1996).

127. Hakimi, *supra* note 6, at 619.

128. Dickson, *supra* note 118, at 933.

129. European Convention on Human Rights, Art. 15. Article 15 allows Member States to derogate or partially revoke another Article of the European Convention on Human Rights in times of emergency if the derogation is publicly announced and communicated to the Secretary-General of the Council of Europe. For a detailed analysis of the European Convention on Human Rights’ derogation requirements, see Hughes, *supra* note 6, at 4-6.

emergency refers to “an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed.”<sup>130</sup> Further, the emergency must be an actual emergency and not an emergency that is merely perceived by the state.<sup>131</sup> When determining whether a measure taken under Article 15 is “strictly required by the exigencies of the situation,” the European Court of Human Rights looks to whether the measure is proportionate.<sup>132</sup> The British Supreme Court<sup>133</sup> has analyzed proportionality with regard to Article 15 derogations using a three-part test: “whether: (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.”<sup>134</sup> The United Kingdom’s derogation was upheld during Internment.<sup>135</sup>

The United Kingdom’s first permanent anti-terrorism statute was the Terrorism Act 2000, which was meant to permanently set the United Kingdom’s antiterrorism laws.<sup>136</sup> A unique feature of the Terrorism Act 2000 was that it provided a new definition of terrorism that included violent or seriously disruptive acts designed to threaten or influence the government “for the purpose of advancing a political, religious, racial or ideological cause.”<sup>137</sup> Most controversially, this Act allowed police to search motor vehicles and people without being required to show reasonable suspicion.<sup>138</sup> The European Court of Human Rights later declared this provision incompatible with Article 8 (right to privacy) of

130. *Lawless v. Ireland* (No.3) 1 Eur. H.R. Rep. 15, 31 (1979-80).

131. Hughes, *supra* note 6, at 5.

132. *A v. Sec’y of State for Home Dep’t*, [2005] 2 A.C. 68, 102-103.

133. Until 2005, the highest court in the United Kingdom was called the House of Lords Appellate Division and it was housed in Parliament. After the passage of the Constitutional Reform Act, the British Supreme Court received its new name and, in 2010, its own building. The Constitutional Reform Act, 2005, c. 4 (U.K.). Members of the House of Lords in Parliament were also no longer allowed to serve as judges. *Id.* To avoid confusion, this Article will refer to the United Kingdom’s highest court as the British Supreme Court even for cases that were heard before 2005.

134. *Id.*

135. Hakimi, *supra* note 6, at 619.

136. Dana Keith, *In the Name of National Security or Insecurity?: The Potential Indefinite Detention of Noncitizen Certified Terrorists in the United States and United Kingdom in the Aftermath of September 11, 2011*, 16 FLA. J. INT’L L. 405, 431 (2004).

137. Terrorism Act, 2000, § 1 (U.K.).

138. *Id.* § 44.

the European Convention on Human Rights.<sup>139</sup> The Anti-Terrorism Act's detention provisions were largely the same as previous temporary provisions, including a forty-eight hour detention period for those suspected of preparing or inciting terrorist acts.<sup>140</sup> This Act was not in effect long due to the events of September 11, 2001, which caused the United Kingdom to engage in a massive overhaul of its antiterrorism legislation.

### 3. The Anti-Terrorism, Crime and Security Act

As with the PATRIOT Act, the Anti-terrorism Act was drafted in response to the attacks on the United States on September 11, 2001 and was processed as an emergency measure.<sup>141</sup> The Anti-terrorism Act contained several broad provisions that were meant to address terrorism, including the ability to seize assets, obtain confidential information from public bodies, and detain suspected terrorists.<sup>142</sup> It was introduced into Parliament on October 12, 2001 and was signed into law approximately two months later on December 14, 2001.<sup>143</sup> The Anti-terrorism Act went through Parliament rather quickly, but its passage was not smooth. As in the United States, Opposition and Labour members of the House of Commons criticized the bill's rushed timetable – three days to go through the Commons<sup>144</sup> – which, they argued, did not give them enough time for a proper debate.<sup>145</sup> Other critics of the Anti-terrorism bill argued that the executive used the threat of terror to pass intrusive legislation that had previously been rejected infringed on people's rights.<sup>146</sup>

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139. *Gillan v United Kingdom*, 50 Eur. H.R. Rep. 45, [87] (2010).

140. Terrorism Act, 2000, § 41 (U.K.).

141. The bill had sixteen hours allotted in the House of Commons and only nine days in the House of Lords. HOME OFFICE, ANTI-TERRORISM, CRIME AND SECURITY BILL – PASSAGE THROUGH PARLIAMENT, Feb. 24, 2002; Dirk Haubrich, *September 11, Anti-Terror Laws and Civil Liberties: Britain, France and Germany Compared*, 38 GOV'T & OPPOSITION 3, 8 (2003).

142. Anti-terrorism, Crime & Security Act, 2001, c. 24-35 (U.K.).

143. *Id.* c. 21-35. The assent came the day after the bill had passed through the legislative process.

144. Matthew Tempest, *Lords Battle Looms over Anti-terror Bill*, GUARDIAN (U.K.), Nov. 27, 2001, <http://www.theguardian.com/world/2001/nov/27/september11.usa3>.

145. Michael Kallenbach, *MPs in Revolt over Terrorism Bill*, DAILY TELEGRAPH (U.K.), Nov. 23, 2001, available at 2001 WLNR 2790360.

146. Benedict Brogan, *Anti-terror Reforms Too Intrusive, Say Ministers*, DAILY



#### 4. Amendments in Parliament

Several members of the Labour Party defied the party whips and voted against certain measures of the Anti-Terrorism Act such as “powers that prevent the Home Secretary’s decisions being challenged by judicial review.”<sup>147</sup> Opposition from the Commons caused the executive to add “sunset clauses” to the bill.<sup>148</sup> Despite numerous other objections, the bill passed through the Commons rather easily – only 23 members of the Labour party voted against it along with Conservatives and Liberal-democrats – but it met strong opposition in the House of Lords.<sup>149</sup> One of the primary issues the Lords had with the bill was the government’s ability to detain terror suspects without trial.<sup>150</sup> As expected, the House of Lords passed several amendments to the Anti-terrorism bill, particularly in the areas of obtaining bank records and detaining suspects without judicial review.<sup>151</sup>

Once back in the Commons, the executive again tried to rush the bill through – giving the Commons another three days to look over the amendments passed in the House of Lords.<sup>152</sup> The executive was particularly keen to have the Anti-terrorism Act passed by the time the Prime Minister, Tony Blair, attended an EU summit in Belgium.<sup>153</sup> To put pressure on Parliament, David Blunkett, the Home Secretary, warned that a terrorist attack could be imminent and criticized those delaying the Anti-terrorism bill, noting that they did not have the security and

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TELEGRAPH (U.K.), Nov. 24, 2001, available at 2001 WLNR 2752489.

147. Nigel Morris, *MPs Prepare for Final Attack on Terror Bill*, INDEPENDENT (U.K.), Nov. 26, 2001, available at 2001 WLNR 7357905.

148. Tempest, *supra* note 144. Sunset clauses are provisions in a statute or regulation that repeal all or portions of the law after a specific date, unless further legislative action is taken to extend them.

149. *Id.*

150. Marie Woolf and Ben Russell, *PARLIAMENT: LORDS - Peers Threaten to Block Emergency Anti-terror Laws*, INDEPENDENT (U.K.), Nov. 28, 2001, available at 2001 WLNR 7381724.

151. Ben Russell, *PARLIAMENT & POLITICS: ANTI-TERROR BILL - Tory and Lib Dem Peers Defeat Government over Police Powers*, INDEPENDENT (U.K.), Dec. 7, 2001, available at 2001 WLNR 7410302.

152. Julian Glover, *Lib Dems and Tories Ambush Government on Terror Bill*, GUARDIAN (U.K.), Dec. 5, 2001, <http://www.theguardian.com/politics/2001/dec/05/houseofcommons.uk>.

