

**The United States and the United Kingdom: Achieving a
Constitutional Balance between Civil Liberties and National
Security during the War on Terror**

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Dedication

This thesis is dedicated to my dear friend Anisa Neki, who taught me that even the largest task can be accomplished if it is done one step at a time.

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Abstract

The ‘War on Terror’ poses great challenges to democracies. The need for appropriate counter-terrorism measures prompts greater discretion to the executive in enacting adequate measures. This thesis demonstrates that since September 11th 2001, the US and the UK have both modified and enacted further national security measures and anti-terrorism legislation accordingly. The thesis critically explores and examines the legality and constitutional legitimacy of the means that the US and UK have used, giving equal normative weight to national security and civil liberty imperatives.

The focus is not merely between how this legislation strikes a balance between national security and civil liberties; it is also on the ways in which judicial intervention serves as a check to both executive and administrative measures. Thus, it is always necessary to conduct a balancing act between the rights of citizens to live in peace and security of persons and property, against the rights of individuals who may seek to threaten this.

The core argument is that the history of both countries indicate that adhering to a human rights standard as far as possible, even in times of war, has both military and political benefits. Nevertheless, it is not claimed that all rights must be protected at all times. Instead, it seeks to establish a legal standard that recognises the need to protect human rights whilst also protecting security

The thesis then turns to an examination of the judicial determinations in times of conflict between national security and civil liberties. The conclusion is that protecting national security interests is at the heart of all nations, however both the executive and the judiciary as upholders of the rule of law, should ensure the action taken is both adequate and necessary in the sense of proportionate (no more but also no less than what is called for). Thus, it calls for greater judicial oversight and accountability of executive action by using, as far as possible, the ordinary rules of criminal justice to deal with suspected terrorists. Furthermore, it is argued that to follow such a long term approach would provide an adequate platform for other countries in the struggle against terrorism. The thesis also identifies many lessons that can be learnt from the approach of the two countries.

Introduction

This thesis presents an in depth analysis of how anti-terrorism legislation governing domestic law enforcement structures, laws and policies have generally changed in the United States (US) and the United Kingdom (UK) since September 11, 2001. By comparing the approaches of the two countries, it will be possible to analyse whether these nations are achieving a viable constitutional balance between protecting national security and human rights. It will also be possible to conclude whether one country can learn from the successes and failures of the other country.

The overall aim of the thesis is not simply to compare and contrast the approaches of the US and the UK. The ultimate goal is to draw important distinctions between the institutional practices and law of the different countries, in order to evaluate successful practices to deal with perceived terrorist threats. It will also analyse practices considered as inadequate in order for each country to avoid measures that are considered to be excessively draconian to individual rights and civil liberties.

The thesis adopts a comparative approach. The comparison between the US with the UK is explained by a number of factors. Firstly, the UK has been dealing with threats of terrorism for many years and it is important to consider whether the attacks on the twin towers on September 11 changed the anti-terrorist approach in any way. Also, the thesis discusses whether the US has reacted in a manner that is parallel to the UK, particularly because the UK has faced substantial terrorist threats and attacks prior to 9/11. Furthermore, the UK is a leading ally of the US and it seems sensible to compare the actions of the two nations as many actions taken on a global level are done in conjunction with one another. This is reflected by the decision to wage war on Iraq, which was proposed by the US and in which the UK subsequently followed suit.

Also, both countries are common law jurisdictions and although both nations have experienced terrorism, there are important constitutional differences. The US has a written constitution and arguably a stronger individual rights tradition. The UK, on the other hand, has an unwritten constitution and it is only the implementation of the Human Rights Act in 1998 that has bought greater recognition of individual rights.

By considering the approaches of the US and the UK, it will be possible to identify whether there are differences in the approaches of the two countries and whether the modern threat from terrorism justifies the broad range of powers claimed by governments. Is it possible to combat terrorism through the use of enhanced domestic law without the need to potentially infringe so much upon civil liberties? Or does the extraordinary nature of the unconventional threat of terrorism require the use of extraordinary measures which justify the reduction of individual rights?

The general approach is to explore various anti-terrorist measures and to contrast this with national security imperatives contained in current US and UK anti-terrorism legislation. The specific aim of this thesis is to critically explore the constitutional legitimacy of the measures taken by the US and the UK. This will involve analysing justifications offered by the Executive and the judiciary in their struggle to balance and reconcile specific interpretations of the meaning, scope and purpose of human rights imperatives against countervailing national security interests.

Human rights legislation generally attempts to ensure a basic standard of rights to be afforded to all individuals, including the rights to a fair trial, and to legal access and the prohibition of indefinite detention. National security legislation, on the other hand, aims to protect citizens from further attacks thereby securing their right to life, for example. Hence in doing so, national security policies and legislation potentially infringe interpretations of the fundamental human rights of those suspected of organising or plotting such attacks. Thus, a crucial determination to be made is whether the declared 'war on terror' is of a similar war as those in the past. If so, declaring war allows nations to employ actions that may be considered 'arbitrary' in ordinary times.

The first chapter examines anti-terrorist measures first in the US, both prior to September 11 and also thereafter. Analysis of pre 9/11 anti-terrorism measures focus primarily on actions relating to the writ of *habeas corpus* and the use of military commissions. It considers whether the Executive can act without congressional authorisation amidst a state of emergency. Also, does a declaration of a state of emergency justify the replacement of civilian courts with military commissions? This section analyses judicial determinations of Executive action during the American Civil War and World War II to determine whether such

actions were considered legitimate, and if so, to what extent?

Also, the chapter analyses anti-terrorism legislation and Supreme Court decisions post 9/11 to highlight the struggle of both Congress and the judiciary to achieve a viable constitutional balance between national security imperatives and civil liberties. It questions whether the measures adopted by terrorists are inherently different to those measures adopted prior to 9/11. If so, should the Executive be afforded greater power to protect national security?

Thereafter, Chapter 2 considers the approach of the UK. As terrorist threats have been prevalent in the UK for many years prior to 9/11, it is necessary to consider whether there has been a move away from the pre-terrorism theme. Was further legislation necessary when the Terrorism Act 2000 introduced anti-terrorist provisions on a permanent basis? Measures relating to detention have been controversial, which is discussed with reference to case law and the UK's obligations under the Human Rights Act and the European Convention on Human Rights.

These two chapters offer critical analysis and policy reasons in support of the administrations' efforts to protect the United States and the United Kingdom by placing the need for national security at this time somewhat higher in its hierarchy of values than certain aspects of individual civil liberties. It also provides a critical analysis of the competing argument that human rights must be considered to be absolute obligations on the state that prevail at all times, even in times of emergency and crisis. The goal here is to determine whether a viable balance between the competing interests is being or, in principle, can be drawn in practice.

The thesis continues with a critical analysis of the judicial responses to issues regarding national security. Judicial reactions to statutory measures are as important as the principles of law themselves, as they are subject to and dependent on interpretation. The Executive often argue that where issues of national security arise, the judiciary should defer to the Executive on such matters and, therefore, not rule on such issues. However, counter arguments maintain that the role of the judiciary is to strictly uphold a liberal interpretation of the Rule of Law, and therefore to leave Executive action unquestioned would potentially lead to 'arbitrary' Executive measures. This argument and its limits will be considered in depth.

The thesis concentrates greatly on the role of the Executive and the judiciary as there are

clear identifiable differences in the constitutional Separation of Powers in the US and the UK. It is important to examine judicial responses to Executive action in order to highlight the role of the judiciary in each country, as the role of the judiciary is different in the US than in the UK. The constitutional arrangements in the US are historically stronger, whereas the Separation of Powers in is weaker and more blurred in the UK. The US Supreme Court is arguably more active than the British House of Lords as the US Supreme Court has made momentous decisions on social issues such as abortion¹ and segregation.²

The thesis discusses the contention that as the Executive have traditionally had a wide discretion on the powers it adopts in times of emergency, does this mean Executive action in the name of national security should remain unquestioned by the courts and the legislature? Or, is there a slow but noticeable assertion of authority from the courts and the legislature in both countries? Should nations, as far as possible, adopt a human rights approach which upholds long standing and fundamental values or should the primary focus be on protecting national security, irrespective of whether this reduces individual human rights? Fundamentally, can a balance be achieved between the two?

The key phrase here is “as far as possible”, which raises the question of under what circumstances it is possible to adopt an unqualified human rights approach? Hence, the thesis recognises that the national security perspective and associated imperatives concerning a government's obligation to protect the security and physical protection needs of all citizens is also extremely important. Failing to address threats to the nation may also ultimately lead to loss of fundamental human rights of the citizens of the nation, e.g. right to life, freedom from fear, the enjoyment of a democratic and orderly way of life and security of property. It recognises that successful acts of terrorism, as well as excessive emergency powers measures, both violate the Rule of Law. Thus, the thesis considers whether there are viable alternatives to anti-terrorist measures such as indefinite detention which violate individual liberties such as the right to a fair trial. Also, are these alternative measures adequate to deal with the perceived threat of terrorism?

¹ *Roe v Wade* [1973] 410 U.S. 113

² *Brown v. Board of Education of Topeka* [1954] 347 U.S. 483

US Anti Terrorism Legislation Pre & Post 9/11

This chapter examines the approach of the United States during times of war in order to identify and discuss measures adopted in times of emergency, to combat threats to national security. In particular, the thesis focuses on measures which interfere with the right to a fair trial and examines the suspension of *habeas corpus* and the use of alternatives, such as military commissions instead of ordinary courts, to try suspected terrorists. As such measures reject the idea of applying 'ordinary' law for suspected terrorists, this appears to suggest a change towards a context where 'the exception' becomes the norm (that is becomes 'normalised'), and the norm (of broad conformity with liberal legality) becomes the exception. For example, suspension of *habeas corpus* and the use of military commissions in the US were common measures only during wartime, as was detention without trial in the UK.

The chapter continues by critically analysing responses to the 'war on terror', including legislation, judicial responses and policy initiatives. By considering the measures adopted in response to threats to national security prior to the terrorist attacks, this section identifies significant differences in the measures enacted by the Executive after the terrorist attacks of 9/11.

This section on the US examines two issues. Firstly, the right to a writ of *habeas corpus*, as guaranteed by Article I of the US Constitution, will be discussed with reference to the use of the writ of *habeas corpus* and its suspension prior to 9/11. According to some, criticism of the Bush administration was "*ill-founded when one considers that the President's actions pale in comparison to actions taken by prior Presidents, such as Abraham Lincoln.*"³ It is, therefore, important to consider these actions as although the decisions were unpopular in many circles, they were considered necessary in a time where the nation was widely perceived of as faced with great national security problems. Thus, as the US is yet again facing threats to its national security, controversial decisions may be required. However, it is also argued that, "*too often concerns over national security have become 'catchall' excuses for systematic*

³ Williams, R. (2007) 'Still A Frightening Unknown: Achieving A Constitutional Balance Between Civil Liberties And National Security During The War On Terror,' *University Law Review* 675, p.2.

violations of human rights” and therefore the response taken should be proportionate to the threat posed.⁴

Secondly, the section considers national security concerns in the aftermath of the 9/11 attacks. These have led to legislation which affords the President extensive powers in the aim to protect the security of the nation and its citizens. Thereafter, the struggle of the US Supreme Court to strike a viable and defensible constitutional balance between national security and civil liberties in decisions such as *Hamdi*, *Rasul* and *Hamdan* will be examined. This will be followed by analysis of legislation such as the Detainee Treatment Act (DTA) and Military Commissions Act (MCA). Lastly, the decision in *Boumediene* will be analysed, where the initial review by the Court of Appeals for the District of Columbia Circuit was a significant victory for the Executive as it upheld the legality of the MCA which prevented alien detainees from petitioning for *habeas corpus*.⁵ The subsequent decision of the Supreme Court significantly differed however, and its implications also need to be addressed.

1.1 Suspension of *Habeas Corpus* prior to 9/11

(i) The writ of *habeas corpus*

Habeas corpus is a Latin term which means ‘produce the body’.⁶ The writ of *habeas corpus* is an important instrument for safeguarding individual freedom against ‘arbitrary’ state action by allowing prisoners to challenge the legality of their detention. This right was incorporated into the US Constitution and: “*has been for centuries deemed the best and only sufficient defence of personal freedom.*”⁷ The US Constitution supposedly inscribes the fundamental principles on which governance of the country is founded and sustained. Hence, the longstanding constitutional recognition of the writ of *habeas corpus* is highly significant.

(ii) Suspension of *habeas corpus*

The War on Terror has led the US government to implement many new counterterrorism

⁴ Landman, T. (2008) ‘Imminence and Proportionality: The U.S. and U.K. Responses to Global Terrorism’, 104 *California Western International Law Journal* Vol 38, p 32

⁵ *Boumediene v. Bush* [2007] 476 F3d 981 (D.C. Cir)

⁶ *The American Heritage Dictionary of the English Language* (2000) 4th Edition (Houghton Mifflin Company)

⁷ *Ex Parte Yergler* [1868] 75 U.S. 85 95-96 (1868), per Chief Justice Chase

policies, which critics argue are inconsistent with the Constitution and therefore, of dubious legitimacy. This is particularly the case in relation to the restriction of the right that allows suspected terrorists to challenge the legality of their detention by petitioning for writ of *habeas corpus* before an Article III court.⁸ However, this right is not absolute and the writ can be suspended ‘*when in cases of rebellion or invasion, the public safety may require it.*’⁹ Although the Constitution is silent regarding which branch has the power to suspend the writ, it has typically been considered by senior judges as a power bestowed upon Congress alone.¹⁰

Due to these limitations, the decision to suspend the writ has rarely been implemented and even when it has, it has been during times of perceived great danger.¹¹ For example, during the American Civil War,¹² amidst insurrection by the Ku Klux Klan in southern states,¹³ and during World War II after the attack on Pearl Harbour.¹⁴ The infrequency of such action is demonstrated by the refusal of Congress to allow President Jefferson to suspend the writ to deal with Aaron Burr’s conspiracy to overthrow the government.¹⁵

Abraham Lincoln suspended the writ during the American Civil War in 1861. Lincoln’s claim that by necessary implication, he, as Commander in Chief, held the constitutional power to authorise suspension of the writ, did not go unchallenged however. Only a month after Lincoln's proclamation, John Merryman, who had spoken out against President Lincoln, was arrested for various acts of treason. The government believed that Merryman's decision to form an armed group to overthrow the government was an act far beyond a simple expression of dissatisfaction, which would be protected under the Constitution.

⁸ Article III of the United States Constitution confers the judicial power of the US in “*one Supreme Court and in such inferior Courts as the Congress may from time to time ordain and establish.*” US Constitution, Article III

⁹ Article 1, Section 9, Clause 2, US Constitution.

¹⁰ *Ex Parte Bollman* and *Ex Parte Swartwout*, 8 U.S. 4 Cranch 75, 101 (1807) - “*If at any time the public safety should require the suspension of the powers vested...in the courts of the United States, it is for the legislature to say so.*”

¹¹ Halliday, P. D. and White, E.G. (2008) ‘The Suspension Clause: English Text, Imperial Contexts, And American Implications’ *Virginia Law Review* 94, page 93

¹² An Act Relating to Habeas Corpus and Regulating Judicial Proceedings in Certain Cases Ch. 81, 12 Stat. 755 (1863)

¹³ An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes, ch. 22, 17 Stat. 13 (1871)

¹⁴ The Hawaiian Organic Act, ch. 339, 31 Stat. 141 (1900)

¹⁵ *Hamdi v Rumsfeld*, 542 U.S 507, 563, Justice Scalia dissenting, (citing 16 Annals of Congress 402-425 (1807))

Although the courts in *Ex parte Merryman*¹⁶ may have interpreted the right in a restrictive way to help restore calm during the war, Chief Justice Roger Taney asserted “*that the President has exercised a power which he does not possess.*”¹⁷ Maintaining there is “*no ground whatever for supposing that the President can authorize suspension,*” the Chief Justice claimed that only Congress has the power to suspend the writ.¹⁸ Taney’s objections clarify who holds the constitutional power to suspend the writ.

Lincoln justified his actions stating that, “*whether strictly legal or not, [these] were ventured upon under what appeared to be a popular demand and a public necessity, trusting then, as now, that Congress would readily ratify them.*”¹⁹ Despite the fact that the Constitution is silent regarding which branch of government is authorised to exercise the power to suspend *habeas corpus*, Lincoln’s statement reflects that he had exercised a power that required some level of approval from Congress.

However, any confusion regarding the legality of Lincoln’s actions to suspend the writ was quashed two years later when Congress enacted legislation empowering the President to suspend the writ nation-wide while rebellion continued.²⁰

In September 1862, Lincoln issued a proclamation, declaring martial law and authorising the use of military tribunals to try civilians within the United States who were believed to be “*guilty of disloyal practice*” or who “*afforded aid and comfort to Rebels.*”²¹ With this order as justification, Vallandigham, a US citizen, was charged with declaring disloyal opinions with the object of causing an unlawful rebellion. Despite being captured away from the battlefield, he faced trial before a military commission. He claimed the military commission was unconstitutional and contrary to his right to a “*speedy and public trial by an impartial jury*”, as well as other rights guaranteed by the Sixth Amendment.²² However, his claims were rejected and he failed to successfully petition the Circuit Court for a writ of *habeas*

¹⁶ *Ex Parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861) (no. 9847)

¹⁷ *Ibid* at 145

¹⁸ *Ibid* at 147

¹⁹ *Abraham Lincoln, Speech to Special Session of Congress* (July 4, 1861), as reprinted in 4 Coll. Works, supra note 2, at 429.

²⁰ Habeas Corpus Act, ch. 80, 12 Stat. 755 (1863).

²¹ Proclamation Suspending the Writ of Habeas Corpus (Sept. 24, 1862), as reprinted in 5 The Collected Works of Abraham Lincoln 518, 524 (Roy P. Basler ed., Rutgers University Press, 1953) at 436-437

²² Curtis, M. K. (1998) ‘Lincoln, Vallandigham, and Anti-War Speech in the Civil War’ 7 William and Mary Bill of Rights Journal 105 at 124-125.

corpus.²³ The case was eventually brought to the Supreme Court on motion for *certiorari*.²⁴ However, the Supreme Court refused to review the proceedings of the military commission because it ruled that it lacked jurisdiction. By implication, it upheld the authority of the military commission by refusing Vallandigham the writ.

Shortly after, the Supreme Court was again required to consider similar issues in *Ex parte Milligan*.²⁵ Milligan was tried and sentenced to death by a military commission, despite being captured away from the battlefield and where civilian courts were functioning.²⁶ In a unanimous decision, the Supreme Court ruled that the military commission had no jurisdiction to try Milligan. Justice Davis explained, “*Martial rule can never exist where the courts are open...*”²⁷ The Court therefore declared that the guarantees which safeguard the Fifth Amendment constitutional right to due process are not to be set aside during war. The underlying reason for the *Milligan* decision was the idea that the right to trial by jury is preserved for everyone accused of crime that is unrelated to members of the army, navy, or militia in actual service.

Recognising that the writ of *habeas corpus* may legitimately be suspended during times of war where citizens join enemy forces, the Court reaffirmed Taney’s opinion in *Merryman* that “*there could be no suspension of the writ or declaration of martial law by the Executive, or by any other than the supreme legislative authority.*”²⁸ It also emphasised that that suspension is limited to discharging the government from its obligation of producing a person arrested in answer to a writ. The Constitution “*does not say after a writ of habeas corpus is denied a citizen, that he shall be tried otherwise than by the course of the common law.*”²⁹ Therefore, it does not permit the replacement of civilian courts with military commissions.

(iii) Trials by Military Commissions

²³ *Ex parte Vallandigham* [1863] 68. U.S at 246.

²⁴ A writ that a superior appellate court issues in its discretion to an inferior court, ordering it to produce a certified record of a particular case it has tried, in order to determine whether any irregularities or errors occurred that justify review of the case.

²⁵ *Ex Parte Milligan* [1866] 71 U.S. (4 Wall.) 2

²⁶ *Ibid* at 106-107

²⁷ *Ibid* per Justice Davis

²⁸ *Ibid* at 57

²⁹ *Ibid* at 126. The Court stressed that the safeguards of the Constitution cannot be disturbed by the President, Congress, or the Judiciary, “*except the one concerning the writ of habeas corpus.*”

In contrast to *Vallandigham*, the Court in *Milligan* confined the use of military commissions to military personnel and allies and, therefore, prevented arbitrary use of such powers against all others. However, in *Ex parte Quirin*, the Supreme Court considered President Roosevelt's similar decision to deny captives' access to US courts by authorising trials by military commissions.³⁰

Upholding the jurisdiction of military commissions, the Court held 'unlawful combatants', regardless of citizenship, can be tried by military commission for violations of the law of war without this constituting a violation of the Fifth or Sixth Amendments.³¹ Furthermore, the Court distinguished *Milligan* for a number of reasons. Firstly, *Milligan* was a civilian, and a civilian, even one who commits war related crimes, is entitled to trial by jury in a civilian court. According to the Court, the saboteurs were inevitably due to face trial by military commission due to their admission that they were enemy combatants.³² Additionally, whereas *Quirin* involved unlawful enemy combatants, *Milligan* was a citizen of Indiana and had never been a resident of any state involved in the rebellion, nor had he been an enemy combatant who would qualify as a prisoner of war.³³

Therefore, the decision in *Quirin* permits military commissions for individuals who are part of the "enemy's war forces" that invade the country from abroad,³⁴ which arguably leaves "untouched" the Court's earlier opinion in *Milligan*.³⁵ By highlighting these critical distinctions, the Court successfully resolved the issues surrounding the legitimacy of using military commissions to try unlawful enemy combatants in the US. Thus, the use of military commissions for those captured abroad and engaged in hostilities against the US was considered legitimate.

³⁰ Proclamation No. 2561, 7 Fed. Reg. 5101 (July 2, 1942): "[A]ll persons who are subjects, citizens or residents of any nation at war with the United States... and who during time of war enter or attempt to enter the United States ... and are charged with committing or attempting or preparing to commit sabotage, espionage, hostile or warlike acts, or violations of the law of war, shall be subject to the law of war and to the jurisdiction of military tribunals...", page 12.

³¹ *Ex parte Quirin* [1942] 317 U.S. 1, 45

³² *Ibid* at 45-46. The Supreme Court in *Hamdan v. Rumsfeld* referred to the saboteurs in *Quirin* as "admitted enemy combatants." *Hamdan v Rumsfeld*, 126 S. Ct. 2749, 2782 (2006).

³³ A 'lawful enemy combatant' is afforded protections as he is classified as a prisoner of war in accordance with the Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention) 12 August 1949, 75 UNTS 135, available at: <http://www.unhcr.org/refworld/docid/3ae6b36c8.html>.

³⁴ *Ibid Quirin* at 46.

³⁵ Fisher, L. (2003) *Nazi Saboteurs on Trial: A Military Tribunal & American Law*, 1st edition (University Press of Kansas) (quoting Memorandum from Justice Black to Chief Justice Stone, Black Papers (Oct. 2, 1942)).

Further issues regarding aliens captured by the US on foreign territories arose in *Johnson v Eisentrager*.³⁶ Denying the prisoners' petitions for *habeas corpus*, the Supreme Court held that non resident aliens³⁷ captured and imprisoned abroad are “*beyond the territorial jurisdiction of any court of the United States.*”³⁸

These cases clearly indicate that issues surrounding suspension of the writ and the use of military commissions are contentious. It is therefore necessary to consider whether government actions after 9/11 are consistent with prior US practice recognised as lawful. Decisions by the Supreme Court regarding *habeas corpus* petitions from detainees captured beyond the US will demonstrate the significance of *Eisentrager* in the arguments put forward by the government. Problems similar to those faced by Lincoln and Roosevelt regarding the writ of *habeas corpus* would also be of paramount concern to the Supreme Court over half a century later.

Also, by reviewing legislation enacted to combat terrorism after 9/11, it will be possible to see whether the measures adopted are inherently different to those discussed above. If so, it will be asked if this is because the magnitude of the current threat is greater than previous threats, which means that the US is compelled to employ new, more efficient strategies?

1.2 Protecting national security after 9/11 by counter terrorism measures

Terrorism is one of the major challenges faced by modern democracies. The threats raised by terrorist activity are very real, but also very difficult to deal with in an effective and proportionate manner.³⁹ Since the attacks of 11 September 2001 and 7 July 2005, both the US and the UK have adopted a pre-emptive approach by enacting legislation to try and prevent further terrorist attacks.

Although terrorism is not a new concept, the definition of terrorism has become greatly significant since the US has become engaged in “the war on terror”. More than a hundred definitions of terrorism exist,⁴⁰ and there has “*never been... some golden age in which*

³⁶ *Johnson v Eisentrager* [1950] 339 U.S. 763

³⁷ Non-resident alien; any individual who is not a citizen or resident of the United States.

³⁸ *Ibid Eisentrager* at 778

³⁹ Stone, R. (2006) *Textbook on Civil Liberties and Human Rights* (Oxford: OUP) p.210.

⁴⁰ Laqueur, W. (1999) *The New Terrorism: Fanaticism and the Arms of Mass Destruction* (New York: Oxford

*terrorism was easy to define.*⁴¹

The U.S. Department of State has used Title 22 of the United States Code to define terrorism as “*politically motivated violence perpetrated against non-combatant targets by sub-national groups or clandestine agents.*”⁴² Oots defines terrorism as intending to “*create extreme fear and/or anxiety-inducing effects in a target audience larger than the immediate victims.*”⁴³ Interestingly, the definition post 9/11 has changed to include religious and ideological motivations.

For example, the US Federal Bureau of Investigation (FBI) defines terrorism as “*the unlawful use of force or violence ... in furtherance of political or social objectives.*”⁴⁴ Furthermore, the US Department of Defense extends this by encompassing the ‘threat’ of unlawful violence for ‘religious’ and ‘ideological’ causes also.⁴⁵ It is clear therefore that the meaning of terrorism is embedded in a person’s or nation’s philosophy. Thus, the determination of the “right” definition of terrorism is subjective or includes a subjectively variable element.⁴⁶

The attacks on the twin towers led to the declaration of a national emergency in the US, and to the enactment of the Authorization for Use of Military Force (AUMF). The AUMF authorises the President to: “*use all necessary and appropriate force against those . . . who he determines planned, authorized, committed, or aided the terrorist attacks.*”⁴⁷ By enacting such an open-ended measure, Congress ratified the broad duties of the President as Commander in Chief to protect national security and prevented any potential criticism of Bush for acting unilaterally and then dealing with legal implications after, as had been the case with Lincoln.

University Press), page 5.

⁴¹ Cooper, H.H.A. (2001) *The Problem of Definition Revisited. American Behavioural Scientist* (London: Sage Publications) 44, 881-893, page 881.

⁴² U.S. Department of State, *Patterns of Global Terrorism*, [2000] Title 22 of the United States Code, Section 2656f (d), available at http://www.law.cornell.edu/uscode/uscode22/usc_sec_22_00002656---f000-.html

⁴³ Oots, K. (1990) ‘Bargaining With Terrorists: Organizational Considerations’ *Terrorism: An International Journal* 13, 145–158, p.145

⁴⁴ Quoted in *Counterterrorism Threat Assessment and Warning Unit, Terrorism in the United States* (2002) (Washington, D.C.: U.S. Department of Justice, FBI Publication 0308), p. 3.

⁴⁵ See Department of Defense Dictionary of Military and Associated Terms, <http://www.dtic.mil/doctrine/jel/dodict/data/t/05373.html>. “*The calculated use of unlawful violence or threat of unlawful violence to inculcate fear; intended to coerce or to intimidate governments or societies in the pursuit of goals that are generally political, religious, or ideological objectives.*”

⁴⁶ Griset, P. L. and Mahan, S. (2003) *Terrorism in Perspective* (London: Sage Publications), page xiii

⁴⁷ AUMF, S.J. Res. 23, 107th Cong. (2001 enacted), Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, 115 Stat. 224 (2001)

The first consideration in establishing adequate counter terrorist measures was that of existing national security policy. Within the US, the term ‘national security strategy’ has “*long been recognised by courts...as a notoriously ambiguous and ill-defined phrase.*”⁴⁸ A seemingly concise definition of national security is “*the ability of national institutions to prevent adversaries from using force to harm Americans or their national interests*”.⁴⁹

Therefore, to prevent further terrorist attacks, the National Security Strategy 2002⁵⁰ emphasised the need to eradicate “*terrorist organisations of global reach and attack their leadership: command, control, and communications; material support; and finances.*”⁵¹ Recognising that terrorist threats are not confined to Al-Qaeda, the US proposed measures which significantly increased the powers of the President and the law enforcement agencies. These include increased surveillance and search capabilities, the use of military commissions, and depriving Federal Courts of habeas jurisdiction.

The first of these counter-terrorist measures was introduced by the USA Patriot Act 2001, which was enacted in the immediate aftermath of 9/11.⁵² The Act permits increased surveillance. In particular, it authorises the interception of electronic communications for the collection of evidence related to terrorism, computer fraud, and abuse.⁵³ It also expands the situations in which surveillance may be conducted so that it is no longer limited to ‘aliens’.⁵⁴

Most significantly, and controversially, the Act authorises secret detentions and the authority to designate American citizens as “enemy combatants”. Thus, the Act authorises the indefinite detention of those who the Executive deems to be an ‘enemy combatant’.

President Bush further emphasised the existence of a state of war by issuing an order which

⁴⁸ Post, R. (1976) ‘National Security and the Amended Freedom of Information Act’ *Yale Law Journal* 85, page 406, 408

⁴⁹ Cimbala, S. J. Sarkesian, S. C. Williams, J. A. (2008) *US National Security: Policymakers, Processes & Politics*, 4th edition (Lynne Rienner Publishers), p. 4, available at www.rienner.com (<http://www.rienner.com/uploads/47e148fd47a65.pdf>),

⁵⁰ <http://www.whitehouse.gov/nsc/nss.html>

⁵¹ Shapiro, J. Davis, L. E. (2003) *The U.S. Army and the New National Security Strategy* (Rand Corporation), p 10

⁵² The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA Patriot Act) 2001. H.R. 3162

⁵³ Sections 201 and 202

⁵⁴ ‘Alien’ means a person who is not a citizen of the United States.

authorises the establishment of military commissions. The Military Order 2001⁵⁵ granted “exclusive jurisdiction” to military commissions to try suspected terrorists classed as ‘enemy combatants’.⁵⁶ Military commissions are constitutionally and statutorily authorised special courts which are composed of military personnel who are commissioned to determine fact and law. Bush’s order made it clear that such tribunals could not operate without modifying the principles of laws and the rules of evidence generally recognised in the trial of criminal cases in Federal Courts.

The Order applies only to non-US citizens and, controversially, mandates protection of classified information. The Order provides for ‘a full and fair trial’,⁵⁷ and the right to counsel.⁵⁸ Hence, supporters argue those subject to the order are “*far more fortunate than their counterparts in earlier times.*”⁵⁹ However, critics argue it highlights the intention of the government to try ‘war criminals’ by special military tribunals and not in Federal Courts.⁶⁰ Also, although the defendant is presumed innocent and is represented by a lawyer, military commissions differ to civilian courts in the following five aspects.

Firstly, they do not allow judicial review by an independent civilian court. Also, they permit prosecutions of persons for crimes unrelated to violations of the laws of war. Additionally, secret intelligence sources are admissible in military commissions, which is particularly controversial because much of this is claimed to have been obtained through the use of torture. Furthermore, trials may be conducted in secret and the army will select a lawyer for the suspect. Finally, they limit greatly the right to prepare a defence. Disclosure of classified information is limited in military commissions to a select few, and more significantly, excludes civilian lawyers. This need is reinforced by national security considerations. Forcing the government to disclose its methods and techniques would be “*foolhardy at best and*

⁵⁵ Military Order: Detention, Treatment and Trial of Certain Non-citizens in the War against Terrorism, 66. Fed. Reg. 57, 833 (November 16, 2001). (Military Order of November 16, 2001)

⁵⁶ Military Order: Detention, Treatment and Trial of Certain Non-citizens in the War against Terrorism, 66. Fed. Reg. 57, 833 (November 16, 2001)., Section 7 (b) “*With respect to any individual subject to this order – (1) military tribunals shall have exclusive jurisdiction with respect to offenses by the individual; and (2) the individual shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on the individual’s behalf, in (i) any court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal.*”

⁵⁷ Executive Order, Section 4(c)(2).

⁵⁸ Ibid at Section 4(c)(5).

⁵⁹ Lathrop, M. L. (2001) *A Realistic Look at Terrorism Trials By Military Commission* (Luce, Forward, Hamilton & Scripps LLP) available at <http://news.findlaw.com/cnn/docs/terrorism/lathrop.trials.112001.html>, p 10.

⁶⁰ Elsea, J. (2001) *Terrorism and the Law of War: Trying Terrorists as War Criminals before Military Commissions* (University Press of the Pacific)¹.

would compromise its effectiveness permanently.”⁶¹

By using military commissions, the government has prevented the use of civilian courts, and subsequently banned the possibility of recourse by way of an appeals procedure. President Bush’s decision strengthens global US domination because it “*empowers the President to do whatever he wishes to prisoners without any legal limitation, as long as he does it offshore.*”⁶² Such military tribunals could be established in any suspect country, without the need for any accountability.

The order makes it clear that the Executive planned to treat the attacks as acts of war rather than criminal acts, which is consistent with the idea of the ‘war on terror’. This distinction has more than rhetorical significance; it sends a clear message that the US Administration leaned heavily in favour of prosecuting those responsible as war criminals, by trying them using special military commissions rather than in Federal Courts for crimes, such as murder, for example.

This is further demonstrated by the way in which the US has classified detainees. The treatment of those captured by the US ultimately depends on their initial classification. The law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations, and also between those who are lawful and unlawful combatants. Classifying one as a prisoner of war means that they must be afforded prisoner of war status, as guaranteed by the Geneva Conventions. Similarly, ‘lawful enemy combatants’ are subject to capture and detention as ‘prisoners of war’ by opposing military forces, in accordance with the Third Geneva Convention.

A ‘lawful enemy combatant’ is defined as a person who is: (a) a member of the regular forces of a State party engaged in hostilities against the United States; (b) a member of a militia, volunteer corps, or organised resistance movement belonging to a State party engaged in such hostilities, which are under responsible command, wear a fixed distinctive sign recognizable at a distance, carry their arms openly, and abide by the law of war; or (c) a member of a

⁶¹ Lathrop, page 10, o.p cit.

⁶² [Prisoners plea rejected by US court, Wednesday, February 21, 2007, available at http://www.france24.com/france24Public/en/archives/news/2007/February/americas/20070222-Guantanamo.html](http://www.france24.com/france24Public/en/archives/news/2007/February/americas/20070222-Guantanamo.html), accessed on 18th March 2011.

regular armed force who professes allegiance to a government engaged in such hostilities, but not recognized by the US.

Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.⁶³ An ‘unlawful enemy combatant’ is defined as: (a) a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces); or (b) a person who, before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense. (c) “Co-belligerent” means any State or armed force joining and directly engaged with the US in hostilities or directly supporting hostilities against a common enemy. By using this term, the US has drawn a distinction which prevents prisoners from being afforded ‘prisoner of war’ status.

Using such classifications is again consistent with the idea of a war, as by classifying Al-Qaeda fighters as ‘combatants’, they are being treated as soldiers. This means the rules of war, military force and Geneva Conventions all become applicable to the detainees, and this allows the use of military commissions. This is demonstrated by the US’s attempt to prevent detainees’ access to US Federal Courts by classifying fighters as ‘combatants’.

However, treating the attacks as acts of war rather than criminal acts can have negative repercussions. Classifying Al-Qaeda fighters as ‘combatants’ suggests the fighters are a militia with a just cause or political end. Hence, such attacks may be seen as a ‘struggle’ rather than crimes, encouraging greater sympathy and support, particularly as they are considered by some as ‘freedom fighters’. In contrast, classifying such people as ‘criminals’, may prevent sympathy for the cause as those captured would simply be considered criminals guilty of contravening the law of the state. Their motive and reasons for breaking the law, regardless of whether it is for what they considered to be a just case, would therefore be of little significance.

⁶³ *Quirin* ibid at 30-31

1.3 Judicial Response to Executive Action

Issues regarding the writ of *habeas corpus* were addressed when both US and non-US detainees held in Guantanamo Bay petitioned the Federal Courts for *habeas corpus* relief. By analysing the landmark Supreme Court decisions, firstly in *Hamdi*, and then in *Rasul*, it will be possible to identify whether the actions of the Executive are consistent with legally required levels of due process.

The ruling in *Hamdi v Rumsfeld*⁶⁴ is significant. Whilst recognising the Executive's power to incarcerate a US citizen accused of terrorism without charge or trial, the court reaffirmed “*the fundamental nature of a citizen's right to be free from involuntary confinement by his own government without due process of law.*”⁶⁵

Yaser Hamdi, an American citizen by birth, was seized in 2001 and classified as an enemy combatant. Hamdi's father filed a petition for a writ of *habeas corpus* with the US District Court for the Eastern District of Virginia. His counsel argued detention without charge and legal access was a breach of Hamdi's rights under the Fifth⁶⁶ and Fourteenth Amendments,⁶⁷ in that he was being deprived of his liberty and being detained without due process of law.

Although initially, the US District Court ordered that a federal public defender be assigned and given unmonitored access to Hamdi, the decision was reversed in a subsequent appeal by the Government. The Fourth Circuit Court held that the district court failed to have regard to the government's intelligence and national security concerns. Supporting the government's argument for maintaining the separation of powers, the court held that “*political branches are best positioned to comprehend this global war in its full context,*” and so, the option to detain

⁶⁴ *Hamdi v. Rumsfeld*, 124 S.Ct. 2633 (2004)

⁶⁵ *Ibid* at 2648 (plurality opinion).

⁶⁶ Amendment V (the Fifth Amendment) of the United States Constitution: *No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury...nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.*

⁶⁷ The Fourteenth Amendment to the United States Constitution (Amendment XIV) Section 1: *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

until the cessation of hostilities was entirely that of the Executives.⁶⁸

Hence, the District Courts statement that more factual assertions should be produced was dismissed as the court held that doing so, “*would be to wade further into the conduct of war than we consider appropriate.*”⁶⁹ The court remanded the case with directions to dismiss Hamdi's petition for writ of *habeas corpus*. Nevertheless, Hamdi successfully filed a petition with the US Supreme Court, where the court was required to decide numerous issues.

The court first considered the legality of Hamdi's detention. Hamdi contended that his detention violated the Non-Detention Act,⁷⁰ which states “*no citizen shall be imprisoned or otherwise detained by the US except pursuant to an Act of Congress.*”⁷¹ However, the court accepted the government's argument that the words “*necessary and appropriate force*” in the AUMF⁷² satisfies the requirement that an individual is being detained pursuant to “*an Act of Congress.*”⁷³ Hamdi further argued that the AUMF did not authorise indefinite detention. Whilst accepting that the US “*may detain, for the duration of the hostilities*”, the Court agreed that his detention may not continue after active hostilities have ended. In response to Hamdi's assertion that his detention could last for the duration of his lifetime due to the character of the War on Terror, the Court relied on the fact that, at the time of the opinion, active combat operations in Afghanistan were ongoing. However, as Erwin Chemerinsky points out, the war on terrorism shows no signs of abating and it is already longer than World War I or World War II.⁷⁴

The level of constitutional due process available to US citizens labelled enemy combatants was also considered. The Court held that citizen-detainees such as Hamdi must receive “*notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decision-maker.*”⁷⁵

⁶⁸ *Hamdi* *ibid* at 284

⁶⁹ *Ibid* at 283-84

⁷⁰ The Non-Detention Act was adopted in 1971 “to repeal the Emergency Detention Act of 1950, which provided procedures for Executive detention, during times of emergency, of individuals deemed likely to engage in espionage or sabotage.”

⁷¹ 18 U.S.C. § 4001(a) (2000)

⁷² Authorization for Use of Military Force, September 18, 2001, Public Law 107-40 [S. J. RES. 23], 107th Congress

⁷³ *Hamdi v. Rumsfeld*, 124 S.Ct. 2633 (2004) at 2639-40 (plurality opinion)

⁷⁴ Chemerinsky, E. (2005) ‘Civil Liberties and the War on Terrorism’ *Washburn Law Journal* 45, p 19, available at <http://washburnlaw.edu/wlj/45-1/articles/chemerinsky-erwin.pdf>

⁷⁵ *Hamdi* *ibid* at 2648 (plurality opinion)

The final issue concerned whether the separation of powers limited the role of the judiciary in implicating the President's war powers. The court rejected the government's claim that separation of powers principles "*mandate a heavily circumscribed role for the courts in such circumstances.*" The court asserted that wartime does not afford the President a "*blank check*" in dealing with citizens rights.⁷⁶ The court felt "*it would turn our system of checks and balances on its head to suggest that a citizen could not make his way to court with a challenge to the factual basis for his detention by his Government simply because the Executive opposes making available such a challenge.*"⁷⁷ Thus, the court's decision makes it explicitly clear that Hamdi must be given a meaningful factual hearing, which at a minimum includes notice of the charges, the right to respond, and the right to be represented by an attorney, rights which are considered by many as absolute rights.⁷⁸

However, the ruling failed to adequately instruct lower courts regarding the proper course for factually similar cases in the future. Firstly, the plurality opinion declined to define the term "enemy combatant". The Court also failed to outline a constitutionally acceptable procedure for determining whether a citizen-detainee's enemy combatant status is accurate. Additionally, the court suggested military tribunals may be constitutionally acceptable to fulfil the role of the neutral decision-maker. Furthermore, the Court suggested that hearsay evidence might be admissible and the burden of proof could even be placed on Hamdi. Since the fairness and the constitutionality of the due process hearing is paramount to the legitimacy of detaining citizen-enemy combatants in wartime, the Court's opinion on the four counts above leaves the outlook for US citizens disputing their detention in conjunction with the 'war on terror' murky and ambiguous.

The Court did not question the legitimacy of the Executive's actions to seize and detain any person suspected of terrorism as an enemy combatant and so the actions of the Executive are not legally and constitutionally restricted. Instead, the court rejected the government's argument that suspects can be detained indefinitely without judicial review of the basis on which they are detained.