153. *Id.*

intelligence information he had.<sup>154</sup> Despite these warnings, the Lords continued to water down the Anti-terrorism bill.<sup>155</sup>

Back in the House of Commons, several of the Lords' amendments, including judicial review for interned foreign terror suspects, were quickly overturned.<sup>156</sup> Prime Minister Tony Blair's statements to the Commons that the measures were essential to fight terrorism, and Home Secretary David Blunkett's concessions (including increasing the powers of an immigration appeals commission), likely convinced Members of the Commons to reverse the Lords' changes.<sup>157</sup> The bill again went back to Lords who reinstated three of their former amendments.<sup>158</sup> Blunkett made further concessions to the Lords, including changing the way appeals of detained terrorist suspects are handled, and both Houses finally passed the bill.<sup>159</sup>

### 5. The Anti-terrorism Act and Indefinite Detention

Like the PATRIOT Act, the Anti-Terrorism Act gives the executive the power to hold non-citizens who are certified as "international terrorists" by the Secretary of State indefinitely without charge or trial.<sup>160</sup> This power is given when non-nationals who are certified as "international terrorists" are ordered to be removed from the United Kingdom but cannot be because of legal or practical considerations such as when the detainee would be subjected to torture in the only country to which he or she can be deported.<sup>161</sup> The European Court of Human

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154. Andrew Grice, *Blunkett Warns of Attack at Christmas*, INDEPENDENT (U.K.), Dec. 8, 2001, available at 2001 WLNR 7383323.

155. Michael Kallenbach, *Lords Savage Labour over 'Hurried' Laws Terrorism Bill*, DAILY TELEGRAPH (U.K.), Dec. 11, 2001, <http://www.telegraph.co.uk/news/uknews/1364947/Yesterday-in-Parliament.html>.

156. Paul Waugh, *PARLIAMENT & POLITICS: MPs Quash Series of Lords Changes to Terrorism Bill*, INDEPENDENT (U.K.), Dec. 13, 2001, available at 2001 WLNR 7192745.

157. *Id.*

158. Patrick Wintour, *Ministers Shocked as Terror Bill Suffers Further Defeats in Lords*, GUARDIAN (U.K.), Dec. 13, 2001, <http://www.theguardian.com/politics/2001/dec/14/uk.september11>.

159. John Deans, *Blunkett U-Turns on Terror*, DAILY MAIL (U.K.), Dec. 14, 2001, available at 2001 WLNR 2675966.

160. Anti-terrorism, Crime and Security Act, 2001, § 23(2) (U.K.).

161. JOINT COMM. ON HUMAN RIGHTS, SECOND REPORT OF SESSION 2001-02: ANTI-TERRORISM, CRIME AND SECURITY BILL, H.L. 37, H.C. 372 [19] (U.K.).

Rights has made it clear that such deportation would violate Article 3 of the European Convention on Human Rights.<sup>162</sup>

Under the seminal case *Soering v. United Kingdom*, the European Court of Human Rights prohibited the United Kingdom from deporting Soering to the United States because he faced the death penalty there.<sup>163</sup> Although the European Court of Human Rights held that the death penalty itself would not necessarily violate Article 3 (prohibition of torture or inhuman or degrading treatment or punishment), the circumstances of the capital punishment system in Virginia, where Soering would be sent, did implicate Article 3.<sup>164</sup> More specifically, the European Court of Human Rights held that the amount of time spent on death row and the risk of rape or physical abuse combined with Soering's young age and mental state when he committed the crime meant that his time on death row would be inhuman or degrading treatment.<sup>165</sup> Further, the European Court of Human Rights held that Member States could be in violation of Article 3 if they extradite anyone to a country "where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country."<sup>166</sup> Accordingly, *Soering* prohibited the United Kingdom from deporting anyone to a country where it is likely they would be tortured or suffer inhuman treatment.

The United Kingdom was therefore left with a quandary as to what to do with suspected terrorists who could be deported only to countries where they would be likely to be tortured. The Anti-terrorism, Crime and Security Act allowed the Home Secretary to detain these suspected terrorists essentially indefinitely pending deportation because such deportation would not be allowed under Article 3.<sup>167</sup> As noted above, this "solution" was one of many aspects of the Anti-terrorism Act that were criticized as it went through Parliament and after it was passed into law. Moreover, both Parliament (in the form of the Joint Committee on

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162. *Soering v. United Kingdom*, 11 Eur. H.R. Rep. 439 (1989). Article 3 states: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

163. *Id.*

164. *Id.* at [111].

165. *Id.* The fact that Soering could also be extradited to Germany, where he was from, and would not be subject to capital punishment, was also relevant to the court.

166. *Id.* at [91].

167. Anti-terrorism, Crime and Security Act, 2001 (U.K.).

Human Rights) and the courts (both British courts and the European Court of Human Rights) found the executive's "solution" to also violate the European Convention on Human Rights as it had during Internment.

#### 6. Joint Committee on Human Rights Concerns

As the Anti-terrorism bill went through Parliament, the Joint Committee on Human Rights warned that the speed with which the Anti-terrorism bill was traveling through Parliament was dangerous and would not allow Parliament to give such a complex bill proper scrutiny.<sup>168</sup> The Joint Committee also questioned whether the bill was justified by the current international situation and noted that the bill could "fall foul of the European Convention on Human rights."<sup>169</sup> Even before the Anti-Terrorism Act was introduced to Parliament, the Joint Committee on Human Rights voiced its concerns that the executive's powers amounted to indefinite detention rather than detention pending removal, which was a clear violation of Article 5 (right to liberty and security of person) of the European Convention on Human Rights, as announced in the European Court of Human Rights case *Chahal v United Kingdom*.<sup>170</sup> Although Article 5 would allow detention for immigration purposes under *Chahal*, it would only do so if the detention was obviously intended to be temporary until deportation.<sup>171</sup> The Anti-Terrorism Act contained no such contingency – it explicitly allowed indefinite detention if the suspected alien terrorist could not be deported.<sup>172</sup> Based on this impending violation, the executive was forced to derogate from Article 5 of the European Convention on Human Rights.<sup>173</sup>

The Joint Committee on Human Rights explained the executive's approach thusly:

[the executive cannot] derogate from Article 3 without

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168. Ben Russell, *Parliament & Politics: Human Rights - MPs Warn Against Rushing Through Anti-terror Bill*, INDEPENDENT (U.K.), Nov. 17, 2001, available at 2001 WLNR 7198482.

169. *Id.*

170. *Chahal v. United Kingdom*, 23 Eur. H.R. Rep. 413 (1996); JOINT COMM. ON HUMAN RIGHTS, *supra* note 161, at [23].

171. JOINT COMM. ON HUMAN RIGHTS, *supra* note 161, at [19].

172. Anti-terrorism, Crime and Security Act, 2001 (U.K.).

173. Human Rights Act, 1998 (Designated Derogation) Order, 2001, S.I. 2001 No. 3641 (U.K.), available at <http://www.refworld.org/pdfid/46e5564f2.pdf>.

‘denouncing’ the Convention as a whole and then re-entering with a reservation relating to Article 3. If it took this course, the Home Secretary [the British Secretary of State] would be able (under powers he already possesses) to deport foreign nationals without regard to their possible fate in the country to which they were returned. This the [executive] is not prepared to do. It has therefore adopted a different route, but one which still appears to necessitate derogation—but in this case the derogation is from Article 5, which is permissible under Article 15.<sup>174</sup>

The executive submitted the derogation order on the same day the Anti-Terrorism Act was introduced, which, according to the executive, allowed it to state that the Anti-Terrorism Act was compatible with the Human Rights Act.<sup>175</sup> According to the executive, the derogation was the result of a “public emergency” resulting from the terrorist attacks on the United States on September 11, 2001.<sup>176</sup>

In response to this derogation order, the Joint Committee on Human Rights’ main concern was that the executive’s ability to indefinitely detain persons with few legal safeguards or limitations on this power was not justified by the executive’s articulated “public emergency” – threats from Al Qaeda and other terrorist groups.<sup>177</sup> The Joint Committee on Human Rights’ concerns were partially due to the executive’s refusal to provide the Joint Committee on Human Rights with any information to support its “public emergency” stance. The Newton Committee, which was charged with reviewing the Anti-Terrorism Act by the Home Secretary, also advised revising the Anti-Terrorism Act so that derogation was not necessary.<sup>178</sup>

The executive responded to some of the concerns of the Joint

174. JOINT COMM. ON HUMAN RIGHTS, *supra* note 161, at [19].

175. JOINT COMM. ON HUMAN RIGHTS, FIFTH REPORT OF SESSION 2002-03: CONTINUANCE IN FORCE OF SECTIONS 21 TO 23 OF THE ANTI-TERRORISM, CRIME AND SECURITY ACT 2001, H.L. 59, H.C. 462, at App’x 2, Letter from David Blunkett to the Chairman of the Joint Committee on Human Rights (U.K.).