⁷⁶ Ibid at 2650 (plurality opinion) (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952))

⁷⁷ Ibid at 2650

⁷⁸ Chemerinsky, E., *ibid*, p 19

Nevertheless, many believed such a decision was valid. Anderson argued that the result reached by the majority opinion in *Hamdi* was correct. When a US citizen is captured on the battlefield by the United States military in conjunction with the War on Terror, the Government may not label that individual an "enemy combatant" and indefinitely detain him without access to a lawyer. The citizen's right to due process guaranteed by the Constitution mandates that he be given a meaningful hearing before a neutral decision-maker in which he may rebut the underlying facts of his detention and "enemy combatant" label. Anderson also agrees that the Court correctly reasoned that the President was congressionally authorized to detain citizens and non-citizens, once it has been sufficiently established that the individual is an enemy combatant.⁷⁹

Similar issues, albeit regarding non-US citizens, arose in *Rasul v. Bush*.⁸⁰ In a landmark ruling, the Supreme Court held that Federal Courts did indeed have jurisdiction to hear habeas petitions from non-citizens held at Guantanamo Bay.⁸¹

The Supreme Court explicitly rejected the government's argument that the detainees were foreign nationals outside US sovereign territory, which barred them from challenging their detention in US courts. Although the government invoked the decision in *Johnson v Eisentrager*,⁸² where German citizens captured by US forces in China had no right to bring *habeas corpus* applications in US courts, the majority in *Rasul* identified important differences between the *Eisentrager* and Guantanamo detainees. Firstly, the court held that Guantanamo detainees are not nationals of a country which can be categorically classed as being at war with the US. Next, these persons deny engagement in acts of violence against the US. Furthermore, the detainees have never been charged or afforded access to any tribunals, and additionally, they are held in territory under US control.

The government's argument that the naval base lies outside the jurisdiction of US courts also failed to convince the court. Stevens held that legislation purports that district courts can, 'within their respective jurisdictions', entertain habeas applications by persons claiming to be

⁷⁹ Anderson, J. B. (2005) 'Hamdi v Rumsfeld: Judicious Balancing At The Intersection Of The Executives Power To Detain And The Citizen – Detainee's Right To Due Process' 95 *Journal of Criminal Law and Criminology* 689

⁸⁰ *Rasul v. Bush* [2004] 124 S. Ct. 2686

⁸¹ Federal Habeas Corpus Statute (28 U.S.C. § 2241)

⁸² *Johnson v Eisentrager* [1950] 339 U.S. 763

held in violation of the laws of the US.⁸³ Such jurisdiction extends to aliens, held in a territory over which the US “*exercises plenary and exclusive jurisdiction, but not ultimate sovereignty.*”⁸⁴ Noting that, by the express terms of its agreements with Cuba, the US exercises “*complete jurisdiction and control*” over Guantanamo Bay, it was held that the jurisdiction of the US courts extends to those detained there.⁸⁵

Nevertheless, the court left unanswered several questions. Firstly, the majority offered no guidance on the process to be employed in reviewing the legality of the detentions. Next, the majority's interpretation of the habeas statute⁸⁶ could be interpreted to mean that the specific holding of *Eisentrager* has been overruled. Also, as Justice Scalia argued in his dissenting judgement, the Court's extension of federal habeas jurisdiction “*to the four corners of the earth*”⁸⁷ could potentially mean that even an alien captured, tried, and convicted by a military commission, and incarcerated outside US sovereign territory, may arguably have access to US courts. Finally, the majority's opinion contains no discussion of whether petitioners have any substantive rights under the US Constitution, especially the rights to correct legal procedure, a speedy and public trial and to due process and equal protection.

Despite this, the case is significant in according the Guantanamo prisoners access to Federal Courts and in providing such courts a role in prescribing the procedures to be followed, “*If nothing else, Rasul has opened the window at Guantanamo by requiring the government to justify its detention policy in a court of law.*”⁸⁸ The impact of these 'enemy combatant' decisions may, however, be much more limited than what Justice Scalia's dissent in *Rasul* suggests.

Rather than developing a comprehensive legal framework governing the conduct of the ‘war on terrorism’, the Supreme Court stuck to the narrow issues presented by the specific cases at hand. Therefore, numerous crucial questions raised by the detention practices, as well as by the justifications advanced in their support, remain unanswered. Furthermore, the decisions

⁸³ Federal Habeas Corpus Statute (28 U.S.C. § 2241)

⁸⁴ *Rasul* *ibid* at Pp. 4-16

⁸⁵ *Ibid* at 2696

⁸⁶ That a district court has jurisdiction so long as the custodian may be served with process, even if the petitioner is an alien incarcerated outside United States sovereign territory.

⁸⁷ *Rasul*, 124 S. Ct. at 2701 and 2706, per Justice Scalia

⁸⁸ Shapiro, S. R. (2005) ‘The Role Of The Courts In The War Against Terrorism: A Preliminary Assessment’ 29 *Fletcher Forum of World Affairs* 103

do not question the powers claimed by the Executive, such as the classification of detainees as 'enemy combatants'. Whalin argues that US Congress and courts have implicitly authorized the President to detain those individuals, regardless of citizenship, whom he determines are enemy combatants, either without charging them, or concrete evidence of their terrorist connections.⁸⁹ However if the administration is right, it could capture US citizens on American soil, far from any battlefield and unconnected to any traditional armed conflict, and detain them indefinitely as 'enemy combatants' without charge.

Nevertheless, the Supreme Court's decisions remains significant. In *Hamdi*, the Executive is reminded that foreign citizens must be afforded the correct due process. In *Rasul*, the Court upheld the right of foreign detainees to challenge the legality of their detention. The *Rasul* decision resulted in high numbers of *habeas corpus* petitions to the US District Court for the District of Columbia. However, there appears to be inconsistencies between decisions.

When faced with the opportunity to check the power of the Executive branch and restore individual freedom, the US Supreme Court, in one instance, upheld the government's authority to detain citizens and offered only a modified form of due process to the detainee.⁹⁰ In another instance, however, it refused to address the issue altogether, twice delaying the constitutional inquiry based on jurisdictional technicalities and procedural preferences.⁹¹ It is clear from these cases that the court's function in time of war is to make sure that detentions are not without justification and to provide detainees with an opportunity to challenge the Government regarding their classification as enemy combatants and the legality of their detentions. Once evidence is presented to the courts that a detainee is being detained as a result of participating in active hostilities against the US, and that the detainee is an enemy combatant, the role of the court in the matter is completed.⁹²

Furthermore, in a landmark ruling, the Supreme Court declared that military commissions “*lack the power to proceed because its structure and procedures violate both the Uniform*

⁸⁹ Whalin, S. A. (2006) 'National Security Versus Due Process: Korematsu Raises Its Ugly Head Sixty Years Later In Hamdi And Padilla' 22 Georgia State University Law Review 711

⁹⁰ *Hamdi*, *ibid* at Part II.B.1

⁹¹ *Rumsfeld v. Padilla* [2004] 124 S.Ct. 2711

⁹² Garrison, A. H. (2003) 'Hamdi, Padilla and Rasul: The War on Terrorism on the Judicial Front' 27 *American Journal of Trial Advocacy* 99

Code of Military Justice (UCMJ) and the four Geneva Conventions.”⁹³ Despite contrary assertions by the government, the Court upheld its right to hear the appeal in *Hamdan v Rumsfeld*,⁹⁴ asserting the DTA does not strip Federal Courts’ jurisdiction over cases pending on the date of its enactment.

Hamdan was designated for trial before a military commission however his petition for a writ of *habeas corpus* was upheld by the district court. The court held that Hamdan could not be tried by a military commission unless he was found by a competent tribunal not to be a ‘prisoner of war’ under the Third Geneva Convention.⁹⁵ On appeal, however, the DC Circuit Court reversed the district court’s decision.

On 29 June 2006, the Supreme Court reversed the ruling of the Court of Appeal. Ruling that it had jurisdiction, the Court declared that the government did not have authority to set up these military commissions, and such tribunals were illegal under both the UCMJ and the Geneva Conventions.

Rejecting the government’s argument regarding the President’s powers, Justice Kennedy stated: “*As presently structured, Hamdan's military commission exceeds the bounds Congress has placed on the President's authority...*”⁹⁶ Four members of the Court explicitly advised the President to reconsider his strategy and to “*return to Congress to seek the authority he believes necessary.*”⁹⁷ They reaffirmed that the Government has identified no “*important countervailing interest*” that permits courts to depart from their general “*duty to exercise the jurisdiction that is conferred upon them by Congress.*”⁹⁸

1.4 Legislative Response to the Supreme Court decisions

The Court’s decisions placed the military and armed forces in “*an unexpected and untenable position*”, where the United States government was continuously faced with questions

⁹³ *Hamdan v. Rumsfeld* 126 S. Ct. 2749, 2764-69 (2006) at Pp. 49–72.

⁹⁴ *Ibid*

⁹⁵ A ‘prisoner of war’ is a combatant captured by the enemy and interned until the end of the current conflict.

⁹⁶ *Hamdan* *ibid* (Kennedy, J., concurring) Justices Souter, Ginsberg, and Breyer joined Justice Kennedy's concurrence.

⁹⁷ *Ibid* (Breyer, J., concurring)

⁹⁸ *Ibid* at 716 (majority opinion)

regarding “an indeterminate number of issues related to detaining prisoners.”⁹⁹ The government considered other methods of circumventing the above decisions by using methods such as transferring non-citizen detainees to prisons built and monitored by the United States in their countries of citizenship, ostensibly under the control of those nations.¹⁰⁰ Instead, however the Supreme Court decisions led to Congress enacting the following legislation.

Firstly, due to the influx in habeas petitions after Rasul, Congress enacted the Detainee Treatment Act (DTA) 2005, which purported to deprive the Federal Courts of habeas jurisdiction.¹⁰¹ The Act restricts the right of a person designated as an ‘enemy combatant’ to petition US Federal Courts for a writ of *habeas corpus*. The DTA authorises an appeal to the courts by a person designated as an “enemy combatant”, or convicted by a military commission after the military trial and appeal is concluded. Detainees can request to review the proceeding of the tribunal which can only be heard by the US Court of Appeals for the District of Columbia Circuit and is only permitted providing it is an appeal related to the composition of the review tribunal, or an appeal of the initial decision. The request is purely procedural and does not involve an investigation of the facts themselves.

The US justifies such measures by claiming that detainees in Guantanamo are dangerous and a threat to global security. This is the legal implementation of “*a space of non-law within the law*.”¹⁰² The legislation effectively allows the US administration to imprison individuals and refuse to afford them the right to a fair trial, and thus potentially restrict the possibility of legal recourse. Nevertheless, it is important because the Act provides detainees a means of access to the United States federal court system to ensure that any final decision by the military commission and appeal thereafter is consistent with the military order and the United States Constitution.

Despite having ‘solved’ this problem however, Congress was also urged by the Executive to address issues surrounding the use of military commissions. The decision of the Supreme Court in *Hamdan* prompted the Executive to reconsider their strategy. The decision

⁹⁹ Huckert, T. L. (2006) ‘The Undetermined Fate of the Guantanamo Bay Detainees’ Habeas Corpus Petitions’ 9 *Gonzaga Journal of International Law* 236, page 267 – 268, available at <http://www.gonzagajil.org>

¹⁰⁰ Raimond, R. (2006) ‘The Role of Indefinite Detention in Antiterrorism Legislation’ 54 *University of Kansas Law Review* 515

¹⁰¹ Detainee Treatment Act § 1005(e), 118 Stat. at 2741-43

¹⁰² Paye, J. C. (2007) *Global War on Liberty*, (Telos Press Publishing), page 62

demonstrated that the government's first attempt at achieving the proper constitutional balance between national security and civil liberties had not been successful.

Thus, Congress enacted the Military Commissions Act 2006, which enhanced the use of military commissions. The Act suspends *habeas corpus* for any person determined to be an "unlawful enemy combatant"; determination of which is at the discretion of the US Executive and for which there is no right of appeal. The result is that this potentially suspends *habeas corpus* for any non-citizen.¹⁰³ However, the MCA highlights the importance of a just system to prosecute suspected terrorists and therefore provides for a number of safeguards.

Firstly, the Act authorises a Combatant Status Review Tribunal (CSRT), or another competent tribunal established under the authority of either the President or the Secretary of Defense, to decide if a prisoner is indeed an enemy combatant. The Act also provides for a Court of Military Commission Review, a special appellate-level court, with a three-member panel to review the decision of the commission. Additionally, the Act also provides further protection for detainees by confirming the provision in the DTA to allow an appeal to the United States Court of Appeals for the District of Columbia Circuit, despite the fact that the Act otherwise eliminates federal court jurisdiction over alien detainee petitions for *habeas corpus*. Lastly, the Act allows a further level of review by authorising the Supreme Court review, by certiorari, of the federal circuit court's decision.

Therefore, despite criticisms, the procedures within the MCA are considered to be "*more protective of detainees' rights than was the case with any military commissions in American history.*"¹⁰⁴ Moreover, although the Act prevents alien detainees from seeking immediate review of their detention, it does so by providing different levels of judicial review. In doing so, Congress and the Executive argue this legislation creates a viable constitutional balance between national security and civil liberties.

The CSRT, however, expands the concept of enemy combatant to include anyone who belongs to al-Qaeda and associated groups. It also expands its applicability to the entire world, which reinforces the idea that US counter terrorism measures have global reach.

¹⁰³ MCA §1005(e)(1), 119 Stat. 2742.

¹⁰⁴ Rivkin Jr., D. B. Casey, L. A. (2007) 'Opposing View, Leave well enough alone; Existing laws give Guantanamo detainees all the rights they need' *U.S.A. Today*, May 11 2007, at 14A

The MCA attempts to disregard judicial decisions which challenge the procedure of the CSRTs by relying on the idea of ‘enemy combatant’. A decision by the Federal District Court in Washington in January 2005 had ruled that CSRTs violated two clauses of the Fifth Amendment. This was because secret evidence obtained through torture was permitted, and detainees were refused legal access. Additionally, it was held that the vagueness of the term ‘enemy combatant’ permits the government to incriminate anyone who is in contact with a person or an organisation considered to be a terrorist.¹⁰⁵ Thus, although the Supreme Court ruled in favour of detainees in *Hamdi*, *Rasul* and *Hamdan*, the effect of these have been subsequently limited by counter measures such as the DTA and the MCA.

However, many believe such measures are warranted considering the exigencies of the situation. Geer argues that fear regarding the extent of presidential power is unwarranted, pointing out that those detained have provided adequate justifications for detention. He justifies the Government’s decision to detain based on the concept of proportionality. He argues “*the power to detain is proportional with the expansion of danger during the War on Terror, and is actually curtailed compared with the power given to the President in prior conflicts.*”¹⁰⁶ Also, Geer argues for courts to allow enemy combatants to challenge their status by an Article III review would be potentially harmful and damaging as the cases of *Hamdi* and *Rasul* taken in conjunction, provide the President with the requisite flexibility to prosecute the long-term war on terror, and to adequately protect the 290 million American citizens who justifiably demand protection from future terrorist attacks, and who have received that protection since September 12, 2001.¹⁰⁷

By allowing the President to exercise such power to counter anti-democratic goals of Al-Qaeda, it is argued that he is subsequently protecting fundamental human rights of the public, particularly the right to life, and the rights to expression, religion and press. Failing to allow the President to do this, on the basis that the rights of detainees will be violated is inadequate

¹⁰⁵ In *re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443 (D.D.C. 2005), at 475, per Judge Green, consolidated and heard as *Boumediene v. Bush* by the D.C. Circuit Court of Appeals, and on appeal, the Supreme Court. *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir.2007), *Boumediene v. Bush*, 553 U.S., 128 S.Ct. 2229 (2008).

¹⁰⁶ Geer, J. E. (2005) ‘First and Ten Against American Terrorism, And The Supreme Court Punts: Why The Supreme Court Should Have Reversed The Court Of Appeals’ Ruling Of *Rumsfeld v. Padilla*’ 28 *Hamline Law Review* 135

¹⁰⁷ *Ibid.*

for some, who believe that rights of detainees, such as the right to legal access and due process, are insignificant and trivial in comparison to the right of life of millions of American citizens. However, Erwin Chemerinsky argues “it cannot be that the president has the authority to detain American citizens apprehended in the United States for crimes committed in the United States without complying with the provisions of the Constitution.”¹⁰⁸ Nevertheless, the courts have emphasised that “core strategic matters of war making belong in the hands of those who are best positioned and most politically accountable for making them.”¹⁰⁹ Such a view was demonstrated by the initial decision in *Boumediene v Bush*.¹¹⁰

1.5 Legality of the Military Commissions Act

The Bush administration subsequently experienced their first judicial victory since the passage of the MCA in *Boumediene v Bush*.¹¹¹ The United States Court of Appeals for the District of Columbia Circuit confirmed that the Military Commissions Act prevents aliens detained at Guantanamo Bay from petitioning for *habeas corpus*.¹¹² The issue before the *Boumediene* court was whether Federal Courts have jurisdiction over petitions for writs of *habeas corpus* filed by aliens captured abroad and detained as unlawful enemy combatants at Guantánamo. The detainees relied on the Supreme Court's decision in *Rasul*, which recognised the right of aliens to seek a writ of *habeas corpus*. The government, however, urged the court to recognise that *Rasul* was decided strictly on the basis of the *habeas corpus* statute then in place. The majority opinion, delivered by Judge A. Raymond Randolph, found that such changes in statute distinguished the *Rasul* decision from the issue before the court.

The government believed this decision would prevent habeas petitions filed in Federal Courts from being heard and therefore limiting alien enemy combatants to challenging their detention in Federal Courts only after military proceedings and appeals therein. However, the detainees petitioned the Supreme Court for a writ of certiorari.

The Supreme Court held that aliens designated as enemy combatants have the constitutional right to *habeas corpus* review in US Federal Courts. It also ruled that the CSRTs were

¹⁰⁸ Chemerinsky, E., *Civil Liberties and the War on Terrorism*, page 4.

¹⁰⁹ *Hamdi*, 542 U.S. at 531 (majority opinion)

¹¹⁰ *Boumediene v. Bush*, 476 F3d 981 (D.C. Cir)

¹¹¹ *Ibid*

¹¹² *Ibid*

"inadequate". Writing for the majority, Justice Anthony Kennedy maintained that "*the laws and Constitution are designed to survive, and remain in force, in extraordinary times.*"¹¹³ Reviewing the MCA, the Supreme Court held that section 7, which limited judicial review of Executive determinations of the petitioners' enemy combatant status, was unconstitutional. The court found that this did not provide an adequate *habeas corpus* substitute, and therefore acted as an unconstitutional suspension of the writ of *habeas corpus*.¹¹⁴

The failure of Congress "*to create an adequate substitute for habeas corpus,*" led to the enactment of the *Habeas corpus* Restoration Act in 2007.¹¹⁵ This legislation repeals those provisions of the DTA and the MCA that eliminated the jurisdiction of any court to consider applications for a writ of *habeas corpus* filed by aliens designated as enemy combatants. It therefore restores statutory *habeas corpus* to enemy combatants, subject to limitations on habeas that pre-dated the DTA, e.g. the AEDPA which set a statute of limitations on *habeas corpus* claims. It also allows courts to consider legal challenges to military commissions only as provided by the UCMJ or by a *habeas corpus* proceeding. Thus the effect of such legislation may be of rhetorical significance only.

1.6 Summary of US

The balance between civil liberties and national security, particularly during times of war, remains a contentious issue. The fundamental rights which permit detainees' access to US courts to challenge the legality of their detention are often the rights which are partially or totally set aside when the nation is at war.

Although suspension of the writ of *habeas corpus* is an 'exceptional' course of action, the preceding examples show that Congress has felt compelled to authorise the suspension of the writ of *habeas corpus* during times of indisputable and congressionally declared rebellion or invasion. Suspension of the writ in such circumstances appears to satisfy two conditions. Firstly, each suspension has been performed by the Executive pursuant to express authority delegated by Congress in response to a state of "rebellion" or "invasion."¹¹⁶ Secondly, each

¹¹³ Ibid, per Justice Kennedy

¹¹⁴ Ibid

¹¹⁵ Habeas Corpus Restoration Act of 2007, June 26, 2007, Report 110-90, 110th Congress 1st Session, page 5

¹¹⁶ U.S. Const. Art I, s 9, cl. 2.

suspension was limited to the duration of that necessity.¹¹⁷ Therefore, such actions which have deprived civil liberties from those engaged in hostilities against the United States were justified on the basis that they were essential to protect the security of the nation.¹¹⁸

Furthermore, history illustrates that actions during traditional wartime have traditionally involved temporarily overriding certain constitutional rights in the name of national security. Thus, actions such as suspending the writ and using military commissions existed only whilst hostilities lasted and the Rule of Law again prevailed when peace was restored. In contrast, the 'war on terror' is much more complex. Whereas prior to 9/11, the writ has been specifically suspended and military commissions have been declared permissible by Congress and the judiciary, actions after 9/11 differ somewhat. For example, during the Civil War, Lincoln, albeit initially without Congressional authorisation, declared suspension of the writ in areas of paramilitary violence. In contrast, Bush attempted to strip individuals of this right with his decision to detain suspected terrorists outside the US and try them by military commissions. The fact that his decision to do so was subsequently successfully challenged is of little significance here; the point is that it was an indirect way of preventing individuals from petitioning to US courts.