176. Human Rights Act 1998 (Designated Derogation) Order 2001, *supra* note 173.

177. JOINT COMM. ON HUMAN RIGHTS, *supra* note 161, at [30].

178. PRIVY COUNSELLOR REVIEW COMM., ANTI-TERRORISM, CRIME AND SECURITY ACT 2001 REVIEW: REPORT, Dec. 12, 2003 (last visited Oct. 20, 2013), *available at* <http://www.statewatch.org/news/2003/dec/atcsReport.pdf>.

Committee on Human Rights but not others.<sup>179</sup> The executive refused to amend the derogation order or change the provisions allowing for indefinite detention of non-nationals suspected of terrorism.<sup>180</sup> The changes it did make favored stronger parliamentary review through “sunset clauses” but did little to improve judicial review.<sup>181</sup> Accordingly, it appears that, due to the speed at which the Anti-Terrorism Act was pushed through Parliament, the scarcity of evidence that Parliament received, and the executive’s refusal to accept all of the Joint Committee on Human Rights’ recommendations, Parliament did not have much of an oversight role over the Anti-Terrorism Act before it became law.<sup>182</sup>

After the Anti-Terrorism Act was passed, commentators were highly critical of the Anti-Terrorism Act.<sup>183</sup> One of the first critics of the Anti-terrorism Act was Lord Woolf, the Lord Chief Justice of England and Wales.<sup>184</sup> He argued that the Anti-terrorism Act would damage the United Kingdom’s reputation abroad and promised that the judges that were to hear aliens’ detention challenges would release them if the detention was not “based on proper evidence.”<sup>185</sup> Days after the bill was passed, eight suspected terrorists were detained by immigration officers under the Home Secretary’s new powers.<sup>186</sup> The media also noted the potential human rights violations inherent in the Anti-Terrorism Act’s indefinite detention provisions and the plans of public interest groups to litigate against it.<sup>187</sup> The Joint Committee on Human Rights and the

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179. JOINT COMM. ON HUMAN RIGHTS, FIFTH REPORT OF SESSION 2001-02: ANTI-TERRORISM, CRIME AND SECURITY BILL: FURTHER REPORT, H.L. 51, H.C. 420, at [8, 19] (U.K.).

180. *Id.*

181. *Id.*

182. Stephen Tierney, *Determining the State of Exception: What Role for Parliament and the Courts?*, 68 MOD. L. REV. 668, 672 (2005). See also Janet L. Hiebert, *Parliamentary Review of Terrorism Measures*, 68 MOD. L. REV. 676, 676 (2005).

183. Mark Elliot, *United Kingdom: The “War on Terror,” U.K.-Style – The Detention and Deportation of Suspected Terrorists*, 8 INT’L J. CONST. L. 131, 133 (2010).

184. Joshua Rozenberg, *Woolf Attacks New Terror Law*, DAILY TELEGRAPH (U.K.), Dec. 17, 2001, available at 2001 WLNR 2793920.

185. *Id.*

186. Ian Burrell & Jason Bennetto, *Blunkett Provokes Anger by Using New Terror Laws to Arrest Eight Suspects*, INDEPENDENT (U.K.), Dec. 20, 2001, available at 2001 WLNR 7069488.

187. Don Mackay, *War on Terror: Fight for Peace: 8 Seized in “Terror” Swoop*, MIRROR (U.K.), Dec. 20, 2001, available at 2001 WLNR 9450421; Paul Waugh, *Campaign Against Terrorism: Terror Suspects to be Rounded Up Under New Law*, INDEPENDENT (U.K.), Dec. 15, 2001, available at 2001 WLNR 7361497; Burrell &

executive resumed discussions when the Anti-Terrorism Act was due for renewal, but no major changes were made to the legislation.<sup>188</sup> Talks between the Joint Committee on Human Rights and the executive resumed again when litigation commenced against the Anti-Terrorism Act. However, the executive refused to alter the legislation absent a judicial decision.<sup>189</sup>

#### 7. The British Supreme Court Justices Issue a Declaration of Incompatibility

In 2004, the British Supreme Court considered in *A and Others* whether the Anti-Terrorism Act was incompatible with the European Convention on Human Rights.<sup>190</sup> *A and Others* was brought by a group of foreign nationals who had been certified by the Secretary of State as suspected international terrorists under § 21 of the Anti-terrorism Act.<sup>191</sup> The appellants could not be deported under Article 3 of the European Convention on Human Rights and they were being held without charge or trial under the United Kingdom's derogation from Article 5.<sup>192</sup> The appellants argued that their detention violated Article 5 of the European Convention on Human Rights and was discriminatory against non-nationals in violation of Article 14 of the European Convention on Human Rights.<sup>193</sup>

The Law Lords (as they were then called) first decided that the executive had proved that a state of emergency existed and that it was acceptable for the executive to derogate from Article 5 of the European Convention on Human Rights. This decision was made with some "misgivings" or "hesitation" by some judges and was not unanimous.<sup>194</sup>

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Bennetto, *supra* note 186. *But see New Law Cannot Touch Briton Who Recruited for Taliban*, DAILY MAIL (U.K.), Dec. 18, 2001, available at 2001 WLNR 2676486 (lamenting that the Anti-Terrorism Act allows only foreign terrorism suspects to be "arrested without a trial.").

188. JOINT COMM. ON HUMAN RIGHTS, SIXTH REPORT OF SESSION 2003-04: ANTI-TERRORISM, CRIME AND SECURITY ACT 2001: STATUTORY REVIEW AND CONTINUANCE OF PART 4, HL 38, HC 381 (U.K.).

189. JOINT COMM. ON HUMAN RIGHTS, *supra* note 175, at [36].

190. *A v. Sec'y of State for Home Dep't*, [2004] UKHL 56.

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.* at [26] (Lord Bingham); [78] (Lord Nicholls); [97] (Lord Hoffman); [165] (Lord Rodger).

As to whether the Anti-Terrorism Act violated other Articles in the European Convention on Human Rights, such as Article 14's prohibition on discrimination, the executive argued that the judiciary should defer to Parliament because Parliament should be the branch that determines what response to terrorism is appropriate.<sup>195</sup>

Previously, the Law Lords might have accepted this argument and deferred to Parliament. Instead, this argument gave Lord Bingham great pause and caused him to draw on a diverse group of sources, including a United States Supreme Court decision, to examine the appropriate roles for courts and the legislature.<sup>196</sup> Lord Bingham ultimately decided that it was entirely appropriate for the Lords to review the compatibility of the Anti-Terrorism Act, and rejected the Attorney General's attempt to "stigmatise judicial decision-making as in some way undemocratic."<sup>197</sup> The judiciary, Lord Bingham, insisted, was acting within its democratic mandate from Parliament.<sup>198</sup>

The majority of Lords ultimately found that the Anti-Terrorism Act's response to the threat of terrorism (in particular the ability to indefinitely detain suspected non-nationals) was disproportionate and discriminatory,<sup>199</sup> and, therefore in violation of the European Convention on Human Rights.<sup>200</sup> In doing so, they were heavily influenced by the Newton Committee report and the comments of the European Commissioner for Human Rights in his Opinion 1/2002 (28 August 2002).<sup>201</sup> The Supreme Court justices also referred to the Joint Committee on Human Rights' reports throughout their discussion of the issues.<sup>202</sup> As a result of its findings, the Supreme Court issued a Declaration of Incompatibility,<sup>203</sup> which left the executive and Parliament to remedy the Anti-terrorism Act.

The executive responded to *A and Others* with outrage to the press,

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195. *Id.* at [37] (Lord Bingham).

196. *Id.* at [39] (Lord Bingham).

197. *Id.* at [42] (Lord Bingham).

198. *Id.* at [42] (Lord Bingham).

199. The Anti-Terrorism Act was found to be discriminatory because it made an impermissible distinction between nationals and non-nationals. Only non-nationals were subjected to indefinite detention. *A v. Sec'y of State for Home Dep't*, [2004] UKHL 56.

200. *Id.* at [43] (Lord Bingham); [84] (Lord Nicholls); [133, 138] (Lord Hope); [159] (Lord Scott); [189] (Lord Rodger); [231] (Baroness Hale).

201. *Id.* at [34], [43] (Lord Bingham).

202. *Id.* at [65] (Lord Bingham).