Furthermore, by declaring a war on terror, the US administration entered into unknown territory. Unlimited in time, scope and territory, the war on terror is unlike any other in global history. The war was declared in 2001 and has been ongoing since, with no end in sight. This means that some detainees could be deprived of their rights indefinitely. Also, the war was declared against terrorists, in particular al-Qaeda, and therefore not a specified nation. This again makes it difficult to predict when the war may end, particularly because there are many groups around the world which have been affiliated to Al-Qaeda. Although members of al-Qaeda may be captured and detained, further members may join and newer more radical terrorist groups may emerge. This shows that the war is one which is undefined in scope and territory and, therefore, it is impossible to predict when the war may end.

Moreover, as the methods employed by contemporary terrorists are inherently different to those employed by previous terrorists, counter-measures must be adequate to provide for the

¹¹⁷ *Boumediene v Bush* 476 F3d 981, 1007 (D.C. Cir 2007).

¹¹⁸ Posner, R. (2006) *Not a Suicide Pact: The Constitution in a Time of National Emergency* (Oxford University Press) at 45.

modern threat. Historically, US anti-terrorism policy focused on deterring and punishing state sponsors as opposed to terrorist groups. However, the Patriot Act and subsequent legislation signifies an important shift in policy from deterrence to pre-emption and prevention.

Other such practices which raise questions regarding whether the right is being inadvertently curtailed include the classification of detainees as 'unlawful enemy combatants', and the use of military commissions. Although the Supreme Court decisions in *Hamdi*, *Rasul* and *Hamdan* ruled in favour of the petitioners, the DTA and MCA appear to overshadow these decisions. The DTA attempts to strip Federal Courts of their jurisdiction to hear habeas petitions from a person designated as an 'enemy combatant', and the MCA specifically suspends *habeas corpus* for any person determined to be an "unlawful enemy combatant." However, the DTA and MCA have received both international and judicial criticism and decisions by the Supreme Court have challenged the legality of certain provisions.

Thus, United States history supports the assertion that true suspension of the writ depends wholly on the existence of the conditions, in conjunction with express congressional authorisation.¹¹⁹ Therefore, this assertion would suggest that since the United States is neither presently engaged in rebellion nor facing invasion, the actions taken by the Executive in the name of 'the war on terror', such as the enactment of the DTA and MCA, do not constitute a legitimate suspension of the writ of *habeas corpus*.

Some scholars question liberalists' parallel between those events and today's war on terrorism. "*The Bush administration has done nothing like that,*" says Cass Sunstein, a liberal constitutional law professor at the University of Chicago. "*This isn't to say that there are no legitimate criticisms. But by historical standards, it's been a pretty cautious response.*" Today's culture, he suggests, has become much more protective of civil liberties since the expanded definition of constitutional protections that followed the civil rights revolution of the 1960s.

The administration's legal tactics have certainly received criticism. However, the Justice Department and its defenders argue that dramatic steps are needed because the threat is grave. Recognising the Constitutional rights relating to individual civil liberties, William Barr, the

¹¹⁹ Bland Jr., C. V. (2007) 'A Constitutional Limitation: The Controversy Surrounding The Military Commissions Act Of 2006 And The Writ Of Habeas Corpus' 53 *Loyola Law Review*.497

former attorney general during the first Bush administration argued, “*Where you are dealing with extraordinary threats that could take tens of thousands of lives, a rule of reason has to prevail.*”¹²⁰

¹²⁰ Cannon, A. (2003) ‘Taking Liberties’, *U.S. News & World Report*, Vol. 134, Issue 16

UK Anti Terrorism Legislation Pre and Post 9/11

Having considered the approach of the US during times of war prior to 9/11 and the response thereafter, this section will consider the approach of the UK. The terror attacks on 7 July 2005 in London were not the first attacks that Britain had faced as they have, for many years, been trying to adequately respond to the terrorist threat posed by the IRA. Thus, it is important to consider whether pre-existing legislation was considered adequate to deal with pending attacks to the UK after 9/11 and 7/7.

Furthermore, comparison between the two nations allows the reader to identify any differences between the approach of the US and the UK, and allows the reader to draw conclusions concerning lessons one country can learn from the successes and failures of the other in their continuing struggle to achieve a viable and legitimate constitutional balance between prevailing interpretations of national security and civil liberties.

The previous section considered measures adopted by the US to deal with threats posed. This section will explore two main issues. Firstly, anti-terrorism legislation which was enacted during the 1970's will be examined. It considers methods used to contain paramilitary violence, such as internment and the use of Diplock courts, and the view of the ECtHR regarding whether detention without trial was 'strictly within the exigencies of the situation'.¹²¹ The section discusses the Terrorism Act 2000, which for the first time introduced permanent anti-terrorism legislation. The Act is particularly contentious due to its revised definition of terrorism.

Secondly, the section considers national security concerns in the aftermath of the 9/11 and 7/7 attacks, and thus, the enactment of further anti-terrorism legislation. This includes the Anti Terrorism Crime and Security Act 2001, the Prevention of Terrorism Act 2005, and the Terrorism Act 2006. The provisions contained within these Acts, and the Counter Terrorism Act 2008, will be discussed, with reference to case law. This will identify areas in which

¹²¹ Article 15(1) reads as follows: 'In time of war or other public emergency threatening the life of the nation, any High Contracting party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law'.

powers have been enhanced and whether any extraordinary measures, previously unheard of, have been adopted.

By considering actions in the UK, it will be possible to identify similarities and differences in the approaches of the two countries and assess the implications. For example, the approach of the UK may differ in some respects due to its obligations under the European Convention of Human Rights.

2.1 Anti-terrorist measures prior to 9/11

Attacks by paramilitary organisations have been prevalent throughout the UK for decades. Serious threats were posed by the IRA, particularly in the 1970's and so the UK government was compelled to adopt measures to ensure the safety of its nation and citizens. Therefore, the threat posed by terrorists is not a new phenomenon within the UK and it would appear that the nation would be somewhat more prepared than the US.

(i) Prevention of Terrorism Acts

In 1974, the Prevention of Terrorism (Temporary Provisions) Act re-enacted provisions contained in the 1939 Prevention of Violence (Temporary Provisions) Act. This included enhanced powers relating to detention, entry, and search and seizure. Also, whereas prior legislation was confined to Northern Ireland, such measures widened the scope to include related terrorist violence within Britain.

The legislation also included proscription of organisation and vested in the Home Secretary the power to issue exclusion orders. Most significantly, the legislation allowed the arrest of individuals without a warrant and on reasonable suspicion that they were guilty of an offence. It also extended police powers by allowing suspects to be held for questioning for forty eight hours, and for a further five days on the issuing of a Detention Order by the Home Secretary.

Despite posing a significant challenge to civil liberties, such provisions, although "*unprecedented in peacetime*," were considered as vital for the emergency.¹²² They

¹²² H.C. Debs (1974) Vol. 882 col. 35, 25 November 1974, Mr. Jenkins; Hansard, 29 November 1974

remained in force until they were replaced with the more permanent legislation, the Terrorism Act 2000.

(ii) Internment

The UK has also used the power of internment, which refers to the arrest and detention without trial of suspected terrorists. Authorised by the Civil Authorities (Special Powers) Act (Northern Ireland) 1956 (SPA) Regulations, an internment order could be issued against a person suspected of acting in a manner prejudicial to either the preservation of the peace.¹²³

Internment was used to prevent individuals from further participation in paramilitary activities.¹²⁴ The measure was justified with reference to the inability of the ordinary courts to restore peace and order and widespread witness intimidation,¹²⁵ which made it difficult to find witnesses willing to testify in open court and rendered jury trial problematic.¹²⁶

However the crucial intelligence on which the success of the operation depended was flawed, leading to the detention of many individuals who were not involved in any paramilitary activity.¹²⁷ Although preventative in conception, it proved punitive in exception.¹²⁸ Additionally, the process appeared to operate on a discriminatory basis with far more Republicans detained than Loyalists.

(iii) *Lawless v Ireland*

However, the use of internment was challenged in *Lawless v Ireland*¹²⁹ and in *Ireland v United Kingdom*.¹³⁰ Although *Lawless* did not concern the UK, it is important as it considered

¹²³ The Civil Authorities (Special Powers) Act (Northern Ireland) 1956

¹²⁴ Spjut R. J. (1986) 'Internment and Detention without Trial in Northern Ireland 1971-1975: Ministerial Policy and Practice' 49 *Modern Law Review* 712.

¹²⁵ *Report of the Commission to Consider Legal Procedures to Deal with Terrorist Activities in Northern Ireland*, Cmnd.518 (1972) Chairman: Lord Diplock. "Until the personal safety of witnesses and their families can be guaranteed, the use by the Executive of some extra-judicial process for the detention of terrorists cannot be dispensed with ...", page 10

¹²⁶ *Ireland v United Kingdom* [1978] 1 EHRR. 25 at p. 37 (para 36).

¹²⁷ *Report of the Commission to Consider Legal Procedures to Deal with Terrorist Activities in Northern Ireland*, Cmnd.518 (1972) Chairman: Lord Diplock, p.15 (para 32)

¹²⁸ Twining. W. L. (1973) 'Emergency Powers and Criminal Process: The Diplock Report' *Criminal Law Review* 406. p. 415.

¹²⁹ *Lawless v Ireland* (No 3) [1961] 1 EHRR 15

¹³⁰ *Ireland v United Kingdom* (1978) 1 E.H.R.R. 25.

whether detention without trial was a violation of Article 5 of the ECHR; whether the government had lawfully derogated under Article 15(3)¹³¹; and whether the measure of detention without trial was ‘strictly within the exigencies of the situation.’¹³² It was held that the derogation was lawful and detention without trial was ‘strictly within the exigencies of the situation’. Therefore, internment was upheld as lawful.

Ultimately, the matter involved two issues: (i) whether any less draconian methods than those adopted would have been sufficient to deal with the situation; (ii) whether the method employed was subject, so far as the situation allowed, to adequate safeguards to protect personal liberty.¹³³

It was held in both cases that such processes were a reasonable response to the circumstances, given the “margin of appreciation.” The court in *Lawless* considered the ordinary processes of criminal law inadequate, particularly the difficulties of gathering sufficient evidence to secure conviction. Also, the Court rejected the alternative of closing the border on the Republic side due to the serious socio-economic repercussions. It also rejected setting up special criminal courts due to the inability to restore peace and order.¹³⁴

Internment was not used after 1975 and there were many claims for its repeal.¹³⁵ However, the possibility of a drastic escalation in the level of violence suggests that, as a last resort, detention might be necessary to restore a modicum of order. Security may dictate the need to make provision for rapid reintroduction subject to prompt Parliamentary ratification.

However, whether internment reduced the paramilitaries’ potential for violence is highly debateable.¹³⁶ Lord Gardiner acknowledged its possible effectiveness in the short term but

¹³¹ Article 15(3) reads as follows: ‘Any High Contracting party availing itself of its right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefore. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed’.

¹³² Article 15(1) reads as follows: ‘In time of war or other public emergency threatening the life of the nation, any High Contracting party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law’.

¹³³ *Lawless* at p 31-38

¹³⁴ *Ibid* at p. 33.

¹³⁵ Op. cit per Baker, para 236.

¹³⁶ Compare Boyle, K. Hadden, T. and Hillyard, P. (1975) *Law and State: The Case of Northern Ireland* (London: Martin Robertson) Chapters 4 and 5, pp. 74-77, with Wilkinson, P. (1977) *Terrorism and The Liberal State* (New York University Press, New York), pp. 150-58.

not as a long term strategy.¹³⁷ Critics have argued that “*the primary sanction of such strategies is to deprive the suspect of their liberty.*”¹³⁸ Preventative activities are not always effective however. Along with alienating communities who are vital to combating threats, such actions undermine the Rule of Law and judicial processes.¹³⁹

Moreover, the right to be free from arbitrary Executive detention is recognised by the right to petition for a writ of *habeas corpus*. However, the UK government appeared to curtail this right with the introduction of Diplock courts.

(iv) Diplock Courts

Alternatives to internment were considered by Lord Diplock.¹⁴⁰ This led to the establishment of Diplock courts,¹⁴¹ which consist of a single judge to try individuals. All three official reviews of the powers in Northern Ireland have considered trial by a single judge to be preferable to jury trials.¹⁴² Jury trials were considered as unsuitable due to fear of intimidation of jurors¹⁴³ and the danger of partisan verdicts.¹⁴⁴ The use of courts may have been more widely accepted if there were three judges instead of one.¹⁴⁵

The Diplock courts essentially created two different systems to try individuals, dependent on where the offence occurred: committing an offence in Britain would result in a trial by ‘ordinary’ courts, whereas committing the same offence in Northern Ireland would result in special procedures.

The state has a duty to protect its nation and citizens and so the use of special courts may be necessary to deal with issues of jury and witness intimidation.

¹³⁷ *Report of a Committee to Consider, in the Context of Civil Liberties and Human Rights, Measures to deal with Terrorism in Northern Ireland* (1975) Cmnd. 5847, para 148

¹³⁸ Brandon, B. (2004) ‘Terrorism, Human Rights and the Rule of Law: 120 years of the UK's legal response to terrorism’ *Criminal Law Review* 997

¹³⁹ *Ibid* at p 15

¹⁴⁰ *Report of the Commission to Consider Legal Procedures to Deal with Terrorist Activities in Northern Ireland*, Cmnd.518 (1972) Chairman: Lord Diplock, page 32

¹⁴¹ Sections 8 and 9 of the Emergency Powers Act (EPA) 1991

¹⁴² Diplock, para 39; Gardiner, para 31; Baker, paras 114-118

¹⁴³ Baker, para 107

¹⁴⁴ Diplock, paras 36-37)

¹⁴⁵ Jackson, J., *Three Judge Courts in Northern Ireland*, in Standing Advisory Commission on Human Rights, 12th Annual Report (1985-86, H.C. 151), pp. 63-76.

(v) Permanent powers - The Terrorism Act 2000

The state's duty to protect the nation is further reflected by the Terrorism Act 2000. Replacing previous temporary anti terrorism legislation which dealt primarily with Northern Ireland, the Terrorism Act is far more significant in its nature. For the first time, it introduces provisions on a permanent basis. The Act contains an extended list of proscribed terrorist organisations, and most significantly, allows police to detain suspects for up to seven days. This was extended to fourteen days by the Criminal Justice Act 2003¹⁴⁶ and thereafter to twenty eight days by the Terrorism Act 2006.¹⁴⁷ However, this has not subsequently been renewed in 2011 and therefore, detention reverts back to 14 days under the CJA 2003.

The Act's main innovation, however, is its new definition of 'terrorism'. Terrorism is defined as 'the use or threat of action designed to influence the government or to intimidate the public or a section of the public for the purpose of advancing a political, religious, or ideological cause.'¹⁴⁸ The definition was further amended by the Terrorism Act 2006 to include action against international governments,¹⁴⁹ and by the Counter Terrorism Act 2008 to include racial causes.¹⁵⁰

The new definition changes the objective stated in the previous definition, which was '*the use of violence for the purpose of putting the public or any section of the public in fear*'. In contrast, this new definition limits the scope by ensuring it does not encompass for example, acts of hooliganism, unrelated to any political end, or even individual acts of aggression.

Nevertheless, the definition is significantly broader than its predecessor in many other respects. Firstly, the term 'violence' is extended to include risks to property, safety, and interference with computer systems.¹⁵¹ Next, the motives of terrorism are made considerably greater by activities including, 'influencing' the government, and further by including violence for religious, racial or ideological causes.

It may be argued that 'influence is too wide', particularly in relation to political actions under

¹⁴⁶ Part 13, Miscellaneous

¹⁴⁷ Section 23

¹⁴⁸ Terrorism Act 2000, section 1

¹⁴⁹ Terrorism Act 2006, section 34

¹⁵⁰ Lord Carlile (2007) *The Definition of Terrorism* (London: Cm 7052), para 65

¹⁵¹ Section 1(2) Terrorism Act 2000

Articles 10 and 11 of the ECHR.¹⁵² There may also be problems with ‘religious or ideological’ causes due to the extensive range of activities involved. For example, ‘religious’ may be intertwined with personal disputes such as family disputes about an arranged marriage. Such a view was rejected by the government, however.¹⁵³ Furthermore, single issue ideological campaigners such as ‘eco-terrorists’ or anti-abortion groups, could also count as political campaigners rather than terrorists even if their main impact is upon private individuals, rather than the state.

Despite assertions that s 1 is ‘practical and effective,’¹⁵⁴ the use of such a broad definition fails to focus on the key mischief of terrorism: the danger to political democracy. Instead, it allows for a whole range of activities, which may not actually be aimed at the state or sections of the public, for example, family disputes, as mentioned above. However, removing all references to motives would extend the special provisions to an over-broad range of circumstances.¹⁵⁵

Furthermore, the scope of the definition includes action outside the UK against foreign governments.¹⁵⁶ Section 1 does not require that the government, towards which the prohibited action is influenced, be democratic or legitimately established, as confirmed in *R v F*¹⁵⁷. Such measures make it possible to try any person who displays any violent action against any constituted government, no matter what the nature of the regime. There were unsuccessful attempts in Parliament to confine the foreign coverage of the Terrorism Act 2000 to ‘designated countries’ rather than regimes which might be viewed as ‘odious’.¹⁵⁸

The broad context given under the definition is also contentious. There is little emphasis on the types of seriously threatening behaviours being perpetrated or the nature of the perpetrators, for example eco terrorists, anti-abortionists and white supremacists. Greater emphasis on such points would render less capable the ordinary criminal justice processes

¹⁵² Tomkins, A., *Legislating against Terror* [2002] Public Law 205 at p 211

¹⁵³ Lord Carlile (2007) *The Definition of Terrorism* (London: Cm 7052), para 53

¹⁵⁴ Lord Carile (2006) *Report on the Operation in 2005 of the Terrorism Act 2000* (London: Home Office), para 32.

¹⁵⁵ Walker, C. (2009) *Blackstone’s Guide to the Anti-Terrorist Legislation 2nd* edition (Oxford University Press), page 10.

¹⁵⁶ Section 1(4)

¹⁵⁷ *R v F* [2007] EWCA Crim 243

¹⁵⁸ Hansard HC (2000) David Lidlington, Standing Committee D, col 26 (18 January 2000). That s 1 protects the Libyan government was confirmed in *R v F* [2007] EWCA Crim 243.

and thereby justify special laws. Hence, measures which may be considered as ‘draconian’ would be limited to circumstances where ordinary policing and laws would not suffice.

Further qualifications would therefore ensure that special measures offer a proportionate response. This is recognised by the government to some extent however, by the refusal to treat animal rights extremists as ‘terrorists’ even though they fall within the definition.¹⁵⁹

However, the definition may encourage the occasional excess, and may set a significant precedent for comparable jurisdictions.¹⁶⁰ On the other hand, the extended definition ensures the use of special measures for individuals inspired by groups such as Al-Qaeda. For example, the fact that the London attacks in July 2005 were commissioned by individuals deploying sophisticated techniques, with possible international support, raises elements of complexity which may defy the application of ordinary law.

The Terrorism Act 2000 marked an important new phase in the laws against political violence within the UK. It launched a more unified and permanent regime. By changing the scope of the term ‘terrorism’, the legislation provides for permanent measures to encompass many different types of activities for the purpose of achieving a political, religion or ideological cause.

Interestingly, the Terrorism Act excludes the use of exclusion orders and the power of internment without trial, a measure common between 1971 and 1975.¹⁶¹ Also, there is no requirement for periodic renewal or re-enactment.¹⁶² Although this is logical, there is also little scrutiny of measures which substantially impair individual rights.

Despite such measures, the UK enacted further provisions after the 9/11 attacks. Whether these measures are necessary depends on whether the tactics and methods used by the terrorists are inherently different to those employed by past terrorists.

¹⁵⁹ The Government Reply to the Report by Lord Carlile of Berriew Q.C. Independent Reviewer of Terrorism Legislation (2007) *The Definition of Terrorism*, (London; CM 7058), p 5

¹⁶⁰ See Roach, K. ‘Sources and Trends in Post 9/11 Anti Terrorism Laws’ in Gould, B. and Lazarus, L. (2007) *Security and Human Rights* (Oxford: Hart Publishing) 227-256, p 244.

¹⁶¹ See Spjut R. J. (1986) ‘Internment and Detention without Trial in Northern Ireland 1971-1975: Ministerial Policy and Practice’ 49 *Modern Law Review* 712.

¹⁶² See Lord Lloyd (1996) *Inquiry into Legislation against Terrorism* (London: CM 3420) paras 1.20, 17.6

2.2 Protecting national security after 9/11 in the UK

In the US, the attacks of 9/11 prompted the passing of the Patriot Act and similarly, the UK government also responded by enacting and implementing anti-terrorism legislation, including the Anti-Terrorism Crime and Security Act 2001 (ATCSA), and thereafter the Prevention of Terrorism Act 2005 (PTA). Further provisions were unveiled by the Terrorism Act 2006 and the Counter Terrorism Act 2008. Legislation struggled with further legal consequences of dealing with international terrorism, particularly because acts of terrorism extended beyond the battlefield and the use of sophisticated techniques created potential problems for detecting and gathering evidence.

(i) Anti-Terrorism Crime and Security Act 2001

The ATCSA came amongst a terrorist threat quite different from anything previously faced.¹⁶³ Similarly to the US, the ATCSA authorised indefinite detention of foreigners suspected of terrorism, without either charge or conviction.¹⁶⁴ Part IV has subsequently lapsed however. An array of limits and reviews were inserted, including a one-off review of the entire Act.¹⁶⁵ The report by the Privy Counsellor Review Committee recommended the end of detention without trial as well as detailed changes in other areas.¹⁶⁶

Along with the lack of safeguards, for example in relation to the right to liberty under Article 5 of the ECHR, the right to be free of discrimination under ECHR Article 14, and the significant risk of a violation of the right to respect for private life under Article 8, because of the range of offences covered,¹⁶⁷ the legislation was also criticised for its failure to provide any protection against resident suspected terrorists. Moreover, it was stated that viable alternatives existed in the forms of either a more aggressive criminal prosecution stance or

¹⁶³ Hansard HL (2001) Lord Goldsmith, vol 629, col 142 (27 November 2001).

¹⁶⁴ ATCSA, Part IV, Article 21 “The Secretary of State may issue a certificate under this section in respect of a person if the Secretary of State reasonably believes that (a) the person present in the United Kingdom is a risk to national security, and (b) suspects that the person is a terrorist.”

¹⁶⁵ Section 122

¹⁶⁶ For further discussion on the deportation and detention policies used by the UK after 9/11, see Elliott, M. (2010) ‘United Kingdom: The “war on terror,” U.K.-style - The detention and deportation of suspected terrorists’ *International Journal of Constitutional Law* Vol. 8 Issue I, p131-145.

¹⁶⁷ Joint Committee on Human Rights (2002) *Anti-Terrorism, Crime and Security Bill*, Second Report of Session, (HL Paper 37, HC 372), para. 24.

intrusive administrative restraints.¹⁶⁸ This included the use of telephone/email intercepts currently prohibited by section 17 of Regulation of Investigatory Powers Act (RIPA) 2000.

However, the government regarded Part IV as indispensable and the alternative strategies, specifically a legal framework both effective and compatible with the United Kingdom's human rights obligations including full compliance with Article 5 of the ECHR, as unworkable.¹⁶⁹ In order to comply with the Human Rights Act 1998 (HRA), therefore, the government were required to invoke derogation under Article 15,¹⁷⁰ because indefinite detention without charge or trial contravened Article 5 of the ECHR.¹⁷¹

In *A v Secretary of State for the Home Department*,¹⁷² the House of Lords held that the laws do not grant any mandate permitting indefinite detention and thus issued a declaration of incompatibility under section 4 of the HRA. The Court ruled that the measures taken were not "strictly required by the exigencies of the situation", and were contrary to Article 14 of the ECHR.¹⁷³ This was despite the fact that the state was considered to be amidst a war / public emergency. Emphasising the need to uphold the Rule of Law, Lord Hoffman explained excessive measures which violated individual rights posed greater danger to "*the life of the nation, in the sense of a people living in accordance with its traditional laws and political values*" than terrorism itself. Lord Hoffman stressed terrorists aimed to undermine the fundamental principles of a democracy. Thus, the Executive resorting to measures potentially infringing individual rights challenge the long established values and principles of society, which "*is the true measure of what terrorism may achieve.*"¹⁷⁴ This statement was received with enthusiasm by liberal groups but not by critics, who considered that it violated the rule that a Judge should not descend into politics, as this was ineffective irrational and discriminatory.

(ii) Prevention of Terrorism Act 2005

¹⁶⁸ Privy Counsellor Review Committee (2004) *Anti-terrorism, Crime and Security Act 2001 Review, Report* (2003-04 HC 100), para 93.

¹⁶⁹ Home Office (2004) *Counter Terrorism Powers* (London: Cm 6147), Pt I paras 8, 34, Pt II para 31.

¹⁷⁰ The Human Rights Act 1998 (Designated Derogation) Order 2001 SI 2001/3644.

¹⁷¹ Art 5 (1)(f)

¹⁷² *Judgments - A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department* (Respondent), [2004] UKHL 56 on appeal from: [2002] EWCA Civ 1502

¹⁷³ *Ibid*

¹⁷⁴ *Ibid*

Consequently, to avoid the need to derogate, the government enacted the Prevention of Terrorism Act (PTA) 2005 which replaced Pt IV of the 2001 Act with Executive restriction by way of control orders.¹⁷⁵ This empowers the Home Secretary to impose a control order “*if [s/he] (a) has reasonable grounds for suspecting that the individual is ... involved in terrorism-related activity; and (b) considers that it is necessary, to protect the public from a risk of terrorism.*”¹⁷⁶

Control orders are preventative orders that impose one or more obligations upon an individual. They are designed to prevent, restrict or disrupt involvement in terrorism-related activity, the orders are either derogating orders,¹⁷⁷ involving house arrest, or non-derogating orders,¹⁷⁸ which restrict the individual's movement. Although the control order may be contested, individuals subject to control orders may remain unaware of the allegations or evidence against them, which is similar to those detained by the US in Guantanamo Bay.

Although the government sought to rely solely upon non-derogating orders, it has received condemnation for exceeding its limits in relation to the infringement of liberty and also in regard to the ‘thin veneer of legality’ in the procedures by which orders can be challenged.¹⁷⁹ Nevertheless, a decision by the House of Lords indicates that non-derogating control orders are, in principle, lawful.¹⁸⁰ However, too much restriction on liberty is a breach of Article 5.

The PTA is significant for a number of reasons. Firstly, unlike the ATCSA, the PTA applies to both British and non-British suspected terrorists. Thus, exceptional procedures have been extended to British citizens, something which the US has been unable or unwilling to do.¹⁸¹ Justification for this relies on the fact that the perpetrators of the 7/7 attacks were mostly British.

Secondly, the use of control orders raises questions regarding suspension of law and *habeas*

¹⁷⁵ Prevention of Terrorism Act 2005, Section 14 (3)

¹⁷⁶ Ibid, section 2 (1)

¹⁷⁷ Ibid, Section 4, “derogating control order” means a control order imposing obligations that are or include derogating obligations from Article 5 of the European Convention on Human Rights which relates to infringement of a person’s right to liberty.

¹⁷⁸ Ibid Section 2, “non-derogating control order” means a control order made by the Secretary of State

¹⁷⁹ *Secretary of State for the Home Department v MB* [2006] EWHC 1000 (Admin) at para 103.

¹⁸⁰ Ibid at 107

¹⁸¹ The Patriot II

corpus, thus the right to a fair trial, for all individuals, and significantly, the right to be free from arbitrary detention. Only the judge and ‘special attorneys’ selected by the Home Secretary have access to the defendant’s file, and special advocates are responsible for representing the view of the defence.

This raises issues regarding independence, and suggests suspension of *habeas corpus*, particularly because the defendant is not present when the decision is made. Additionally, the making and enforcement of control orders is inconsistent with the right to a fair trial, which ensures the right to be informed promptly of the charges and the disclosure of evidence against the defendant. This was demonstrated in *A v United Kingdom*, where the court ruled that control orders were unlawful.

Furthermore, the PTA affords greater weight to suspicion rather than fact by allowing individuals to be subjected to an order based on what the Home Secretary considers they could do in the future. This essentially criminalises possible future actions.

The power vested in the Home Secretary raises questions about the role of the judiciary. Issues regarding who has the power to decide adequate measures to deal with a national emergency have been forthcoming throughout history and are still prevalent today. Although some believe the power undoubtedly lies with the Executive,¹⁸² common law jurisdictions such as that of the UK have a long standing tradition of Parliamentary and judicial control over the actions of the Executive.¹⁸³

However, on reaching the House of Lords, the court upheld the authority of the Home Secretary to detain individuals “*if he has reasonable cause to believe*” the person to be of hostile origin or associations. Questions relating to this assertion of power by the Home Secretary are not new. In *R v Secretary of State, Ex parte Hosenball*,¹⁸⁴ Lord Denning’s stated dictum that when there is a conflict between national security interests and freedom of an individual, “*the balance between these two is not for a court of law. It is for the Home Secretary.*”¹⁸⁵

¹⁸² Schmitt, C. (1988) *Political Theology: Four Chapters on the Theory of Sovereignty* (George Schwab translation, Cambridge: MIT Press)

¹⁸³ *Liversidge v Anderson* [1942] A. C. 206

¹⁸⁴ *R v Secretary of State for the Home Department, ex parte Hosenball*, [1977] 3 All E.R. 452

¹⁸⁵ *Ibid* at 457

The courts have however stressed that national security is not so extensive as to warrant unnecessary infringements of rights. This is important for two reasons. Firstly, it suggests individual rights may be curtailed to some extent to ensure national security. Secondly, it fails to draw a clear distinction between what rights may be infringed and in what circumstances. Some violation of rights may therefore be considered legitimate in times of emergency however what actually constitutes a national emergency is also unclear.

Nevertheless, by introducing measures inconsistent with prior emergency powers, critics argue “this law deliberately turns its back on the Rule of Law and establishes a new form of political regime.”¹⁸⁶ However, the unprecedented threat posed by terrorists inevitably requires different rules of law. Hence control orders are considered as an important tool to protect the public and their use has been considered as proportionate to the threat posed.¹⁸⁷

The idea of deviating from internationally recognised legislation during times of emergency was rejected by Lord Carlile however. Despite being of a minority opinion, Lord Carlile reiterated that “*in this country, amid the clash of arms, the laws are not silent...they speak the same language in war as in peace.*”¹⁸⁸ The judgement by Lord Carlile emphasises the principle of the judiciary as guardians of the Rule of Law and thus, rejects Scmitt’s claims regarding exclusive sovereignty without adversarial scrutiny.

(iii) Terrorism Act 2006

The Council of Europe Convention on the Prevention of Terrorism was adopted on 3 May 2005 and signed by the UK on 16 May 2005. Its purpose was “to enhance the efforts of the Parties in preventing terrorism and its negative effects on the full enjoyment of human rights...”¹⁸⁹

Article 5 requires States to criminalise “public provocation to commit a terrorist offence”.

¹⁸⁶ Paye, J. C. (2007) *Global War on Liberty*, (Telos Press Publishing), page 79

¹⁸⁷ Lord Carlile (2008) *Control Orders are 'Justifiable and Proportional'* (London: Home Office) available at <http://security.homeoffice.gov.uk/news-publications/news-speeches/carlile-report-control-ordersm>

¹⁸⁸ *Ibid* at p. 17

¹⁸⁹ Joint Committee on Human Rights (2007) *The Council of Europe Convention on the Prevention of Terrorism*, First Report of Session (HL Paper 26/HC 247, 22 January 2007), paras 1-2 available at <http://www.publications.parliament.uk/pa/jt200607/jtselect/jtrights/26/26.pdf>.

However, the scope of an offence must be restricted in two ways. Firstly, there must be a specific intention to incite the commission of a terrorist offence, and, secondly, the message to the public must cause a danger that such offences may be committed.¹⁹⁰ Article 12 further requires states to respect relevant human rights obligations.¹⁹¹

To comply with these obligations, and amidst the aftermath of the London bombings, the Terrorism Act 2006 was enacted. The legislation introduced offences designed to avert or penalise extremist messages or preparatory activities. These offences did already exist in some form however, for example sections 55, 57 and 58 of the TA 2000. For example, section 55 of the Terrorism Act 2000 provides for an offence of instructing and training another, or receiving instruction or training, in the making or use of firearms, explosives or chemical, biological or nuclear weapons. The offence includes recruitment for training that is to take place outside the UK. Section 57 further criminalises possession of an article for a purpose connected with the commission, preparation or instigation of an act of terrorism. Moreover, Section 58 proscribes collecting or recording information of a kind likely to be useful to a person committing or preparing an act of terrorism, or possessing a document or record containing information of that kind.

Section 1 criminalises publication of statements that are ‘likely to be understood by some or all of the members of the public to whom it is published as a direct or indirect encouragement or other inducement to them in the commission, preparation or instigation of acts of terrorism’.¹⁹²

The offence of “indirect encouragement” has been controversial, which includes a statement that ‘glorifies’ acts of terrorism, a statement from which people can “reasonably” infer that they should emulate the conduct being glorified.¹⁹³ ‘Glorification’ includes ‘any form of praise or celebration’.¹⁹⁴ For the offences to be committed, the publisher must either intend members of the public to be directly or indirectly encouraged or be subjectively reckless

¹⁹⁰ Ibid, Article 5(1)

¹⁹¹ Ibid, Article 12, (paragraphs 11-17).

¹⁹² Terrorism Act 2006, section 1

¹⁹³ Ibid, section 1(3). For example, a statement glorifying the bombing of a bus at Tavistock Square on 7 July 2005 and encouraging repeat performances may be interpreted as encouragement to emulate attacks on the transport network in general.’

¹⁹⁴ Ibid, Section 20(2)

about this.¹⁹⁵ Hence, it is no defence under s 1(5)(b) to show that the dissemination fell on deaf ears.

The ordinary law of criminal encouragement in Part II of the Serious Crime Act 2007 requires the encouragement of an act which would amount to one or more offence and at least with the belief that one or more offences would be committed as a consequence. Section 1 expands this further in two ways.

The first way relates to direct incitement, the scope of which is made wider by specifying that it is an offence ‘to incite people to engage in terrorist activities generally’ and extra-territorially. Secondly, for indirect incitement, it is an offence to incite them obliquely by creating the climate in which they may come to believe that terrorist acts are acceptable’ such as glorification or otherwise.

Thus, the scope is very broad and the overall impact is to criminalise generalised and public encouragement of terrorism. The Terrorism Act 2000 creates offences relating to the objective of the perpetrator, specifically the aim of putting pressure on a government. In contrast, the Terrorism Act 2006 calls into question the possibility of expressing a political opinion that the government considers unacceptable. Its provisions “*focus completely on the realm of mere possibility.*”¹⁹⁶ Moreover, the application of these offences in the context of foreign regimes (by reference to s 17)¹⁹⁷ has caused debates about whether supporting the armed opposition to Apartheid in South Africa constitutes terrorism.”¹⁹⁸

The Joint Committee therefore concluded that the definition “*carries with it a considerable risk of incompatibility with the right to freedom of expression in Article 10 ECHR.*”¹⁹⁹ Moreover, the breadth of the definition of “terrorism”, the vagueness of “glorification”,²⁰⁰ and the lack of a requirement that there be at least a danger that an act of terrorism will result, is likely to have a disproportionate impact on freedom of expression,

¹⁹⁵ Ibid Section 1(2)(b)

¹⁹⁶ Paye, J. C. (2007) *Global War on Liberty*, (Telos Press Publishing), page 98

¹⁹⁷ Joint Committee on Human Rights (2005) *Counter-Terrorism Policy and Human Rights: Terrorism Bill and Related Matters* (HL Paper 75/HC 561), para 12.

¹⁹⁸ House of Commons Debates (2005) Bob Marshall-Andrews, vol. 438, col. 844 (2 November 2005).

¹⁹⁹ Joint Committee on Human Rights (2007) *The Council of Europe Convention on the Prevention of Terrorism*, First Report of Session (HL Paper 26/HC 247, 22 January 2007).

²⁰⁰ Joint Committee on Human Rights (2005) *Counter-Terrorism Policy and Human Rights: Terrorism Bill and Related Matters* (HL Paper 75/HC 561), para 7.

contrary to the express requirement in Article 12 of the HRA.²⁰¹

Nevertheless, the Government maintains that the offence rightly criminalises the activities of those who seek to encourage acts of terrorism.²⁰² However statutory alternatives to circumscribe extreme speech do exist.

Part II of the Terrorism Act 2000 for example, deals with incitements of terrorism abroad.²⁰³ This was invoked, for instance, against Younis Tsouli.²⁰⁴ Moreover, Abu Izzadeen was convicted of terrorist fundraising and inciting terror abroad but cleared of encouraging terrorism.²⁰⁵ Additionally, section 4 of the Offences against the Person Act 1981 criminalises the solicitation of murder,²⁰⁶ and lesser offences may be adequately dealt with as public order offences.²⁰⁷

This possibility of alternative charges was illustrated by the conviction of Mohammed Atif Siddique under the 2006 Act. Although he was convicted of collecting and distributing terrorist propaganda, Siddique was also convicted of more serious offences²⁰⁸ under the Terrorist Act 2000. This included weapons training (section 54), possession of articles for purposes of terrorism (section 57), and collection of information (section 58).

Additionally, the 2006 Act permits pre-charge detention for up to 28 days. This is considerably longer than that of any other ECHR Member State, and the US, which tends to “*greatly undermine the claim that it is necessary and proportionate.*”²⁰⁹ Attempts to extend this to 42 days in the Counter Terrorism Bill 2008 were rejected by Parliament. However, as noted above, pre-charge detention has reverted back to 14 days as provided for by the CJA

²⁰¹ Joint Committee on Human Rights (2007) *The Council of Europe Convention on the Prevention of Terrorism*, First Report of Session (HL Paper 26/HC 247, 22 January 2007), at para 50.

²⁰² Home Office (2006) *Evidence, Explanatory Notes to the Terrorism Act 2006*, Third Reading (Vol. 678 Cols. 197 – 242).

²⁰³ Terrorism Act 2000, sections 59-61.

²⁰⁴ *Attorney General's References (Nos 85, 86 and 87 of 2007) R v Tsouli and others* [2007] EWCA Crim 3300.

²⁰⁵ *The Times* 19 April 2008 p 25.

²⁰⁶ See *R v el-Faisal* [2004] EWCA Crim 456; *R v Hamza* [2006] EWCA Crim 2918; *R v Saleem, Javed, and Muhid* [2007] EWCA Crim 2692; cases of Attila Ahmer and Mohammed Hamid, *The Times* 8 March 2008 p 26; O'Donoghue, T. (2006) ‘Glorification, Irish Terror and Abu Hamza’ 170 *Justice of the Peace* 291.

²⁰⁷ See the case of Subhaan Younis (Glasgow District Court, *The Times* 29 September 2005 p 3). Showing of a beheading in Iraq

²⁰⁸ *The Times* 18 September 2007 p 31; *The Scotsman* 24 October 2007 p7. For the views of his lawyer, see *Re Anwar* [2008] HCJAC 36, p5.

²⁰⁹ Greer, S. (2008) ‘Human Rights and the Struggle against Terrorism in the United Kingdom’ *European Human Rights Law Review* 168-169

2003.

(iv) Counter-Terrorism Act 2008

The Counter-Terrorism Act 2008 widens existing legal tactics and is motivated by familiar themes that the threat is ‘very different in nature and scale’ and intervention is needed ‘at a very early stage’.²¹⁰

Part I enhances powers to gather and share information, especially by allowing the retention and use of fingerprints and DNA samples for counter-terrorism as well as criminal purposes. Many criminal justice measures were incorporated to balance the rejection of 42 day detention, including post-charge questioning of terrorist suspects and the drawing of adverse inferences from silence. There is also imposition of requirements on people convicted of terrorist offences to let authorities know where they are living and any changes to their circumstances. Additionally there is enhanced sentencing of offenders who commit offences with a terrorist connection; and provision for inquests to be heard without a jury. The Act fails to provide a review scheme however.

2.3 Summary of UK

After 9/11 the British Government decided that the threat of terrorism in Britain was such as to amount to a public emergency threatening the life of the nation and purported, on that ground to derogate from the Convention. Relying on this derogation, the British Parliament passed the first of many further anti-terrorism legislation, in the form of the ATCSA. This was followed by numerous anti-terrorism legislation, applicable both to British and non-British citizens.

Most significantly, the threat of terrorism to the UK has been prevalent for many years prior to 9/11 and anti-terrorist legislation already existed to deal with these. Also, although the UK enacted anti-terrorist legislation after 9/11, the attacks in London on 7th July 2005 appeared to suggest the inadequacy of the current measures and therefore, led to further anti-terrorist legislation.

²¹⁰ Hansard HC (2008) Jacqui Smith, vol 474, cols 647, 653 (1 April 2008).

Although many have criticised the enactment of further anti-terrorist legislation, Lord Goldsmith, (the UK Attorney General from 2001 to 2007), stressed that, “*things have changed: in scale, in the methods and aspirations of the terrorist and in the way that terrorism is conducted with modern technology and with suicide bombs. These have all changed the landscape of terrorism.*”²¹¹ Thus, the threats are not of the same nature as those mentioned above prior to 9/11 and so it may be argued that further legislation to combat terrorism was necessary despite the existing permanent provisions in the Terrorism Act 2000.

Like that of the US, UK anti-terrorist legislation also involved measures which restricted the right to a writ of *habeas corpus*. Such measures were considered necessary to restore peace and to overcome problems such as witness and jury intimidation and further paramilitary violence. Furthermore, the UK took remarkable action by introducing permanent measures by way of the Terrorism Act 2000, which most significantly, authorises pre charge detention for up to seven days.

Nevertheless, despite such measures, the UK felt it necessary to introduce further measures after 9/11. As the UK had used internment during the 1970s, again the Executive attempted to legislate for detention without charge and conviction. However, these measures were subsequently declared incompatible with the ECHR.²¹² Despite this, the UK overcame this setback by introducing control orders, which are imposed at the discretion of the Home Secretary and can involve many restrictions on liberty.