203. *Id.* at [73] (Lord Bingham).



calling the decision “simply wrong.”<sup>204</sup> Incoming Home Secretary Charles Clarke also promised that “the detainees will all remain in prison indefinitely regardless of the ruling.”<sup>205</sup> The press was surprisingly not antagonistic to *A and Others*, calling the Anti-Terrorism Act “draconian”<sup>206</sup> and “misconceived.”<sup>207</sup> Even some of the British tabloids, which are typically very conservative, presented both sides of the issue.<sup>208</sup> The substantial and mainly positive press that the Supreme Court justices’ ruling received, as well as the subsequent resignations of the appointed detainees’ barristers, was probably instrumental in the executive’s decision to change its antiterrorism legislation.<sup>209</sup>

### 8. The Prevention of the Terrorism Act

The executive had until March 2005 to decide whether to renew the indefinite detention provisions in the Anti-terrorism Act or attempt to revise the legislation in response to the Declaration of Incompatibility issued by Supreme Court in *A and Others* and it had until March 2006 before the Anti-terrorism Act’s “sunset clause” caused that provision to lapse completely.<sup>210</sup> Although the new Home Secretary, Charles Clarke,

204. Neil Mackay, *Home Secretary Charles Clarke is Already Embroiled in a Battle Between Law Lords and the Government. At Stake is British Democracy*, SUNDAY HERALD (U.K.), Dec. 19, 2004, at 13, available at 2004 WLNR 14422492.

205. *Id.*; Stephen Howard, *No Freedom For Detainees; Government Defies Law Lords’ Ruling*, DAILY POST (U.K.), Dec. 17, 2004.

206. Mackay, *supra* note 204. See also Martin Bright, *Is a Pair of Boots All that Stand Between 11 Untried Detainees and Their Liberty?*, OBSERVER (U.K.), Dec. 19, 2004, available at 2004 WLNR 23621486 (describing the Government’s flimsy evidence).

207. *Leading Article: The Law Lords Have Made an Admirable Defence of Our Fundamental Freedoms*, INDEPENDENT (U.K.), Dec. 17, 2004, available at 2004 WLNR 14254400; see also Bright, *supra* note 206.

208. Ben Taylor, *Crisis as Lords Say Anti-terror Laws are Illegal*, DAILY MAIL (U.K.), Dec. 17, 2004, available at 2004 WLNR 14286992. But see *The Government’s First Duty is to Keep Us Safe*, DAILY TELEGRAPH (U.K.), Dec. 17, 2004, <http://www.telegraph.co.uk/comment/telegraph-view/3613615/The-Governments-first-duty-is-to-keep-us-safe.html> (blaming the problem on the European Convention on Human Rights and the “Europeanisation” of the British legal system).

209. Clare Dyer, *Government Prepares to Unveil Changes to Anti terror Laws*, GUARDIAN (U.K.), Jan. 17, 2005; Jason Bennetto & Ben Russell, *Reform of Terror Laws on Labour Agenda*, INDEPENDENT (U.K.), Dec. 21, 2004, available at 2004 WLNR 14473597.

210. Patrick Wintour & Alan Travis, *Blair Faces Dilemma on Law and Order*, GUARDIAN (U.K.), Dec. 17, 2004, available at 2004 WLNR 23592011.

originally stated that he would attempt to renew the provisions of the Anti-terrorism Act,<sup>211</sup> the executive instead introduced the Prevention of Terrorism Bill in the House of Commons on February 22, 2005.

Instead of indefinite detention, the Prevention of Terrorism Bill gave the Secretary of State power to place an individual under house arrest or place such other restrictions on his or her movements.<sup>212</sup> These restrictions included prohibiting telephone usage and limiting how long the person could be outside of his or her dwelling.<sup>213</sup> The executive called these powers “derogating control orders.”<sup>214</sup> In order to obtain a control order, the Secretary of State was required to apply to the High Court of England and Wales and show that he or she had reasonable grounds for suspecting the controlee is or has been involved in terrorism-related activity, and that the control order was necessary to protect the public from a risk of terrorism.<sup>215</sup>

The court was required to permit the control order unless the Secretary of State’s decision is “obviously flawed” and it can do so in the absence of the controlee.<sup>216</sup> Once the control order was issued, the controlee was entitled to a hearing but the controlee and his or her attorney could be excluded from the hearing to ensure that no information was revealed to the controlee that is contrary to the public interest as long as the controlee’s special advocate was provided that information.<sup>217</sup> If the court found that the Secretary of State’s control order was not “flawed,” the control order would remain in place.<sup>218</sup>

## 9. Parliament’s Response

The Prevention of Terrorism Bill went through Parliament in a little over two weeks so it would be in place before the (human rights incompatible) detention regime of the Anti-Terrorism Act expired. The Prevention of Terrorism Bill was debated in the Commons the day after

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211. *Id.*

212. Prevention of Terrorism Act, 2005, § 1 (U.K.).

213. *Id.*; Clive Walker, *Keeping Control of Terrorists Without Losing Control of Constitutionalism*, 59 STAN. L. REV. 1395, 1412 (2007).

214. John Ip, *Comparative Perspectives on the Detention of Terrorist Suspects*, 16 TRANSNAT’L L. & CONTEMP. PROBS. 773, 799 (2007).

215. Prevention of Terrorism Act, 2005, §§ 2(1), 3(1)(a), 15(1)(c) (U.K.).

216. *Id.* §§ 3(2)(b), 3(5).

217. United Kingdom Civil Procedure Rules 76.22(1), 76.23, 76.28(1).

218. Prevention of Terrorism Act, 2005, § 3(13) (U.K.).

it was introduced and the Joint Committee on Human Rights' report came three days after its introduction to the Commons, in time for the Commons' standing committee to debate it.<sup>219</sup> The Joint Committee on Human Rights welcomed the executive's acceptance of the Law Lords' ruling in *A and Others*, its decision to no longer derogate from Article 5 of the European Convention on Human Rights, and its decision to move away from indefinite detention to more flexible control orders.<sup>220</sup> However, it also questioned the necessity of control orders and the lack of judicial involvement before those orders were issued.<sup>221</sup> The Commons debates likewise focused on judicial involvement in the issuance and review of control orders.<sup>222</sup> Despite these debates and the Joint Committee on Human Rights' concerns, the Prevention of Terrorism Bill quickly passed through the Commons and went to the Lords unamended.

The executive tabled amendments to the Prevention of Terrorism Bill while it was being considered by the Lords and the Joint Committee on Human Rights published a report on those amendments two days later.<sup>223</sup> As with the Anti-Terrorism Act, the amendments partially addressed some of the Joint Committee on Human Rights' concerns. Specifically, the executive allowed increased (but still limited) judicial review of control orders.<sup>224</sup> Although the speed of the Prevention of Terrorism Bill's passage made it impossible for the Joint Committee on Human Rights to fully scrutinize these amendments, the Joint Committee on Human Rights still found fault with the amended bill and urged the executive to allow for greater judicial supervision.<sup>225</sup> These pleas went unheard and the Prevention of Terrorism Bill was not amended again. The executive refused to change its current approach absent a ruling

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219. JOINT COMM. ON HUMAN RIGHTS, NINTH REPORT OF SESSION 2004-05: PREVENTION OF TERRORISM BILL: PRELIMINARY REPORT, H.L. 61, H.C. 389 (U.K.).

220. *Id.* at [3].

221. *Id.* at [5-13].

222. *See, e.g.*, 431 PARL. DEB., H.C. (6th ser.)10 1762 (U.K.) (Mr. Clarke).

223. JOINT COMM. ON HUMAN RIGHTS, TENTH REPORT OF SESSION 2004-05: PREVENTION OF TERRORISM BILL, H.L. 68, H.C. 334 (U.K.).

224. *Id.*

225. JOINT COMM. ON HUMAN RIGHTS, FOURTEENTH REPORT OF SESSION 2006-07: GOVERNMENT RESPONSE TO THE COMMITTEE'S EIGHTH REPORT OF THIS SESSION: COUNTER-TERRORISM POLICY AND HUMAN RIGHTS: DRAFT PREVENTION OF TERRORISM ACT 2005 (CONTINUANCE IN FORCE OF SECTIONS 1 TO 9 ORDER 2007), HL 106, HC 539 (U.K.).

from the Supreme Court.<sup>226</sup> The Prevention of Terrorism Bill became law on March 11, 2005.