The anti-terrorist measures adopted by the UK have primarily focused on increasing the number of days of pre-charge detention and also the use of control orders to restrict the movements of individuals. However, pre-charge detention for up to 28 days is considerably longer than that of any country, including the US which suggests that its use is greatly unnecessary and disproportionate.²¹³

Interestingly, the UK government have not introduced special courts or commissions to try suspected terrorists, as it had done so previously with the use of Diplock courts. Thus, the UK

²¹¹ Lord Goldsmith (2009) ‘Justice and the Rule of Law’ 43 *International Law Journal* 27, page 3

²¹² *Judgments - A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent)*, [2004] UKHL 56 on appeal from: [2002] EWCA Civ 1502

²¹³ Greer. S. (2008) ‘Human Rights and the Struggle against Terrorism in the United Kingdom’ *European Human Rights Law Review* 168-169

have attempted to deal with suspected terrorists by using the criminal courts as far as possible and not automatically resorting to a level of prosecution below that used in normal times. This shows that the UK believes many of its existing measures are adequate to deal with terrorist threats. Nevertheless, certain measures such as indefinite detention provisions and control orders are exceptions to the idea that the UK has adopted a totally criminal justice approach in dealing with suspected terrorists.

2.4 Conclusion

After discussing the measures adopted by both the UK and the US, it is possible to draw similarities and differences between the approaches of the two countries. The range of measures adopted post 9/11 is significant. In both countries, the powers of the police and intelligence services have been enhanced, in relation to for example, pre-charge detention and interception powers.²¹⁴

Whereas the US introduced temporary legislation, subject to review and renewal, the UK has enacted legislation such as the Terrorism Act 2000, which incorporates emergency provisions into criminal law on a permanent basis. Although this was enacted prior to 9/11, it was a result of the increased threat from international terrorism. This is indicative of a system whereby the exception becomes the norm and the norm becomes the exception.

The use of military commissions in the US, and that of Diplock courts in the UK, demonstrates how those involved in hostilities against the state have traditionally been afforded less protection than ordinary criminals. Both military commissions and Diplock courts refute the idea of the right to trial by jury. In both instances, the defence is prevented from preparing a successful defence, primarily to the withholding of information relating to the charges or allegations.

The US administration opted to use military commissions to try suspected terrorists after 9/11. The UK, in contrast, has used the ordinary court system to try suspects. This ensures the right to a 'fair trial' is retained and also that the actions of the Executive remain open to

²¹⁴ See Aldrich, R. (2005) 'Whitehall and the Iraq War: The UK's Four Intelligence Enquiries' *Vol. 16 Irish Studies in International Affairs*, p73-88 ("there is a growing mismatch between what intelligence can reasonably achieve and the improbable expectations of politicians and policy-makers.")

adversarial scrutiny. However, as mentioned above, those subject to control orders are not subject to the ordinary criminal justice system. Thus, such measures are an exception to the UK's general approach of using the ordinary courts for suspected terrorists.

The most striking measures are those relating to detention. The AUMF and Patriot Act have authorised the US Executive to indefinitely detain foreigners. Although the UK attempted to do this in the ATCSA 2001, it was subsequently ruled as contrary to the ECHR. Nevertheless, the UK has, in essence, introduced the concept of indefinite detention in the PTA 2005 by way of control orders. Although this differs from the method employed by the US, it nevertheless has the same consequences.

The US Patriot Act and the ATCSA, enacted in the wake of the 9/11 attacks, are based on the existence of a double legal system, where there is protection of the law for citizens, and suspension of the law for foreigners. Although this is discriminatory, states have traditionally protected the rights of their citizens to an enhanced standard. This idea of a dual legal system begins to disappear with the Patriot II and PTA 2005. Despite attempts to extend provisions to include citizens under the Patriot II, the US operates as a double judicial system of ordinary law for criminals and exceptional law for suspected terrorists. The PTA, in contrast, has extended exceptional measures to include citizens. This therefore extends the suspension of *habeas corpus* to the whole population, encompassing all individuals regardless of nationality. This is again indicative of 'a generalised state of exception.'

This is further evidenced by the use of pre-trial detention in the UK. Initially, limited to fourteen days, police powers have been extended to allow detainees to be detained without charge for up to twenty eight days. The government has claimed this is insufficient however Parliament has rejected attempts to extend this further.

Contrary to claims by the Home Secretary, these exceptional procedures are significantly different to those applied in matters of terrorism by countries such as Spain or Germany. In these countries, long-term preventative detention is exclusively ordered by a judge, the detainee is aware of the charges and the defence has the possibility of contesting the evidence or the reasons for the detention.

However, justification for the ongoing need of antiterrorism legislation can be answered at

three levels.²¹⁵ Firstly, there is a state responsibility to act in order to safeguard the protective right to life of citizens.²¹⁶ Therefore, in principle, it is justifiable for liberal democracies to be empowered to defend their nation, as their first priority is ‘to ensure the security and safety of the nation and all members of the public.’²¹⁷

The use of exceptional measures has long been recognised as a legitimate reaction to “clear and present dangers”. This is illustrated by the ECHR, particularly by Article 17, which prohibits engagement in any activity aimed at the destruction of rights and freedoms, and the power of derogation in times of emergency threatening the life of the nation under Article 15. Protecting the security and democratic way of life of a state is essential therefore; however, this must not wholly subsume other values such as individual rights.

Secondly, exceptional laws are justified on the basis that in a democracy, terrorism is an illegitimate form of political expression. This is because terrorism is considered as a form of political violence. As violence typically involves the use or threatened use of coercion resulting, or intended to result in, the death, injury, restraint, or intimidation of persons or the destruction or seizure of property, it is illegitimate and therefore criminal in nature.²¹⁸ Therefore, due to the manner in which terrorists fight their cause, one which results in the deaths of many, it is considered an illegitimate form of expression.

Thirdly, terrorism is a different type of criminal activity due to its structure, targets, and sophisticated techniques. It therefore requires a response above that of the ‘normal’ law, for example a change in detection and processes within the criminal justice system. “*Just as variation has been adopted against, for example, rapists, serious fraudsters, and drug traffickers,*”²¹⁹ similarly terrorists may demand “*variant treatment because of their atypical organisation, methods, and targets.*”²²⁰

²¹⁵ See Porter, B. (1978) *The Origins of the Vigilant State*, (London: Weidenfeld and Nicolson) p 192; Walker, C. (2006) ‘Clamping down on terrorism in the United Kingdom’ 4 *Journal of International Criminal Justice* 1137.

²¹⁶ *Inquiry into Legislation against Terrorism* (1996) (London: Cm 3420), paras 5.15

²¹⁷ Home Office (2009) *Pursue, Prevent, Protect, Prepare: The United Kingdom’s Strategy for Countering International Terrorism* (London: CM 7547), p 4.

²¹⁸ Wilkinson, P. (1977) *Terrorism and The Liberal State* (New York University Press, New York), p. 23-24.

²¹⁹ Sexual Offences (Amendment) Act 1976; Drug Trafficking Offences Act 1994; Criminal Justice Act 1987

²²⁰ Walker, C. (2009) *Blackstone’s Guide to the Anti-Terrorist Legislation* 2nd edition (Oxford University Press), p 15.

However such laws can be problematic.²²¹ They are considered as unnecessary adjuncts to ‘normal’ laws relating to police powers, such as those in the Police and Criminal Evidence Act 1984, and regular criminal offences. Also, excessive use may engender abuses, both by the Executive and police and security forces. Such laws may also damage the country’s international reputation if they are inconsistent with globally recognised legislation, particularly with regards to protecting fundamental individual rights.²²² Moreover, the need to respond promptly and decisively can produce ‘panic’ legislation, ill-considered and ineffective in practice. However, such reactive legislation, such as the AUMF and the ATCSA may be necessary temporarily due to the lengthy procedures involved in enacting in-depth legislation.

Also, ‘emergency’ laws may be implemented beyond the original emergency, causing difficulties in reasserting laws of normality. However, Lincoln’s actions after the Civil War indicate that the normal Rule of Law can be redeemed when an emergency ceases to exist.

Additionally, a libertarian perspective would argue that times of emergency pose a great threat to individual rights, which are often considered as obstacles to public safety. Exceptional powers are controversial as they tend to target suspect communities, causing discontent and dissatisfaction, for example, among young Muslim males.²²³ The targeting of suspect communities therefore weakens community relations with the police and hinders the identification and detection of terrorists by encouraging sympathy for their cause and a reduction of voluntary assistance.

Measures adopted by both countries, including indefinite detention and pre-trial detention, directly violate civil liberties. Such processes rebut the presumption of innocence that is normally granted to persons prosecuted within a judicial context. It would be a reasonable development if governments were able to rely primarily on ‘normal’ policing powers and its extensive contingency planning and networks. However, due to the perception that the security of the nation and the democratic way of life is greatly threatened, exceptional powers may remain for a considerable period of time.

²²¹ See Sunstein, C. R. (2007) *Worst-Case Scenarios* (Harvard University Press). Compare Posner, E.A and Vermeule, A. (2007) *Terror in the Balance* (Oxford University Press), ch 2.

²²² *Inquiry into Legislation against Terrorism* (1996) (London: Cm 3420), paras 5.6-5.9.

²²³ See Home Affairs Committee (2003) *Terrorism and Community Relations* (London: HC 165), para 43.

However, the meaning and scope of individual rights are not self-evident or historically fixed and it is difficult to achieve a balance between the rights to live in a democratic society free from terrorist attacks, for example boarding a train or a plane without fear of attack, with the need to uphold the Rule of Law and protect individual rights. States have a duty to ensure security, however there are various conceptions as to what 'security' means. Nevertheless, if security requires that some rights are curtailed for the greater good of the security of all citizens, then there should be great emphasis upon regulation and review of exceptional laws to ensure their existence is limited to only what is necessary and proportionate.

To achieve a viable and constitutional balance between national security and civil liberties is extremely difficult and the actions of Executive, legislature and the judiciary illustrate the continuous struggle to do so. The Executive believe they are, as democratically elected members, responsible for ensuring the national security of the nation and its citizens. It is therefore argued that the best way in which to resolve issues between national security and civil liberties is to defer to the Executive on such matters. This would afford great power and discretion to the Executive in dealing with perceived terrorist threats, without the need to be held accountable by the judiciary. This may be beneficial, for example, in cases where individuals are detained as a result of information gained from secret intelligence sources. If the courts demanded disclosure of such sources and thereafter considered them as impermissible, the intelligence agencies would be forced to abide by the rules of law but this may be detrimental if the threat posed by the terrorist was substantial, regardless of how the information was obtained.

This reaffirms Schmitt's view that the President / Prime Minister, as Commander in Chief, is totally sovereign and therefore not answerable to any branch, such as the judiciary or Parliament regarding actions which involve securing the nation. Thus, such commentators suggest that the balance between national security and civil liberties should be decided by the Executive alone and therefore challenges to the courts on such matters, should result in the judiciary applying the principle of judicial deference. However courts have also reaffirmed their duty to protect individual rights.²²⁴ This is discussed further in the following chapter.

²²⁴ *A and others v. Secretary of State for the Home Department* [2002] EWCA Civ 1502; [2004] UKHL 56

3

Judicial Determinations on National Security

Having explored the counter-terrorism measures in both the US and the UK, this chapter considers whether issues regarding national security are subject to scrutiny by the judiciary or whether the judiciary should defer to the Executive on such matters. The chapter first considers the traditional approach of the courts in determining cases relating to national security, and thereafter, considers whether judges have retreated from such an approach. This is discussed first in relation to the US and thereafter the UK.

The law is determined as much by judicial interpretation of precedent and statutes as it is by statutes themselves. Therefore, it is necessary to analyse long term trends and changes as predictors of judicial reactions to current and future cases even under as yet unknown future statutes. Judicial reactions to statutory measures are as important as the principles of law themselves, as they are subject to and dependent on interpretation and thus, it is important to consider the patterns of law. Statutes and precedents can be interpreted in a national security way or civil liberties. Fundamentally, this chapter considers whether a balance can be achieved between the two in both the US and the UK?

National security is an evolving concept, dependent on the perception of the nature of the threats posed to the nation and its citizens. Although protecting the nation is at the heart of any country's government, there are always consequences regarding the way in which measures enacted and implemented to protect national security may affect civil liberties. Conflicts regarding how and where to strike the balance of national securities and civil liberties are not new, particularly during times of war and emergencies.

The Executive often argue that where issues of national security arise, the judiciary should defer to the Executive on such matters and, therefore, not rule on such issues. However, counter arguments maintain that the role of the judiciary is to strictly uphold a liberal interpretation of the Rule of Law, and therefore to leave Executive action unquestioned would potentially lead to 'arbitrary' Executive measures.

Although judges are governed by prior precedent and cases can sometimes be resolved with appeals to text and precedent, there are “open areas” in the law, where neither text nor precedent commands a result.²²⁵ It is in such areas that there is no ‘right’ answer and therefore, it is possible to reach many different reasonable outcomes. Thus, decisions “*inevitably reflect judges’ moral values, institutional preferences, personal ideologies, and emotional dispositions.*”²²⁶ Such issues are prevalent in legal conflicts concerning how to establish a viable balance between national security and civil liberties, which can be partly attributed to the relative infrequency of such cases. Therefore, judges both in the UK and the US often find themselves in a difficult and unknown situation when they are called upon to resolve these issues.

3.1 United States

The difficulty in striking the correct balance between national security and civil liberties is demonstrated by the actions of the US government to indefinitely detain individuals after 9/11. The Court in *Hamdi* and *Rasul* failed to directly address questions regarding the legitimacy of the government to detain individuals and classify them as ‘enemy combatants’. The Supreme Court was faced with such issues for the first time, and there was no precedent for the Court to adhere to a particular result. It is therefore not surprising that because the Supreme Court had failed to address this issue, subsequent decisions by the US District courts differed in their approaches.²²⁷

In the United States, therefore, “*the struggle between the needs of national security and political or civil liberties has been a continual one.*”²²⁸ It is therefore important to consider the historical actions of the judiciary in dealing with such conflicts. Notably, during the American Civil War, Abraham Lincoln attempted to suppress ‘treacherous’ behaviour by

²²⁵ See generally Posner, A. R. (2006) ‘The Role of the Judge in the Twenty-First Century’ *Boston University Law Review* 1049

²²⁶ Stone, G. R. (2006) ‘Civil Liberties v. National Security in the Law’s Open Areas’ 86 *Boston University Law Review* 1315

²²⁷ See *Khalid v. Bush*, 355 F. Supp. 2d 311 (D.D.C. 2005); and *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443 (D.D.C. 2005)

²²⁸ ‘Developments in the Law - The National Security Interest and Civil Liberties’ (1972) 85 *Harvard Law Review* 1130 at 1133.

suspending *habeas corpus*, due to the belief “*that the nation must be able to protect itself in war against utterances which actually cause insubordination.*”²²⁹

Also, prior to the US entering WWI, President Woodrow Wilson “*predicted a dire fate for civil liberties should we become involved.*”²³⁰ This prediction was realised with the passage of the Espionage Act 1917²³¹ and the Sedition Act 1918.²³² Thereafter, World War II led to Executive orders providing for internment of Japanese Americans,²³³ and the Vietnam War was accompanied by government efforts to silence war protests.²³⁴ Most significantly, and as already discussed, the declaration of a ‘war on terror’ by the Bush administration in 2001, led to the adoption of many new measures, including indefinite detention of detainees and the use of military commissions.

During the Civil War, Lincoln famously suspended the writ of *habeas corpus*, thereby allowing American citizens to be arrested by the military without recourse to the judiciary.²³⁵ Chief Justice Taney held in *Ex parte Merryman*²³⁶ that Lincoln had acted beyond his Presidential powers, and that it was “*one of those points of constitutional law upon which there was no difference of opinion*” that the Constitution specifically reserves the power to suspend the writ of *habeas corpus* to Congress alone.²³⁷ Thereafter, in *Ex Parte Milligan*,²³⁸ the Supreme Court held it is unconstitutional, regardless of congressional authorisation, to try civilians in military tribunals when the civilian courts are open. However, although some commentators have claimed that the core holding of *Milligan* remains

²²⁹ Epstein, L., & Walker, T. G. (2001) *Constitutional Law For A Changing America: Rights, Liberties, and Justice*, 4th edition (CQ Press) (quoting Zechariah Chafee Jr., *Free Speech In The United States* (1941) at 266).

²³⁰ Swisher, B. C. (1940) ‘Civil Liberties in War Time’ 55 *Political Science Quarterly* 321

²³¹ Act of June 15, 1917, ch. 30, tit. I, § 3, 40 Stat. 217, 219 (current version at 18 U.S.C. § 2388 (2000)) (prohibiting any attempt to “*interfere with the operation or success of the military or naval forces of the United States . . . [,] to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces . . . , or [to] wilfully obstruct the recruiting or enlistment service of the United States*”).

²³² Act of May 16, 1918, ch. 75, 40 Stat. 553 (prohibiting uttering, printing, writing, or publishing of anything disloyal to government, flag, or military forces of United States) (repealed 1921).

²³³ See *Korematsu v. United States* [1944] 323 U.S. 214

²³⁴ See Linfield, M. (1990) *Freedom Under Fire: U.S. Civil Liberties in Times of War* (Boston: South End Press), at 113–56 .

²³⁵ *Lincoln, Speeches and Writings 1859-1865* (1989) (Library of America) (granting permission to suspend the writ of *habeas corpus*)

²³⁶ *Ex parte Merryman* 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9,487).

²³⁷ *Ibid* at 148.

²³⁸ *Ex Parte Milligan* 71 U.S. (4 Wall.) 2 (1866).

undisturbed,²³⁹ most scholars now recognise that *Milligan* is “confined between the covers of constitutional history books. The decision itself has had little effect on history.”²⁴⁰

Thereafter, in two of the most notable times in history, in which national security arguments directly clashed with civil liberties, judges adopted a logical approach of presumption and thus assumed that the actions of the Executive were constitutional when they had acted in the name of national security.

Firstly, the Court was consistent in its approach and upheld many convictions of individuals who had expressed opposition during World War I.²⁴¹ For example, Rose Pastor Stokes, the editor of the socialist *Jewish Daily News*, was sentenced to ten years in prison for the publication in the *Kansas City Star* of the following statement: “*I am for the people, while the government is for the profiteers.*”²⁴² The Reverend Clarence H. Waldron was also sentenced to fifteen years in prison for distributing a pamphlet stating that “*if Christians are forbidden to fight to preserve the Person of their Lord and Master, they may not fight to preserve themselves, or any city they should happen to dwell in.*”²⁴³

These decisions made it clear that the Court’s position that “*while the nation is at war serious, abrasive criticism . . . is beyond constitutional protection.*”²⁴⁴ This was further emphasised by the court in *Schenck*. The court maintained that “*when a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured.*”²⁴⁵

²³⁹ See, e.g., Eisenberg, A. N. (2002) *Wilson’s Wisdom*, in *It’s A Free Country: Personal Freedom In America After September 11* (Nations Books) 255-64.

²⁴⁰ Neely Jr, M. E. (1991) *The Fate Of Liberty: Abraham Lincoln and Civil Liberties* (Oxford University Press) at 184.

²⁴¹ Rabban, D. M. (1997) *Free Speech In Its Forgotten Years* (Cambridge: Cambridge University Press) at 257. For example, in *Gilbert v. Minnesota*, 254 U.S. 325, 333 (1920); *Pierce v. United States*, 252 U.S. 239, 252 (1920); *Schaefer v. United States*, 251 U.S. 466, 482 (1920); *Abrams v. United States*, 250 U.S. 616, 624 (1919); *Debs v. United States*, 249 U.S. 211, 216 (1919); *Frohwerk v. United States*, 249 U.S. 204, 210 (1919); *Schenck v. United States*, 249 U.S. 47, 53 (1919).

²⁴² *United States v. Stokes* (unreported) (D. Mo. 1918), rev’d, 264 F. 18, 20 (8th Cir. 1920). Stokes previously made the same statement at the Women’s Dining Club of Kansas City. Stone, R., *Perilous Times: Free Speech In Wartime* 171 (2004). “[A]lthough Mrs. Stokes was indicted only for writing a letter, the judge admitted her speeches to show her intent . . . so that she may very well have been convicted for the speeches and not for the letter.” Zechariah Chafee, Jr., *Free Speech In The United States* 53 (1941).

²⁴³ *United States v. Waldron* (unreported) (D. Vt. 1918), quoted in Zechariah Chafee, Jr., *Free Speech In The United States* 53 (1941) at 55.

²⁴⁴ Kalven, Jr, H. (1988) *A Worthy Tradition: Freedom of Speech in America* (New York: Harper & Row) 147.

²⁴⁵ *Schenck v. United States*, 249 U.S. 47, 53 (1919) at 52 per Justice Oliver Wendell Holmes

However, the end of the war bought with it recognition that the Espionage Act had been excessive and the Supreme Court recognised injustices had occurred in the name of national security during wartime. The Supreme Court subsequently overruled the WWI decisions, recognising that it had failed to protect constitutional rights during wartime.²⁴⁶

Rejecting the “clear and present danger” justification for curtailment of First Amendment²⁴⁷ rights during World War I, Justice Douglas insisted there was “*no place in the regime of the First Amendment for any “clear and present danger” test.*” Explaining that “*great misgivings are aroused*” when the test is used, Justice Douglas explained that the “*threats were often loud but always puny and made serious only by judges so wedded to the status quo that critical analysis made them nervous.*” He further explained that although he “*doubts if the “clear and present danger” test is congenial to the First Amendment in times of a declared war, I am certain it is not reconcilable with the First Amendment in days of peace.*” He added, apart from rare instances, where speech is brigaded with action, “*speech is, I think, immune from prosecution.*”²⁴⁸

The Second World War cases also illustrate great judicial deference to the Executive. In *Ex parte Quirin*,²⁴⁹ the Court affirmed President Roosevelt’s determination that eight German saboteurs were “unlawful combatants” who should be tried in military tribunals. However the court rejected the government’s argument that the courts were to review the President’s determination.