Despite the Joint Committee on Human Rights' continuing concerns about existing control orders, when the control order provisions of the Prevention of Terrorism Act came up for renewal in February 2006, the executive decided to renew them without amendment.<sup>227</sup> The executive stated that it intended to review the orders again a year later, after the executive had received a report by Lord Carlisle, who had been appointed by the Home Secretary to review the Prevention of Terrorism Act.<sup>228</sup> The executive also wanted to wait until after the resolution of existing cases against the Prevention of Terrorism Act.<sup>229</sup>

#### 10. The British Supreme Court's Rulings

As noted by the Joint Committee on Human Rights, the Prevention of Terrorism Act's control orders raised the same Article 5 concerns as indefinite detention.<sup>230</sup> Litigation soon followed its enactment and the executive took notice of lower court activity that resulted from the Prevention of Terrorism Act. For example, the executive lowered the maximum number of curfew hours in some cases after the Court of Appeal held that some of the control orders' curfew requirements were so restrictive that they amounted to a violation of liberty under Article 5.<sup>231</sup> However, no major actions were to be taken until the Supreme Court had ruled on the issue. The executive noted in its July 2007 Consultation Paper that it did not want to pre-empt any forthcoming Supreme Court judgments and would consider "whether any further changes to the control order system are necessary in light of" these

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226. *Id.*

227. JOINT COMM. ON HUMAN RIGHTS, TWELFTH REPORT OF SESSION 2005-06: COUNTER-TERRORISM POLICY AND HUMAN RIGHTS: DRAFT PREVENTION OF TERRORISM ACT 2005 (CONTINUANCE IN FORCE OF SECTIONS 1 TO 9) ORDER 2006, H.L. 122, H.C. 915 (U.K.).

228. *Id.*

229. *Id.*

230. *Id.*

231. JOINT COMM. ON HUMAN RIGHTS, TENTH REPORT OF SESSION 2007-08: COUNTER-TERRORISM POLICY AND HUMAN RIGHTS (NINTH REPORT): ANNUAL RENEWAL OF CONTROL ORDERS LEGISLATION 2008, H.L. 57, H.C. 356, Letter from Home Secretary dated Feb. 18, 2008, at App'x 2 (U.K.).

judgments.<sup>232</sup>

Subsequently, on October 31, 2007, the Supreme Court gave judgments in three cases concerning significant aspects of the control orders regime, upon which the Joint Committee on Human Rights had previously reported. The case of *JJ* concerned the point at which the obligations in a control order become so restrictive that they amount to a deprivation of liberty; *MB* concerned whether the procedures in control order cases were compatible with the right of the controlled person to due process; and *E* concerned the extent of the executive's duties under the Prevention of Terrorism Act to keep the possibility of criminal prosecution under review.<sup>233</sup>

In *JJ*, the Supreme Court ruled by a majority of three to two that the six control orders at issue, which had curfews of 18 hours per day, deprived the plaintiffs of their liberty, and therefore breached Article 5 of the European Convention on Human Rights.<sup>234</sup> The control orders were therefore quashed. However, due to the nature of British judicial decisions – each judge writes a separate opinion even if they agree with each other – the majority of judges had different views on why the control orders were incompatible with the European Convention on Human Rights.

Speaking as part of the majority, Lord Bingham believed that, although not technically prison:

[t]he effect of the 18-hour curfew, coupled with the effective exclusion of social visitors, meant that the controlled persons were in practice in solitary confinement for this lengthy period every day for an indefinite duration, with very little opportunity for contact with the outside world, with means insufficient to permit provision of significant facilities for self-entertainment and with knowledge that their flats were

232. HOME OFFICE, POSSIBLE MEASURES FOR INCLUSION IN A COUNTER TERRORISM BILL, July 25, 2007, at [58], <http://www.statewatch.org/news/2007/jul/uk-ct-bill-consultation.pdf>.

233. Sec'y of State for Home Dep't v. *JJ*, [2007] UKHL 45; Sec'y of State for Home Dep't v. *MB*, [2007] UKHL 46; Sec'y of State for Home Dep't v. *E*, [2007] UKHL 47.

234. Sec'y of State for Home Dep't v. *JJ*, [2007] UKHL 45, [24] (Lord Bingham), [63] (Baroness Hale) and [105] (Lord Brown).

liable to be entered and searched at any time.<sup>235</sup>

Lord Bingham compared this isolation and the fact that the Home Secretary “wholly regulated” their lives, made their living conditions similar to that of prisoners, except breaches of control orders were subject to more severe punishment than infractions made by traditional prisoners.<sup>236</sup> Baroness Hale agreed that the control orders amounted to a deprivation of liberty and refused to speculate as to what length of curfew would not mean a deprivation of liberty.<sup>237</sup>

The final member of the majority, Lord Brown, stated that the existing control orders violated Article 5 but he also indicated that control orders that had curfews of up to sixteen hours per day would not, in his opinion, amount to a deprivation of liberty.<sup>238</sup> The other two judges, Lords Hoffman and Carswell, believed that the control orders did not amount to a deprivation of liberty.<sup>239</sup> Lord Brown’s statement led the executive to construe *JJ and Others* as holding that curfews of up to 16 hours did not violate the European Convention on Human Rights. The Secretary of State consequently raised curfews in four cases to 16 hours.<sup>240</sup>

Unsurprisingly, the Joint Committee on Human Rights disapproved of the Home Secretary’s reading of *JJ* and made several recommendations to amend the Prevention of Terrorism Act in light of that judgment.<sup>241</sup> Specifically, the Joint Committee on Human Rights recommended a twelve hour limit on curfew hours and noted that, depending on the other restrictions placed on an individual, in some instances, curfews of twelve hours could still be found to violate the right to liberty.<sup>242</sup> The Joint Committee on Human Rights warned that the European Court of Human Rights would surely rule on the issue in time and called for Parliament to give better guidance as to what it considered to be the appropriate limits on control orders so that individuals’ liberty

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235. *Id.* at [24] (Lord Bingham).

236. *Id.*

237. *Id.* at [63] (Baroness Hale).

238. *Id.* at [105] and [108].

239. *Id.* at [54, 84].

240. JOINT COMM. ON HUMAN RIGHTS, NINTH REPORT OF SESSION 2007-08: COUNTER-TERRORISM POLICY AND HUMAN RIGHTS (EIGHTH REPORT): COUNTER-TERRORISM BILL, HL 50, HC 199, at [55-73] (U.K.).

241. *Id.*

242. *Id.*

would be respected.<sup>243</sup>

In the second case considered by the Supreme Court, *MB*, the Secretary of State applied to the court for permission to make a non-derogating control order to prevent MB, a British citizen, from travelling to Iraq to fight against the United Kingdom.<sup>244</sup> The application was made without notice to MB and was supported by an open and a closed statement; MB never received notice of the application and, after it was granted, was never told what the closed statement said about him.<sup>245</sup> MB argued that he was not given a fair hearing as required by Article 6 of the European Convention on Human Rights.<sup>246</sup> The second plaintiff, AF, was also placed under a non-derogating control order, which restricted his visitors and even which mosque he could attend, and he was not given the closed material that formed the basis of his control order.<sup>247</sup> AF argued that his rights under Article 5 (deprivation of liberty) and Article 6 (right to a fair trial) had been violated.<sup>248</sup>

The Supreme Court held by a majority of four to one that the procedures contained in the Prevention of Terrorism Act (and the Rules of Court made under it) would not be compatible with Article 6's right to a fair hearing to the extent that they could lead to the upholding of a control order where the state never disclosed the essence of the case against the controlled person.<sup>249</sup> The Supreme Court refused to issue a Declaration of Incompatibility as it did when reviewing the Anti-Terrorism Act, but it did use Section 3 of the Human Rights Act to read additional words into the legislation guaranteeing the right of the controlled person to a fair hearing.<sup>250</sup>

This judgment was subsequently interpreted by Lord Carlile as rejecting the compatibility challenge. Lord Carlile also stated that the state of the law post-*MB* was uncertain and asserted that that uncertainty would "ensure the most careful consideration" of each case by the executive.<sup>251</sup> The Joint Committee on Human Rights was not satisfied

243. *Id.*

244. Sec'y of State for Home Dep't v. MB, [2007] UKHL 46.

245. *Id.*

246. *Id.*

247. *Id.*

248. *Id.*

249. *Id.*

250. *Id.*

251. Lord Carlile of Berriew Q.C., Third Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005 [61], Feb. 18, 2008

with this assurance and advocated the adoption of its prior recommendations for improving the fairness of the special advocate regime such as allowing the controlled person greater access to the information being used as the basis of the control order and greater access to the special advocate that was to serve as his or her attorney.<sup>252</sup> The executive responded that the additional language inserted into the Prevention of Terrorism Act by the Supreme Court effectively ensured that the Act complied with the European Convention on Human Rights.<sup>253</sup>

In *E*, the final Prevention of Terrorism Act case considered by the Supreme Court, the Supreme Court held that it was the Secretary of State's duty to continue to review the possibility of prosecuting controlled persons so that individuals would not remain under control orders indefinitely.<sup>254</sup> *E* was subjected to a non-derogating control order and in 2005, the Secretary of State learned of two criminal judgments in Belgium implicating *E* in terrorist activities.<sup>255</sup> However, the Secretary of State did not disclose this information to *E* or to the chief officer of the relevant police force.<sup>256</sup> Instead, the Secretary of State continued to renew the control order, despite the police chief informing the Secretary of State under the requirements of the Prevention of Terrorism Act that the police chief did not believe there was sufficient evidence to continue to keep *E* under a control order. *E* sued under Article 5 for deprivation of liberty.<sup>257</sup>

According to the Supreme Court, "prosecution should be the preferred course" and would be better for both society and the accused individual.<sup>258</sup> In his report, Lord Carlile welcomed the idea of increased prosecutions.<sup>259</sup> In response to these comments, the Joint Committee on Human Rights noted that "no individual who has been made the subject

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(U.K.).