One year later, the Court considered the constitutionality of a military regulation that imposed a time curfew on all Americans of Japanese ancestry.²⁵⁰ Chief Justice Harlan Fiske Stone, writing for the majority, held that “*the war power of the national government is the power to wage war successfully.*”²⁵¹ In effect, *Hirabayashi* held that when a decision of the political branches involves military imperatives, “*it is not for any court to sit in review of the wisdom*

²⁴⁶ *Brandenburg v. Ohio*, 395 U.S. 444, 450-52 (1969) per Douglas, J., concurring (rejecting the “clear and present danger” justification for curtailment of First Amendment rights during World War I.) at p 451

²⁴⁷ Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

²⁴⁸ *Brandenburg v. Ohio*, 395 U.S. 444, 450-52 (1969) per Douglas, J., concurring) (rejecting the “clear and present danger” justification for curtailment of First Amendment rights during World War I).

²⁴⁹ *Ex parte Quirin* 317 U.S. 1 (1942).

²⁵⁰ *Hirabayashi v. United States*, 320 U.S. 81, 83 (1943).

²⁵¹ *Ibid* per Chief Justice Harlan Fiske Stone, p 85

of their action or substitute its judgment for theirs,” even when the decision openly and obviously eliminates a right guaranteed to the people by the Constitution.²⁵² Thereafter, following the Japanese attack on Pearl Harbor in 1941, President Franklin D. Roosevelt authorised the Army to designate military areas from which persons of Japanese ancestry should be evacuated and sent to internment camps.²⁵³ Approximately 120,000 people of Japanese ancestry were interned, despite assertions that the demand for mass evacuation was based on “public hysteria” rather than on fact.²⁵⁴

Despite this, following the ‘logical’ presumption for dealing with conflicts between civil liberties and national security, the Supreme Court upheld the President’s decision of mass internment in *Korematsu v. United States*.²⁵⁵ Once again, the Court overlooked questions of race discrimination and racial profiling and the absence of any suspicion that Korematsu was disloyal. Justice Black explained they were aware of the hardships imposed, “*but hardships are part of war, and war is an aggregation of hardships.*”²⁵⁶ Therefore, it was accepted that exceptional measures are necessary in times of war, despite the hardships caused to individuals by such measures.

However, after WWII, opinions regarding internment began to change and in 1976, President Gerald Ford observed that the evacuation and internment of loyal Japanese American citizens was wrong.²⁵⁷ Additionally in 1988, President Ronald Reagan signed the Civil Liberties Act.²⁵⁸ This officially declared the Japanese internment as a “*grave injustice*” and offered an official presidential apology and reparations to each of the Japanese American internees who had suffered discrimination, loss of liberty, loss of property, and personal humiliation because of the actions of the US government.²⁵⁹ The decision in *Korematsu* has never been cited thereafter by the Supreme Court and it has, over the years, become a “constitutional pariah.”²⁶⁰

²⁵² Ibid at 93.

²⁵³ Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 25, 1942)

²⁵⁴ Memorandum from J. Edgar Hoover, Director of FBI, to Francis Biddle, U.S. Attorney Gen., quoted in Whitehead, D., *The FBI Story: A Report To The People* 189 (1956).

²⁵⁵ *Korematsu v. United States* 323 U.S. 214 (1944).

²⁵⁶ Ibid. at 219, 223-24

²⁵⁷ Proclamation No. 4417, “*An American Promise*,” 41 Fed. Reg. 7741 (Feb. 19, 1976).

²⁵⁸ Civil Liberties Act 1988 50 U.S.C. app. § 1989b (2000).

²⁵⁹ Ibid app. §§ 1989-1989a. The Civil Liberties Act of 1988 authorised a payment of \$20,000 to each surviving internee. Barkan, E. (2000) *The Guilt Of Nations: Restitution And Negotiating Historical Injustices* (Baltimore and London: The Johns Hopkins University Press) 30-31.

²⁶⁰ Hutchinson, D. J. (2002) “The Achilles Heel” of the Constitution: Justice Jackson and the Japanese

Therefore, the traditional level of judicial deference is in part a result of structural assumptions derived from the US Constitution. Congress and the Executive are jointly charged with conducting foreign and military affairs,²⁶¹ and the judiciary has generally assumed that these branches of the government are best placed to make judgments on, amongst other issues, matters relating to national security threats, including judgments as to the existence of a threat. Therefore, the President, as Commander in Chief, is afforded particular deference regarding matters affecting the security of the nation.

However, decisions such as *Schenck*, *Hirabayashi* and *Korematsu* illustrate that in hindsight, the courts approach has had retrospective disastrous effects. Although they were considered as necessary during the war, the decisions are regarded as constitutional failures and they illustrate that deference to the government on issues of national security has often led courts to uphold government actions which in hindsight appeared unjustified.²⁶² Moreover, there have been numerous cases in which the government has knowingly misrepresented the nature of the threat to the courts. For example, in *Korematsu v. United States*, 323 U.S. 214 (1944), it later became apparent that US officials had knowingly misinformed the court about evidence relating to the danger of Japanese Americans.²⁶³ More recently, several prosecutions by the Bush administration of suspected terrorists have failed due to the fact that prosecutors exaggerated the evidence.²⁶⁴

(i) Deference in modern times

Exclusion Cases' *Supreme Court Review* 455 n. 99.

²⁶¹ US Constitution, Art. I, section 8 (enumerating Congress's powers); Art. II, section 2 (establishing, among other powers, the President's role in foreign and military affairs).

²⁶² See generally Gross, O. (2003) 'Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?' 112 *Yale Law Journal* 1011 at 1034 (discussing courts' "highly deferential attitude" in reviewing governmental actions and decisions in emergency situations).

²⁶³ See Serrano, S. K. Minami, D. (2003) 'Korematsu v. United States: A "Constant Caution" in a Time of Crisis' 10 *Asian Law Journal* 37 ("Unearthed documents had revealed that no military necessity existed to justify the incarceration, and that government decision makers knew this at the time, and later lied about it to the Supreme Court.").

²⁶⁴ See Detroit News, *Botched Terror Cases Are Evidence of Overzealous Prosecution*, Sept. 24, 2004, at 10A ("In some cases, the blame lies with sloppy work by prosecutors. In others, the government appears to have been over-eager to declare it had bagged a terrorist and allowed due process to fall by the wayside."); Eggen, D., *Report Scolds Terrorism Prosecutors: U.S. to Drop Convictions About Trio in Detroit*, Washington Post, Sept. 2, 2004, at A03 ("The report raises serious questions about the veracity of most of the key evidence and testimony at the heart of the [Detroit sleeper cell] case.")

The logical presumption of judicial deference appears to have been increasingly rejected by US courts in recent times. There have been numerous cases in which the Supreme Court has had to consider the constitutional balance between national security and civil liberties, somewhat analogous to the issues involved in *Schenck*, *Hirabayashi* and *Korematsu*. The following cases show that the Court abstained from the traditional level of judicial deference typically afforded in such circumstances.

Two Vietnam War cases concerning the First and Fourth Amendments respectively were the initial indication of a change of approach by the courts. In *New York Times Co. v. United States*,²⁶⁵ the government attempted to enjoin publication of the Pentagon Papers, a top secret study of the Vietnam War that had been made available to the newspapers “*through an unprecedented breach of security.*”²⁶⁶ The government argued publication would grievously harm national security.

In a 6-3 ruling, the Supreme Court explicitly rejected the government’s national security claim, ruling that the government could not constitutionally enjoin the publication.²⁶⁷ Justice Black observed that the “*word ‘security’ is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment.*”²⁶⁸ Justice Stewart further insisted that the government could not constitutionally enjoin the publication because it had failed to *prove* that disclosure “*will surely result in direct, immediate, and irreparable damage to our Nation.*”²⁶⁹ Therefore, the onus was placed on the government to prove that disclosure would be harmful to the nation. This directly contrasts previous judgments where courts have accepted that the Executive are best placed to decide whether ones actions pose a risk to the nation, without the need for any substantial proof.

Thereafter, the Court considered claims by President Nixon regarding exemption from the ordinary requirements of the Fourth Amendment when undertaking national security investigations. The government specifically claimed the President must be free to engage in national security wiretaps without the warrant and probable cause requirements. This

²⁶⁵ *New York Times Co. v. United States* 403 U.S. 713 (1971) (per curiam)

²⁶⁶ Ungar, S. J. (1989) *The Papers & The Papers: An Account Of The Legal And Political Battle Over The Pentagon Papers* (Columbia University Press), p15.

²⁶⁷ *New York Times Co.*, (1971) 403 U.S. at 714.

²⁶⁸ *Ibid.* at 719 (Black, J., concurring).

²⁶⁹ *Ibid.* at 730 (Stewart, J., concurring).

contention was unanimously rejected in *United States v. U.S. District Court*.²⁷⁰ The court held that the President has no constitutional authority to wiretap citizens without a judicially issued search warrant based upon probable cause. This included investigations involving the national security of the nation.²⁷¹

The court recognised that the President has a constitutional responsibility to protect the nation. However they recognised that because Executive branch officials are charged with keeping the nation safe, they are not “neutral and disinterested” arbiters in deciding whether there is probable cause to search. Therefore, the court ruled that even in the context of national security investigations, “*the Fourth Amendment contemplates a prior judicial judgment*” before government investigators may use “*constitutionally sensitive means in pursuing their tasks.*”²⁷²

More recent rulings by the Supreme Court concern the Executive authority of the Bush administration in the war on terrorism. In the following rulings, the approach of the Supreme Court substantially with reference to applying the doctrine of deference, a doctrine which led to the decisions in *Schenck*, *Hirabayashi* and *Korematsu*.

For example, in *Rasul v. Bush*,²⁷³ the Court held that Federal Courts have *habeas corpus* jurisdiction to review the legality of the detention of Guantanamo detainees and their classification as ‘enemy combatants’.²⁷⁴ The Court went even further in *Hamdi v Rumsfeld*.²⁷⁵ The Court rejected the government’s argument that because Hamdi was an ‘enemy combatant’, he could be indefinitely detained without access to counsel, and without any formal charge or proceeding. Thus, the court ruled Hamdi had not received due processes of law.

Delivering the majority opinion, Justice O’Connor explained that it “*is during our most challenging and uncertain moments that our Nation’s commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the*

²⁷⁰ *United States v. U.S. District Court* 407 U.S. 297 (1972)

²⁷¹ *Ibid* at 324.

²⁷² *Ibid* at 317.

²⁷³ *Rasul v. Bush* 542 U.S. 466 (2004)

²⁷⁴ *Ibid* at 485

²⁷⁵ *Hamdi v Rumsfeld* 542 U.S. 507 (2004) (plurality opinion)

principles for which we fight abroad.”²⁷⁶ In rejecting the government’s contention that the Court should play “a heavily circumscribed role” in reviewing the actions of the Executive in wartime, O’Connor pointedly observed that “*a state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens.*”²⁷⁷

Moreover, in *Hamdan v. Rumsfeld*,²⁷⁸ Hamdan was deemed eligible for trial by military commission. As in *New York Times Co, United States v. U.S. District Court, Rasul and Hamdi*, the Court declined to grant broad deference to the Executive, instead making its own independent determination of the legality of the President’s action. The Court held that Congress had not authorised the use of military commissions, and it further ruled that the Executive Order which established military commissions violated both the Uniform Code of Military Justice and the 1949 Geneva Conventions.²⁷⁹ As the US is a signatory to international law such as the Geneva Conventions, it is important that they adhere to their international obligations. This is particularly the case because the US is considered as the leading nation in the ‘War on Terror’ and therefore their actions are scrutinised on a global level. The Court emphatically rejected the President’s assertion that, as Commander in Chief of the Army and Navy, he could constitutionally impose these procedures even though they violated both federal and international law.²⁸⁰

These twenty first century cases illustrate that the US courts do not wish to make mistakes like those made in the past by using the “logical” presumption of deference, as evidenced in *Schenck, Hirabayashi* and *Korematsu*. Instead the courts have adopted an approach which is a “pragmatic” presumption of close judicial scrutiny, as evidenced in *Rasul, Hamdi*, and *Hamdan*.²⁸¹

It is clear from these cases that the courts are no longer protecting national security concerns by automatically overriding civil liberties without strong evidence and rationale. The courts have recognised that there must be a constitutional balance and whilst cases like *Hamidi*,

²⁷⁶ Ibid at 532

²⁷⁷ Ibid at 535-36. Lichtblau, E. (2004) ‘U.S., Bowing to Court Ruling, Will Free “Enemy Combatant”’ *New York Times*, at A1.

²⁷⁸ *Hamdan v Rumsfeld* 126 S. Ct. 2749 (2006).

²⁷⁹ Ibid at 2785.

²⁸⁰ Ibid at 2773.

²⁸¹ Stone, G. R. (2006) ‘Civil Liberties v. National Security in the Law’s Open Areas’ 86 *Boston University Law Review* 1315, page 16.

Rasul and Hamdan have rejected the Executives' arguments and ruled in favour of the petitioners, many questions have been left unanswered. For example, in *Hamdi* and *Rasul*, the court failed to lay out the correct level of due process. Also, the rulings of the Supreme Court left unclear whether the court will impose any effective limits on government actions in response to the war on terror. However, by doing so, courts have retained a certain level of deference to the Executive during times of war and perceived dangers to the nation, albeit not complete deference as was previously the case.

This is evident by the refusal of the Court to grant *certiorari* in a number of other cases that raised similar issues about the limits on government power after 9/11, including *Center for National Security Studies v. United States Department of Justice*,²⁸² *North Jersey Media Group, Inc. v. Ashcroft*,²⁸³ and *M.K.B. v. Warden*.²⁸⁴ All the cases involved challenges to lower court decisions which deferred to government judgments about the need for secrecy in connection with post-9/11 detentions.

Thus, the struggle to achieve a constitutional balance continues. However the cases illustrate that US courts are aiming to uphold the Rule of Law in relation to individual rights so far as is possible, whilst also affording a certain level of deference to the Executive on issues of national security. The analysis shows that traditionally, courts were reluctant to rule on cases concerning national security issues. However, there has been a slow but noticeable assertion of authority by the courts since the 1970s to uphold the Rule of Law and declare Executive action incompatible with the US Constitution.

This has not been received favourably by the Executive, who insist that matters of national security are not the concern of the courts and judicial determinations can potentially have detrimental effects for the nation. Nevertheless, it is important to note that although the courts have not retained a total level of deference to the Executive, it has recognised that the Executive are best positioned to decide on many matters. For example, in *Hamdi*, the courts

²⁸² *Center for National Security Studies v. United States Department of Justice* 240 F.3d 918 (D.C. Cir. 2003), *cert. denied*, 124 S. Ct. 1041 (2004) (holding that the U.S. Department of Justice was exempted under the Freedom of Information Act's law enforcement exemption from having to disclose the names of detainees and their attorneys).

²⁸³ *North Jersey Media Group, Inc. v. Ashcroft* 241 F.3d 198, 219 (3d Cir. 2002), *cert. denied*, 538 U.S. 1056 (2003) (holding that newspapers do not have a First Amendment right to access deportation hearings that have been determined to present significant national security concerns by the Attorney General).

²⁸⁴ *M.K.B. v. Warden* 242 S. Ct. 1405 (2004) (denying *certiorari* in a case involving the press's right to access habeas proceedings involving the war on terror).

ruled that Hamdi must be afforded the correct level of due process but they failed in instructing the lower courts as to what the correct level of due process was.

Nevertheless, cases like *Schenck*, *Hirabayashi* and *Korematsu* have, in hindsight, raised awareness of the disastrous effects emergency powers may have. It is however important to note that above, the 'War on Terror' began in 2001 and there appears to be little indication of the conflict ending. Therefore the judicial determinations in cases like *Hamdi*, *Rasul* and *Hamdan* illustrate that the courts have upheld their role as guardians of the law by allowing judicial review of Executive action, however only to the extent of ensuring Executive action does not unnecessarily or disproportionately affect individual rights. The courts have therefore retained a certain level of deference to ensure the Executive is not left powerless or weapon less in fighting the current war.

3.2 United Kingdom

In the United Kingdom the courts have also endured a continuous struggle in determining the balance between national security and civil liberties. Case law suggests that judges in the UK, just like those in the US, are very conscious of the boundary line between those matters in which they regards themselves as competent to adjudicate, and those matters which should be left for the democratically-elected government, i.e. the doctrine of deference.

The doctrine may be compared with that of justiciability under judicial review. The principal distinction lies in the fact that whereas courts will rule on justiciability in order to decide whether to review, with deference the courts conduct an examination and then decide that they should defer to the elected government and / or Parliament on the grounds of competence and / or democratic principle. The concept is also similar to the concept of margin of appreciation, which is used by the Court of Human Rights and which confers on states an area of discretion with which the Court will not interfere.²⁸⁵

Underlying the concept of deference is the desire to preserve the separation of powers between the judiciary, Executive and legislature, and to protect the judges from charges that they are interfering in another institution's legitimate sphere of power. In no area of policy is

²⁸⁵ The European Convention of Human Rights. The margin of appreciation is a concept derived from international law: it has no application within domestic law.

this respect to separation of powers more clearly demonstrated than in matters of national security, which will frequently, but not inevitably, be linked to the exercise of the royal prerogative.

The prerogative ensues for the Executive a wide and inadequately defined area of power which is largely immune from judicial review. In *Council of Civil Service Unions v Minister for Civil Service* (the GCHQ case),²⁸⁶ the House of Lords ruled that the courts have jurisdiction to review the exercise of Executive power. Nevertheless, the House of Lords conceded that matters of national security fell within the class of powers deemed ‘non-justiciable’ by the courts, i.e. the subject matter is one more appropriately controlled by the Executive accountable to Parliament rather than the courts of law. Emphasising this, Lord Diplock explained that “*the judicial process is totally inept to deal with the sort of problems which it (national security) involves.*”²⁸⁷

Notwithstanding the legitimacy of this objective, there is a fine line between deferring to another institution, and failing adequately to protect human rights – the legal duty²⁸⁸ which has been conferred on judges by the Human Rights Act. Simon Brown L.J. commented in *Roth*²⁸⁹ that “*the court's role under the Human Rights Act is to act as guardian of human rights. It cannot abdicate this responsibility.*”²⁹⁰ Therefore, suggestions that there must be “nearly absolute” deference in certain areas cannot be supported by the provisions of the Act itself. It is argued that a self-imposed abstinence by the courts from engaging in social policy and national security issues could undermine their ability to protect some fundamental rights altogether.²⁹¹

Typically, where the government has justified its actions on the basis of national security, the courts have been reluctant to challenge the Executive. This doctrine of deference can be illustrated by reference to a number of cases. For example, in *Liversidge v Anderson* (1942),

²⁸⁶ *Council of Civil Service Unions v Minister for Civil Service* (1985) (the GCHQ case) 3 All ER 935

²⁸⁷ *Ibid* per Lord Diplock

²⁸⁸ HRA 1998, section 3(1) - “*So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.*”

²⁸⁹ *International Transport Roth GmbH v Secretary of State for the Home Department* [2002] 1 C.M.L.R. 52., para.81

²⁹⁰ *Ibid* per Simon Brown L.J.

²⁹¹ Klug, F. (2003) ‘Judicial Deference under The Human Rights Act 1998’ *European Human Rights Law Review* Issue 2, 125-133, page 6.

the House of Lords refused²⁹² to review the Home Secretary's power of detention under the Defence of the Realm Acts. The regulation provided that the minister had power to order the detention of persons whom he 'had reasonable cause to believe' to be of hostile origin or associations and 'in need of subjection to preventative control'.²⁹³

In 1962, Dr Soblen, an American citizen who had been convicted of espionage in the United States, fled from the country before being sentenced. Whilst on an aeroplane, Dr Soblen cut his wrists, and was landed in London for hospital treatment. The Home Secretary issued a deportation order on the basis that his continued presence was 'not conducive to the public good'. The Court of Appeal ruled that Dr Soblen had no right to make representation, and that deportation was an administrative matter for the Home Secretary.²⁹⁴

In *R v Home Secretary ex parte Hosenball*,²⁹⁵ two American journalists, Philip Agee and Mark Hosenball, were detained with a view to deportation, on the basis that their work involved obtaining and publishing information prejudicial to national security. There was no appeal against the Home Secretary's decision where national security was pleaded.²⁹⁶ Instead, there was a right to a hearing before a panel of three advisors to the Home Secretary. When Hosenball tried to challenge the Home Secretary's decision in the courts, the Court of Appeal upheld the deportation order. It was recognised that the rules of natural justice applicable to immigration decisions had not been complied with in the decision to deport *Hosenball*. The Court of Appeal nevertheless ruled that the requirements of national security prevailed and that, where "there is a conflict here between the interests of national security on the one hand and the freedom of the individual on the other", the Home Secretary "is answerable to Parliament as to the way in which he did it and not to the courts here."²⁹⁷

The case of *R v Home Secretary ex parte Cheblak*²⁹⁸ also reveals the extensive powers of the Home Secretary to detain persons 'in the interests of national security'. During the Gulf War, 160 Iraqi and Palestinian citizens were detained with a view to deportation, on the basis that

²⁹² *Liversidge v Anderson* (1942). Lord Atkins dissenting. Note that Lord Atkins's dissent was accepted as a correct statement of common law in *R v Inland Revenue Commissioners ex parte Rossminster Ltd* (1980)

²⁹³ *Ibid* at 52

²⁹⁴ *R v Home Secretary ex parte Soblen* [1962] 3 All E.R. 373

²⁹⁵ *R v Secretary of State for the Home Department, ex parte Hosenball*, [1977] 1 W.L.R. 766; [1977] 3 All E.R. 452

²⁹⁶ Immigration Act 1971, s 15(3),

²⁹⁷ *Hosenball* op cit, per Lord Denning at 461.