252. JOINT COMM. ON HUMAN RIGHTS, *supra* note 240, at 55-73.

253. JOINT COMM. ON HUMAN RIGHTS, TWENTIETH REPORT OF SESSION 2007-08: COUNTER-TERRORISM POLICY AND HUMAN RIGHTS (TENTH REPORT): COUNTER-TERRORISM BILL, H.L. 108, H.C. 554, at 91 (U.K.).

254. Sec'y of State for Home Dep't v. *E*, [2007] UKHL 47, [26] (appeal taken from Eng.).

255. *Id.* at 6.

256. *Id.*

257. *Id.*

258. *Id.*

259. Lord Carlile of Berriew Q.C., *supra* note 251, at 4, 74.



of a control order has subsequently been prosecuted for a terrorism offense, other than for breach of a control order” and recommended that an amendment imposing an express duty on the Secretary of State to review individuals under control orders every three months.<sup>260</sup> The executive did not take that advice and instead construed *E* as clarifying the Secretary of State’s duties and stated that it believed that it need not make any legislative amendment in response.<sup>261</sup>

### 11. The Counter Terrorism Act

After these Supreme Court judgments, the executive published the Counter-Terrorism Bill on January 24, 2008. The Counter-Terrorism Bill, although containing numerous amendments, did not address any of the Supreme Court decisions and gave even more expansive powers to the executive. Most controversially, the executive wanted to raise the amount of time a person could be held in custody without being charged with a crime from twenty-eight days to forty-two days.<sup>262</sup> In response to the Counter-Terrorism Bill, the Joint Committee on Human Rights issued numerous reports recommending amendments to fully address the Supreme Court’s decisions and better protect human rights.<sup>263</sup> The Joint Committee on Human Rights seemed surprised that the executive had not already addressed its concerns, especially since the Supreme Court had expressed similar concerns and had even quashed some control orders in *JJ* and used § 3 of the Human Rights Act to read words into the Prevention of Terrorism Act in *MB*.<sup>264</sup>

Lord Carlile published his third annual review of the control orders on February 18, 2008, three days before the renewal order was due to be debated in the House of Commons.<sup>265</sup> His conclusions were the same as

260. JOINT COMM. ON HUMAN RIGHTS, *supra* note 231, at 65, 72.

261. JOINT COMM. ON HUMAN RIGHTS, *supra* note 253, at 72.

262. JOINT COMM. ON HUMAN RIGHTS, TWENTY-FIRST REPORT OF SESSION 2007-08: COUNTER-TERRORISM POLICY AND HUMAN RIGHTS (ELEVENTH REPORT): 42 DAYS AND PUBLIC EMERGENCIES, H.L. 116, H.C. 635 (U.K.).

263. JOINT COMM. ON HUMAN RIGHTS, *supra* note 253; JOINT COMM. ON HUMAN RIGHTS, *supra* note 240, at 40; JOINT COMM. ON HUMAN RIGHTS, *supra* note 231, at 5-14; JOINT COMM. ON HUMAN RIGHTS, TWENTY-FIFTH REPORT OF SESSION 2007-08: COUNTER-TERRORISM POLICY AND HUMAN RIGHTS (TWELFTH REPORT): ANNUAL RENEWAL OF 28 DAYS 2008, H.L. 132, H.C. 825, at 12-17, 21-62 (U.K.).

264. JOINT COMM. ON HUMAN RIGHTS, *supra* note 231, at [37, 53].

265. Lord Carlile of Berriew Q.C., *supra* note 251, at [76].

those in his second review.<sup>266</sup> Namely, that “as a last resort (only), the control order system as operated currently in its non-derogating form is a justifiable and proportional safety valve for the proper protection of civil society.”<sup>267</sup> The executive used this report to urge Parliament to renew the legislation and praised the Prevention of Terrorism Act as “striking the right balance between safeguarding society and safeguarding the rights of the individual.”<sup>268</sup> The executive also stated that the Supreme Court’s “judgments on control orders upheld the control orders regime. As such, Parliament should recognize the importance of control orders and support the legislation’s renewal for a further year.”<sup>269</sup>

The Joint Committee on Human Rights argued, however, that Carlile’s third report did differ from the previous reports in that, in the third report, Lord Carlile believed that control orders should not last more than two years except in very exceptional circumstances.<sup>270</sup> The executive made no mention of this finding in its press release.<sup>271</sup> The executive refused to accept any of the Joint Committee on Human Rights’ amendments at first and, despite public pressure and defection amongst Labor members of the House of Commons regarding the forty-two days detention power, the Counter-Terrorism Bill passed the Commons and went to the Lords. In the Lords, it was subject to substantial debate and criticism with the result that the Lords voted overwhelmingly (309 votes to 118) to amend the bill to remove the forty-two days provision.<sup>272</sup> In response, the executive decided to drop the forty-two days power, which was the primary point of contention.<sup>273</sup> The remaining provisions remained but the executive agreed to look at a few of the issues the Joint Committee on Human Rights had raised, including those relating to control orders.<sup>274</sup> The Counter-Terrorism Act was signed into law on November 26, 2008.

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266. *Id.*

267. *Id.*

268. HOME OFFICE, LORD CARLILE REPORT: CONTROL ORDERS ARE “JUSTIFIABLE AND PROPORTIONAL”, Feb. 18, 2008 (U.K.).

269. *Id.*

270. Lord Carlile of Berriew Q.C., *supra* note 251, at [50-51].

271. HOME OFFICE, *supra* note 268.

272. 704 PARL. DEB., H.L. (5th ser.) (2007-08) 542-43 (U.K.).

273. Sam Coates, *House of Lords Deals Fatal Blow to 42-day Terror Detention Plans*, TIMES (U.K.), Oct. 14, 2008.

274. JOINT COMM. ON HUMAN RIGHTS, SECOND REPORT OF SESSION 2008-09: THE WORK OF THE COMMITTEE IN 2007-08, H.L. 10, H.C. 92, at App’x Annex 3 (U.K.).

## 12. Post Counter-Terrorism Act - Renewal of Control Orders and a New Government

Since the Counter-Terrorism Act was passed, existing control orders have had to be renewed several times, which has caused the Joint Committee on Human Rights to repeatedly report on the human rights implications of the control orders.<sup>275</sup> In these reports, the Joint Committee on Human Rights has asked for further changes to be made such as requiring greater parliamentary oversight of control orders and requiring the Secretary of State to report more substantially on existing control orders.<sup>276</sup>

One source of authority the Joint Committee on Human Rights has repeatedly cited is the European Court of Human Rights, which held that the indefinite detention permitted under the Anti-Terrorism Act violated Article 5.<sup>277</sup> In addition to Joint Committee on Human Rights reports on the Anti-Terrorism Act, the European Court of Human Rights also deferred to the Supreme Court's decision that measures taken under the Anti-Terrorism Act were not necessary to combat the United Kingdom's terrorism "emergency" and held that the derogation from Article 5 was disproportionate.<sup>278</sup> The European Court of Human Rights agreed with the Joint Committee on Human Rights that the Anti-Terrorism Act was incompatible with the European Convention on Human Rights because detainees were not given the evidence that was being used to detain them.<sup>279</sup>

Despite these criticisms, the United Kingdom's anti-terrorism

275. JOINT COMM. ON HUMAN RIGHTS, *supra* note 227, at [37, 53]; JOINT COMM. ON HUMAN RIGHTS, EIGHTH REPORT OF SESSION 2006-07: COUNTER-TERRORISM POLICY AND HUMAN RIGHTS: DRAFT PREVENTION OF TERRORISM ACT 2005 (CONTINUANCE IN FORCE OF SECTIONS 1 TO 9) ORDER 2007, H.L. 60, H.C. 365 at 63 (U.K.).

276. JOINT COMM. ON HUMAN RIGHTS, *supra* note 227, at [37, 53]; *see also* A v. United Kingdom, 49 Eur. H.R. Rep. 29, [171] (2009).

277. JOINT COMM. ON HUMAN RIGHTS, *supra* note 227, at [37, 53].

278. *Id.* at 190. One scholar has called the European Court of Human Rights' reliance on the British Supreme Court "parasitic." Elliot, *supra* note 183, at 136.

279. JOINT COMM. ON HUMAN RIGHTS, NINTH REPORT OF SESSION 2009-10: COUNTER-TERRORISM POLICY AND HUMAN RIGHTS (SIXTEENTH REPORT): ANNUAL RENEWAL OF CONTROL ORDERS LEGISLATION 2010, H.L. 64, H.C. 395 (U.K.); A v. United Kingdom, 49 Eur. H.R. Rep. 29 [223-24] (2009). Because it can take the European Court of Human Rights up to five years to hear a case, the European Court of Human Rights did not review the Anti-Terrorism Act until 2009.

legislation did not substantially change until the political composition of the legislature and executive changed. When the Liberal-Democrats and the Conservatives formed a Coalition Government in 2010, they put forth a “Programme for Government” that promised to “introduce safeguards against the misuse of anti-terrorism legislation.”<sup>280</sup> As a result of that promise, the Coalition Government published a Review of Counter-Terrorism and Security Powers on January 26, 2011. That report concluded that the Prevention of Terrorism Act should be repealed, and control orders should be replaced by increased surveillance of terrorism suspects and a less intrusive and more focused system: Terrorism Prevention and Investigation Measures (“TPIMs”).<sup>281</sup>

TPIMs require suspected terrorists to sleep at night in an agreed upon location but allow them to move freely during the day and use the internet and cellular phones.<sup>282</sup> In sharp contrast to the Labour Government’s efforts, the Coalition Government also reduced the amount of days of pre-charge detention from twenty-eight to fourteen.<sup>283</sup> When making those changes, the executive clearly took the European Court of Human Rights’ holding in *A v. United Kingdom* into account. The Coalition Government’s report is rife with references to the European Court of Human Rights and concerns that existing anti-terrorism legislation violated the European Convention on Human Rights, which shows the continuing influence of the European Court of Human Rights.<sup>284</sup> The Joint Committee on Human Rights welcomed these changes and urged the executive to suspend control orders until TPIMs were in place, which the executive refused to do.<sup>285</sup> It is unclear what form the United Kingdom’s anti-terrorism legislation will take next.

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280. CABINET OFFICE, THE COALITION: OUR PROGRAMME FOR GOVERNMENT 11 (2010) (U.K.).

281. HOME OFFICE, REVIEW OF COUNTER-TERRORISM AND SECURITY POWERS: REVIEW FINDINGS AND RECOMMENDATIONS, Cm 8004 at 7 (2011) (U.K.).

282. Duncan Gardham, *Terrorist Suspects Allowed to Move Freely*, DAILY TELEGRAPH (U.K.), Jan. 27, 2011, available at 2011 WLNR 1633285.

283. HOME OFFICE, *supra* note 281, at 6.

284. *Id.* at 10, 11, 17, 20, 31, 35, 41, 43, 45.

285. JOINT COMM. ON HUMAN RIGHTS, EIGHTH REPORT OF SESSION 2010-11: RENEWAL OF CONTROL ORDERS LEGISLATION 2011, H.L. 106, H.C. 838 (U.K.). The Government may have been bolstered by Lord Carlile’s Sixth Report, which found that, despite political controversy, control orders were working “reasonably well.” Lord Carlile of Berriew QC, *Sixth Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005*, at 1 (2011) (U.K.).

13. Government branches' Influence on United Kingdom's Anti-terrorism Legislation

The United Kingdom's anti-terrorism legislation has changed significantly and repeatedly since September 11, 2001 due to the concerns of the various branches for human rights and the conflicts between the branches that resulted from these concerns. Unlike courts in the United States, British courts had never ruled on indefinite detention until the Anti-Terrorism Act because they were barred from hearing human rights cases until the Human Rights Act was passed. Due to the powers given to the judiciary and legislature by the Human Rights Act, the Joint Committee on Human Rights and the Supreme Court (with support from the European Court of Human Rights) forced the executive to change the United Kingdom's antiterrorism legislation. All three actors had an impact but their combination was crucial for legislative change.

14. Influence of the Judiciary

The United Kingdom's anti-terrorism legislation saga shows that the influence of the British judiciary and the European Court of Human Rights is very strong. The executive was apparently aware of the judiciary's ability to interfere with the Anti-Terrorism Act while it was drafting the Anti-Terrorism Act because it anticipated that judges (domestic or European) could use Article 5 to invalidate the Anti-Terrorism Act's provision for indefinite detention of non-citizens who were suspected terrorists. In fact, the Derogation Order has been seen by some commentators as the executive's attempt to wrest power away from the judiciary both in the United Kingdom and the European Court of Human Rights.<sup>286</sup> By derogating from Article 5, the executive restricted available rights under the Anti-Terrorism Act and effectively eliminated the European Court of Human Rights' ability to determine whether those rights had been breached. The executive said that it intended to

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286. Danny Nicol, *The Human Rights Act and the Politicians*, 24 *LEGAL STUD.* 451, 463 (2004).

essentially remove the European Court of Human Rights from the equation and that it could decide for itself what the risk was and what measures were necessary when it introduced the bill.<sup>287</sup> Once it had derogated, the executive could evade the courts' view of what Article 5 required by relying on courts' willingness to defer to the executive's belief that enough of an emergency existed for it to derogate.<sup>288</sup>

The Supreme Court's Declaration of Incompatibility against the Anti-Terrorism Act clearly had a strong impact on the executive. In response, the executive created the Prevention of Terrorism Act, which essentially replaced the indefinite detention in Part IV of Anti-Terrorism Act with control orders. The new legislation was put in place very quickly – approximately three months after the Supreme Court's decision in *A and Others*. Further, the Home Secretary explicitly stated that the purpose of the Prevention of Terrorism Bill was to ensure that the law was made compliant with *A and Others*.<sup>289</sup> The executive also indicated that, after *A and Others*, it had behind-the-scenes discussions with the Supreme Court to make sure that the Prevention of Terrorism Act was compatible with the Human Rights Act.<sup>290</sup>

It is possible that the executive was willing to accept the Declaration of Incompatibility in *A and Others* so readily, effectively treating it like a statutory strike-down, because it was afraid of a similar ruling with regard to the renewal orders, which were secondary legislation and therefore could actually be struck down by the judiciary. If that happened, the prisoners would have to be released, so the executive was willing to amend the Anti-Terrorism Act with the Prevention of Terrorism Act's control orders. These control orders would keep the prisoners under some control and would be primary legislation that could not be struck down.

The impact of the European Court of Human Rights case law is also apparent. After *A and Others* was decided, the executive stated that it was creating new legislation because it feared a similar ruling by the

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287. 375 PARL. DEB., H.C. (6th ser.) (2001) 127 (U.K.) [Beverly Hughes, MP]. The Opposition's antipathy for the European Court of Human Rights' ruling regarding Article 3 in *Chahal* was manifest throughout the Bill's passage through Parliament. See 375 PARL. DEB., H.C. (6th ser.) (2001) 49, 133 (U.K.) [Oliver Letwin, MP; James Paice, MP].

288. The British judiciary could be expected to defer under the doctrine of parliamentary sovereignty and the European Court of Human Rights could be expected to defer under the doctrine of the margin of appreciation.

289. 431 PARL. DEB., H.C. (6th ser.) (2005) 345-47 (U.K.) [Charles Clarke].

290. *Id.* at 346.

European Court of Human Rights.<sup>291</sup> The Supreme Court also felt the European Court of Human Rights' influence. The fact that the European Court of Human Rights has historically deferred to Member States' decision to derogate due to a national emergency probably strongly influenced the Supreme Court's decision to defer to the executive's emergency designation.<sup>292</sup> The British Supreme Court's deference is not surprising; British courts are required to "take into account" European Court of Human Rights case law when interpreting the European Convention on Human Rights.<sup>293</sup> The Supreme Court also repeatedly referred to the European Court of Human Rights' decisions and reports in *A and Others*.<sup>294</sup>

After the Prevention of Terrorism Act was passed, the executive continued to behave strategically with regard to the Supreme Court's rulings. The executive was willing to be creative with judicial decisions and read them in a way that was most beneficial to the executive and its agenda. All three of the Supreme Court's decisions in October 2007 found some European Convention on Human Rights violation, which should arguably have led the executive to re-examine the control orders for European Convention on Human Rights compliance. Instead, the executive interpreted each of these decisions to mean that either the law did not need changing or that the Supreme Court had already made the appropriate changes and so no executive action was required. For example, instead of accepting the British Supreme Court's holding in *JJ* that the control orders violated right to liberty under Article 5, the executive took a stray remark from Lord Brown's opinion to argue that it needed only to slightly reduce the curfew hours in order to comply with the European Convention on Human Rights.<sup>295</sup>

The executive's willingness to rely on the judiciary to fix its human rights infractions is also apparent here. The executive accepted the Supreme Court "reading in" terms to the Prevention of Terrorism Act's control order procedures to make sure they did not violate the right to a

291. *Id.*

292. Tom R. Hickman, *Between Human Rights and the Rule of Law: Indefinite Detention and the Derogation Model of Constitutionalism*, 68 MOD. L. REV. 655, 667 (2005).

293. Human Rights Act, 1998, § 2 (U.K.).

294. *A v. Sec'y of State for Home Dep't*, [2004] UKHL 56, [34], [43] (Lord Bingham) (noting the concerns of the European Commissioner for Human Rights in his Opinion 1/2002 (28 August 2002)).

295. JOINT COMM. ON HUMAN RIGHTS, *supra* note 235, at [55-73].

fair hearing. Moreover, the executive used that “reading in” to avoid any responsibility for changing the legislation itself, even though there was an opportunity to do so with the Counter-Terrorism Bill. Likewise, the executive took *E*’s holding that the Secretary of State should monitor control orders as a simple clarification of the Secretary of State’s duties. With that clarification in hand, the executive saw no need to address the matter again, despite the Joint Committee on Human Rights’ protestations.<sup>296</sup>

#### 15. Influence of Parliament and the Joint Committee on Human Rights

Throughout the various stages of the three antiterrorism laws, Parliament and the Joint Committee on Human Rights had a role to play and the Joint Committee’s influence seems to have grown over time. Every iteration of British anti-terrorism legislation was amended due to resistance by Parliament (particularly the Lords) and the Joint Committee on Human Rights. On the other hand, the executive felt free to disagree with Parliament and the Joint Committee on Human Rights regarding most of the human rights implications of the Anti-Terrorism Act. Even support by the media did not give the legislature enough power to change the executive’s mind on key provisions of its anti-terrorism legislation. Parliament, therefore, had limited power over the executive with regard to the Anti-Terrorism Act.

However, the Joint Committee on Human Rights Reports’ criticisms of the Anti-Terrorism Act were borne out by the Supreme Court’s decision in *A and Others*, which arguably gave its later reports more weight within Parliament and for the executive. Indeed, the Joint Committee on Human Rights typically couches its reports in terms of how courts will likely view legislation<sup>297</sup> so the Supreme Court’s prior disapproval gave the Joint Committee on Human Rights much more ammunition with which to attack future anti-terrorism legislation. On the other hand, Parliament’s role in passing the Anti-Terrorism Act did

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296. JOINT COMM. ON HUMAN RIGHTS, *supra* note 248; JOINT COMM. ON HUMAN RIGHTS, *supra* note 235, at [40]; JOINT COMM. ON HUMAN RIGHTS, *supra* note 227, at [5-14]; JOINT COMM. ON HUMAN RIGHTS, *supra* note 257, at [12-17, 21-62].

297. David Feldman, *Injecting Law into Politics and Politics into Law: Legislative and Judicial Perspectives on Constitutional Human Rights*, 34 COMMON L. WORLD REV. 104, 115 (2005).



influence the judiciary to adopt a more deferential position to the Government's emergency designation and the reports of the various parliamentary committees also influenced the findings of the Supreme Court.<sup>298</sup>

The Counter-Terrorism Bill showed the resurgence of Parliament's power in the legislative process. Although the Joint Committee on Human Rights did not make progress with its proposed amendments, the House of Lords (and very nearly the Commons) was able to effectively prevent the executive from instituting the forty-two days detention policy. The Joint Committee on Human Rights' other proposed amendments did not pass but, for at least a few of them, the executive promised to look at the issue.<sup>299</sup>

This promise was fulfilled after the Liberal-democrats were made part of the executive through their coalition with the Conservatives. Control orders have been reduced to TPIMs, which give more freedom to suspected terrorists,<sup>300</sup> because of the election promises made by the Liberal-democrats in response to Joint Committee on Human Rights reports, judicial decisions and media outrage.<sup>301</sup> Accordingly, it was the Joint Committee on Human Rights, Parliament, the British Supreme Court, and the European Court of Human Rights working together that was the most successful in convincing the executive to alter its anti-terrorism legislation.

This story is ongoing, particularly with regard to the power struggles over the renewal of control orders and the creation of the Conservative-Liberal-democrat coalition. It can be expected that future bills will give further insight into how the three branches of the British government interact to create anti-terrorism law.

### III. Conclusion

The United States and United Kingdom began with similar anti-terrorism legislation that allowed for their executive branches to

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298. *A v. Sec'y of State for Home Dep't*, [2004] UKHL 56, [25, 29, 34, 115-16] (Lord Bingham).

299. JOINT COMM. ON HUMAN RIGHTS, *supra* note 268, at App'x 3.

300. HOME OFFICE, *supra* note 281, at 10, 11, 17, 20, 31, 35, 41, 43, 45.

301. Allegra Stratton & Patrick Wintour, *Front: Clegg Goes to War with Labour Over Civil Liberties*, GUARDIAN (U.K.), Apr. 14, 2010, at 1, available at 2010 WLNR 7634011.

indefinitely detain suspected terrorists, particularly those who could not be deported. The initial anti-terrorism laws in both countries were heavily impacted by the same event – the attacks of September 11, 2001 – and the executives in both countries used the media to influence the legislatures to pass sweeping anti-terrorism legislation that expanded the executive's powers. Yet, the executive branches in both countries were met with resistance by the legislature, which forced them to amend the anti-terrorism legislation before it would pass. Moreover, the laws in both countries were affected by the judiciary; before the fact in the United States and after enactment in the United Kingdom.

The major difference between both countries is how many conflicts the British government experienced before reaching a stable anti-terrorism law regime. Several anti-terrorism bills were passed in the United Kingdom, each one lessening the executive's control over detainees, and each one was still criticized by the legislature and judiciary. However, because the British executive still controls Parliament and, therefore, the judiciary, it took a political shift and a change to the members of the executive branch and Parliament (through the election of the Coalition Government) before the executive was willing to make any major changes to existing anti-terrorism laws. On the other hand, it was the strong party affiliation in the United Kingdom, which removed much of the legislative gridlock that plagues Congress, that allowed these substantial policy changes to occur. Once the executive comes in to power, it can pass its legislation virtually unfettered. The House of Commons generally follows its party and the Lords, although capable of delaying legislation, cannot block it.

The United Kingdom's less balanced system meant that the executive was originally able to pass anti-terrorism legislation that was much stricter than that in the United States, despite the existence of the European Convention on Human Rights. However, it also meant that this legislation was easily undone when a new executive came into power. As a result, in the United Kingdom, although restricted in their movements, unremovable aliens suspected of terrorism have been given much greater freedom than their American counterparts. The United Kingdom's anti-terrorism legislation therefore shows the effects of executive dominance on the creation of law.

The United States represents a much more balanced and stable system; the original PATRIOT Act was never superseded by future legislation. On the other hand, when drafting the PATRIOT Act, the

executive anticipated the judiciary's preference for reviews of detentions every six months and incorporated that provision into the PATRIOT Act without any request from the judiciary to do so. The American Supreme Court has been able to make some changes to anti-terrorism legislation but it is limited to the cases and issues brought before it and it is also limited by the political affiliations of the judges, which can lead to its own kind of gridlock. In contrast, the change in the political affiliation of the executive has not had a very strong impact; Guantanamo remains open and indefinite detention remains a reality. In terms of progress for detainees, therefore, the United State might learn from the United Kingdom and its willingness to amend legislation in response to political and popular pressure.