²⁹⁸ *R v Secretary of State for the Home Department, ex parte Cheblak* [1991] 1 W.L.R. 890

their presence was not ‘conducive to the public good’. Abbas Cheblak and his family had been resident in the United Kingdom for 16 years. In an application for *habeas corpus*, the Court of Appeal accepted the Home Secretary’s explanation that Cheblak had associations with an unspecified organisation which supported the Iraqi government, and refused to press the Home Secretary for further information.²⁹⁹

Furthermore, in *R v Lambert*³⁰⁰ Lord Woolf stated that the courts:

“... should as a matter of constitutional principle pay a degree of deference to the view of Parliament as to what is in the interest of the public generally when upholding the rights of the individual under the Convention.”³⁰¹

The incorporation of European Convention rights under the Human Rights Act 1998 does not extend judicial protection to suspects beyond that already guaranteed by the ordinary criminal justice model in the UK. Although the Convention protects, *inter alia*, the right to liberty, fair trial and privacy, two factors limit their effectiveness in relation to national security matters. The first limitation is the permissible exceptions specified in the relevant articles. The second lies in this continuing concept of judicial deference, whereby the judges express the view that they should defer to the democratically elected government in matters of security. In a clash between judges, dissenting judges in *Hirst v. the United Kingdom* stressed “it is essential to bear in mind that the Court is not a legislator and should be careful not to assume legislative functions.”³⁰²

(i) Deference in modern times

As discussed above, the historical tendency of the United Kingdom judiciary, as that of the United States, has also been to defer to the Executive whenever credible national security issues are raised by the government.³⁰³ The historical tendency of judges to defer to the

²⁹⁹ Mr Cheblak was subsequently released from detention following a hearing before the Home Secretary’s panel. See also *R v Secretary of State for the Home Department ex parte Jahromi* (1995) and *Chahal v UK* (1997).

³⁰⁰ *R v Lambert* [2002] Q.B. 1112

³⁰¹ *Ibid* at 1114, per Lord Woolf

³⁰² *Hirst v the United Kingdom* (No 2) [2005] ECHR 681. Joint dissenting opinion of judges Luzius Wildhaber, Jean-Paul Costa, Peer Lorenzen, Anatoly Kovler, and Erik Jebens

³⁰³ *Liversidge v Anderson* [1942] A. C. 206

Executive in such areas appears greatly outdated in light of the Human Rights Act 1998 (HRA).³⁰⁴ For instance, the inability to challenge indefinite detention without trial through judicial review would be considered as outrageous from a human rights perspective.³⁰⁵ Nevertheless, from a national security perspective, judicial deference to the Executive is reflective of traditional theories that the Executive is best positioned to make decisions regarding national security and, therefore, there should be minimal constitutional checks and balances by the judiciary.

Judicial deference is particularly contentious in relation to Articles 5 and 6 of the HRA, which concern due process and fair trial, as such areas provide for minimal judicial restraint. For example, the Act expressly binds the Crown, and imposes an unqualified obligation on public authorities to comply with Convention rights under section 6(1).³⁰⁶ However, this provision excludes Parliament. Therefore, in the absence of derogation under Article 15, there can be no question of any agency of the Executive, for example the Special Immigration Appeal Commission (SIAC), relying upon Crown Immunity, when seeking to take action against foreign nationals considered a security risk. Additionally, the HRA removes from judges the discretion to refuse in principle to review the actions of any public authority on any grounds.

Therefore, the UK courts have increasingly maintained their role as the self-appointed ‘guardian of the constitution’ in general, and ‘guardians of human rights’ in particular. This means that the criteria of proportionality of response and the prohibition of discrimination regarding foreign nationals remain relevant even where they concern issues of national security. Thus, automatic judicial deference is increasingly rejected. In light of human rights, which challenge the idea that national security decisions are not subject to judicial review, judges have changed their approach and such deference has become more qualified. Courts do however, continue to recognise that the Executive possess special expertise in areas regarding national security.

³⁰⁴ Human Rights Act 1998, c. 42

³⁰⁵ For example, see *A. v. Secretary of State for the Department* [2004] UKHL 56

³⁰⁶ HRA, section 6(1) “*It is unlawful for a public authority to act in a way which is incompatible with a Convention right.*”

In *Secretary of State for the Home Department v. Rehman (AP)*,³⁰⁷ the House of Lords reviewed the Home Secretary's decision to deport a Pakistani national on the ground that it would be 'conducive to the public good in the interests of national security because of association with Islamic terrorist groups.'³⁰⁸

Issued shortly after 9/11, on 11 October 2001, the unanimous decision upheld the decision of the Secretary of State to deport a Pakistani-born Imam because the Home Secretary maintained that he was involved in terrorist activities abroad. The Court held that the Executive is "*undoubtedly in the best position to judge what national security requires.*"³⁰⁹ The decision essentially limits the role of the judiciary and affords government officials the ultimate power to decide what actions are necessary to combat terrorism. Lord Hoffman also recognised that in such circumstances, the role of the judiciary is limited and it is the Executive that rightly have ultimate political and constitutional responsibility for national security

*"It is not only that the Executive has access to special information and expertise in these matters. It is also that such decisions, with serious potential results for the community, require a legitimacy that can be conferred only by entrusting them to persons responsible to the community through the democratic process."*³¹⁰

This case reflects the court's traditional role to defer questions of national security and instead, allow responsibility to lie with the Executive. However, more recently, the judiciary appear to reiterate their role as guardians of the law and, thus, have reduced the level of deference typically given to the Executive.

Similar to the United States detainment of alien enemy combatants in Guantanamo Bay, the United Kingdom detained foreign nationals without counsel or hearing at Belmarsh prison, under the control of the British government.³¹¹ Like the US, the UK made legislation a

³⁰⁷ *Secretary of State for the Home Department v. Rehman (AP)*, [2001] UKHL 47.

³⁰⁸ *Ibid.*

³⁰⁹ *Ibid* at 26 (per Lord Slynn)

³¹⁰ *Secretary of State for the Home Department v. Rehman (AP)*, [2001] UKHL 47 per Lord Hoffman.

³¹¹ See Winterman, D. (2004) 'Belmarsh—Britain's Guantanamo Bay?' *BBC News* (Oct. 6 2004), available at <http://news.bbc.co.uk/1/magazine/3714864.stm>

central facet of its response to the attacks of 9/11, which led to subsequent challenges in British courts.

For example, in *A. v. Secretary of State for the Department*,³¹² the House of Lords considered Part IV of the Anti-Terrorism, Crime and Security Act³¹³ which provided for the indefinite detention of non-citizens deemed by the Executive to represent a threat to national security. In order to achieve this, the government derogated³¹⁴ from Article 5 of the European Convention, which provides, “*everyone has the right to liberty and security of person.*” The Order acknowledged the existence and effect of the Immigration Act and the European Convention and articulated the necessity of derogating from those existing legal principles due to the ‘exigencies of the situation’, i.e. the threat terrorism posed to national security.³¹⁵ The government justified derogation on the basis that there was a “public emergency”.³¹⁶

This determination follows the rationale for judicial deference in *Rehman*. The majority of the House of Lords retained a traditional deference to the Executive on the question of whether there was, in fact, an emergency. In a reversal of his earlier stance, Lord Hoffmann dissented on the basis that no other country in Europe had declared an emergency, and that the dangers of overreacting to acts of terrorism are greater than terrorism itself.³¹⁷

The detainees also argued that the derogative elements in Part IV of the ATCSA violated the principle of proportionality. According to the proportionality principle, any limitation of a fundamental right, in this instance the right to liberty, based on a claim of public emergency must be strictly limited in proportion to the threat.

³¹² *A. v. Secretary of State for the Department* [2004] UKHL 56

³¹³ Anti-Terrorism, Crime and Security Act, 2001

³¹⁴ The Human Rights Act of 1998 (Designated Derogation) Order, 2001, S.I. 2001/3644 (U.K.), available at <http://www.opsi.gov.uk/si/si2001/20013644.htm>.

³¹⁵ *Belmarsh I* [2004] UKHL 56 at 11

³¹⁶ Reaffirming the Court’s approach in *Lawless v Ireland* (No 3) (1961) 1 EHRR 15, it was held in *Greek Case* (1969) 12 ECHR 1, [153] that a ‘public emergency’ must have the following four characteristics: (1) it must be actual or imminent; (2) its effects must involve the whole nation; (3) the continuance of the organised life of the community must be threatened; and (4) the crisis or danger must be exceptional, in that the normal measures or restrictions, permitted by the Convention for the maintenance of public safety, health and order, are plainly inadequate.

³¹⁷ *A. v. Secretary of State for the Department*, [2004] UKHL 56, per Lord Hoffman at 81

In 1961, the European Court of Human Rights upheld detention of an IRA activist in *Ireland*.³¹⁸ In contrast, over four decades later, the House of Lords interpreted the ECHR and the jurisprudence of the ECHR, to rule that UK law permitting detention enacted by derogation from Article 5, failed to meet the tests of proportionality and non-discrimination required of derogations, and was thus incompatible with the ECHR.³¹⁹

The House of Lords considered this scheme in light of the derogation provisions of the ECHR, which they considered to be to the same effect as those of the ICCPR with regard to discrimination.³²⁰ Lord Bingham therefore concluded that although:

“Article 4(1) of the ICCPR, in requiring that a measure introduced in derogation from Covenant obligations must not discriminate, does not include nationality, national origin or “other status” among the forbidden grounds of discrimination: ..., by article 2 of the ICCPR the states parties undertake to respect and ensure to all individuals within the territory the rights in the Covenant “without distinction of any kind, such as race, national or social origin or other status”. Similarly, article 26 guarantees equal protection against discrimination “on any ground such as race, national or social origin or other status”. This language is broad enough to embrace nationality and immigration status. It is open to states to derogate from articles 2 and 26 but the United Kingdom has not done so. If, therefore, as I have concluded, section 23 discriminates against the appellants on grounds of their nationality or immigration status, there is a breach of articles 2 and 26 of the ICCPR and so a breach of the UK’s “other obligations under international law” within the meaning of article 15 of the European Convention.”³²¹

³¹⁸ *Lawless v Ireland* 3 Eur. Ct. H.R. (ser A) at 62 (1961)

³¹⁹ *A v. Secretary of State for the Home Department*, [2004] UKHL 56 (appeal taken from England and Wales) (permitting “the appeals, quashing the derogation order, and declaring section 23 of the 2001 Act incompatible with the right to liberty in article 5(1) of the European Convention”).

³²⁰ *Ibid.* at 47 (“The United Kingdom did not derogate from article 14 of the European Convention (or from art 26 of the ICCPR, which corresponds to it.”); *Ibid.* at 63 (“The Attorney General . . . accepted that article 14 of the European Convention and article 26 of the ICCPR are to the same effect.”); *Ibid.* at 68 (“To do so was a violation of article 14. It was also a violation of article 26 of the ICCPR and so inconsistent with the United Kingdom’s other obligations under international law within the meaning of art 15 of the European Convention.”).

³²¹ *Ibid.* at 69(4). Article 4(1) of the ICCPR provides “In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.” ICCPR at art. 4(1)).

Even though the new scheme had even more procedural safeguards than those in place in *Lawless*,³²² the Law Lords adjudged that the legislation was both disproportionate and discriminatory, and hence incompatible with the ECHR.³²³

The core of the problem was discrimination: foreign citizens suspected of international terrorism could be detained indefinitely, whereas British citizens could not. If that were the only problem, the Court might simply have advised the government that it needed to provide equal treatment. But the Court went further, suggesting that restrictions on liberty short of detention should suffice and effectively inhibit terrorist activity.³²⁴

Interestingly, Lord Bingham emphasised that the decision was driven by the constitutional necessity of maintaining the courts' role in enforcing principled legal constraints on government action. "*The function of independent judges charged to interpret and apply the law is universally recognised as a cardinal feature of the modern democratic state, a cornerstone of the Rule of Law itself. The Attorney General is fully entitled to insist on the proper limits of judicial authority, but he is wrong to stigmatise judicial decision-making as in some way undemocratic.*"³²⁵

Lord Bingham's justification rejects claims, such as Schmitt's, which state that Parliament is sovereign and thus, the judiciary is subordinate to Parliament. Some suggest that the courts must always defer to the Executive on matters concerning national security. However, this leaves unquestioned government actions and allows for the Executive to act in a way which is

³²² Id. at 217 Lord Walker dissenting, explained, "*The 2001 Act contains several important safeguards against oppression. The exercise of the Secretary of State's powers is subject to judicial review by SIAC, an independent and impartial court, which ... has a wide jurisdiction to hear appeals, and must also review every certificate granted ... [for security detentions] at regular intervals. Moreover the legislation is temporary in nature. Any decision to prolong it is anxiously considered by the legislature. While it is in force there is detailed scrutiny of the operation of ... [security detentions] by the individual (at present Lord Carlile QC) ... appointed [as ombudsman]. There is also a wider review by the Committee of Privy Councillors ... All these safeguards seem to me to show a genuine determination that the 2001 Act, and especially Part 4, should not be used to encroach on human rights any more than is strictly necessary.*"

³²³ Ibid at 43, 67, 72.

³²⁴ For example, detainee must wear an electronic monitoring tag at all times; remain at his premises at all times; telephone a named security company five times each day at specified times; permit the company to install monitoring equipment at his premises; that he limit entry to his premises to his family, his solicitor, his medical attendants and other approved persons; that he make no contact with any other person; that he have on his premises no computer equipment, mobile telephone or other electronic communications device; that he cancel the existing telephone link to his premises; and that he install a dedicated telephone link permitting contact only with the security company. Ibid at 35.

³²⁵ *Belmarsh I* at 42 per Lord Bingham

unlimited and ill defined. Further clarifying the rationale for the decision, Lord Bingham added, “*the 1998 [Human Rights] Act gives the courts a very specific, wholly democratic, mandate. As Professor Jowell has put it: “The courts are charged by Parliament with delineating the boundaries of a rights-based democracy.”*”³²⁶

As the US government had contended in similar cases, the British government also argued that the courts should defer to the Executive and the legislature regarding the nature of the threats posed by terrorism and the necessity of the actions taken in response.³²⁷ Reaffirming the view of Lord Bingham, Lord Hope emphasised the principle of proportionality and stressed that as the case concerned actions which affect the rights and freedoms of the individual, the courts “*may legitimately intervene, to ensure that the actions taken are proportionate.*”³²⁸ The notion of proportionality states that any layer of government should not take ‘*any action that exceeds that which is necessary to achieve the objective of government*’.

The context here is set by the nature of the right to liberty which the Convention guarantees to everyone, and by the responsibility of the court to give effect to the guarantee to minimise the risk of arbitrariness and to ensure the Rule of Law. Its absolute nature, save only in the circumstances that are expressly provided for in Article 5(1), indicates that any interference with the right to liberty must be accorded the fullest and most anxious scrutiny. The Executive did not extend Part IV past its specified date of repeal and instead, responded by introducing new legislation that allowed control orders to be imposed on all suspected terrorists, irrespective of nationality.³²⁹

Therefore, the question of whether indefinite security by way of derogation would receive judicial approval in the European Courts today, as in *Lawless*, is unclear. In *Brannigan and McBride v. UK*,³³⁰ the Court upheld British detentions under derogation of terrorists in Northern Ireland for periods of up to seven days without judicial supervision. However, the

³²⁶ *Ibid* at 42 per Lord Bingham (quoting Jowell J. (2003) ‘Judicial Deference: Servility, Civility or Institutional Capacity?’ *Public Law* 592

³²⁷ *A. v. Secretary of State for the Department*, [2004] UKHL 56, per Lord Hoffman at 107.

³²⁸ *Belmarsh* at 107-108.

³²⁹ Prevention of Terrorism Act, 2005, c. 2, § 16(2)(a) (Eng.) (repealing Anti-Terrorism Crime and Security Act, 2001, c. 24, §§ 21–32)

³³⁰ *Brannigan and McBride v. United Kingdom*, 258 Eur. Ct. H.R. (ser. A) at 38 (1993). The statute extended the time during which police could detain a suspect while gathering evidence for criminal prosecution.

Court emphasised adherence to safeguards, particularly access to *habeas corpus*, the absolute and legally enforceable right of access to a solicitor within 48 hours, the right to inform a friend or relative of his detention, and the right to have access to a doctor.³³¹

However, the implications of *Brannigan*, i.e. detailed scrutiny of whether derogations from Article 5 are “strictly required” by the exigencies, are illustrated in *Aksoy v. Turkey*.³³² In *Aksoy*, Turkey had derogated from ECHR Article 5 in order to detain terrorism suspects. The Court found that a detention of fourteen days without judicial supervision was “exceptionally long, and left the applicant vulnerable not only to arbitrary interference with his right to liberty but also to torture.” Moreover, the Government failed to adduce any “detailed reasons as to why the fight against terrorism . . . rendered judicial intervention impracticable.”³³³

Hence, although the Court in *Lawless* had upheld a security detention under derogation of five months, in *Aksoy* it was unwilling to uphold a detention under derogation of fourteen days without judicial supervision.³³⁴ Furthermore, the Belmarsh detainees took their case to the European Court of Human Rights.

The Grand Chamber held that their detention violated Article 5 of the European Convention of Human Rights (ECHR). This was on the grounds that they were not detained with a view to deportation given the fact that they would face a substantial risk of torture if returned to their countries of citizenship. The Court confirmed the decision of the House of Lords on both points discussed above. However, it was also held that some of the detainees were denied a fair hearing to test the legality of their detention. This was because they were denied knowledge of the specific allegations against them and thus could not work effectively with a security cleared special advocate in preparing their defence.

³³¹ Ibid at 55

³³² *Aksoy v. Turkey*, 1996-VI Eur. Ct. H.R. 2260, 2269

³³³ Ibid at 78

³³⁴ See also *Demir and Others v. Turkey*, 1998-VI Eur. Ct. H.R. 2640 (16–23 days incommunicado detention without judicial supervision not justified under derogation from Article 5); *Nuray Sen v. Turkey*, Eur. Ct. H.R., Judgment of June 17, 2003, at 28 (eleven days detention without judicial intervention not justified under derogation from Article 5).

These cases indicate continuing problems regarding the use of such advocates to mediate between “fair trial” considerations under Article 6 of the HRA and national security imperatives.

3.3 Conflicts between national security and civil liberties

The question regarding the standard by which a judge should review Executive or legislative actions taken in wartime has several possible answers therefore.

Firstly, the Court may act as a guardian of the law, as the judiciary is considered to “*guard the constitution and the rights of individuals.*”³³⁵ Therefore, the court may depart from the preferences of the Executive and military officials, as in *Milligan*. This approach requires courts to conduct an independent non deferential review of Executive action, regardless of whether that review decreases the nation’s ability to successfully defend itself against its enemies. However, such an approach has been rejected on the basis that although “*the Constitution protects against invasions of individual rights, it is not a suicide pact.*”³³⁶

Alternatively, the Courts response may mirror that of the nation’s leader and thus the Executive, by deferring completely to the political branches, as seen in *Korematsu*. Having overlooked questions of race discrimination and racial profiling, as well as the absence of any specific suspicion that Korematsu was disloyal, Justice Hugo Black explained that the court:

*“cannot say that the war-making branches of the Government did not have ground for believing that in a critical hour such persons could not readily be isolated and separately dealt with, and constituted a menace to the national defense and safety, which demanded that prompt and adequate measures be taken to guard against it.”*³³⁷

Additionally, recognising the lack of evidence, Justice Robert Jackson, dissenting, elaborated further.

³³⁵ The Federalist No. 78, at 381

³³⁶ *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963)

³³⁷ *Korematsu v. United States* 323 U.S at 218

*“In the very nature of things, military decisions are not susceptible of intelligent judicial appraisal. They do not pretend to rest on evidence, but are made on information that often would not be admissible and on assumptions that could not be proved. . . . Hence courts can never have any real alternative to accepting the mere declaration of the authorities that issued the order that it was reasonably necessary from a military viewpoint.”*³³⁸

The problem with this deferential approach is that decisions based on such deference create precedents that are potentially unacceptable once the threat of war has receded, as illustrated below. The third approach, which is traditionally adopted by courts, is to apply a diminished standard of review to the constitutionality of wartime policies and actions.

The first approach protects, rather than curtails individual rights, in times of emergency. Such an approach, of the judiciary as guardian, and not a suppressor, of rights in times of war, has been accepted by many legal scholars and jurists, including Geoffrey R. Stone,³³⁹ George Fletcher,³⁴⁰ and Justice Abe Fortas.³⁴¹ However, many commentators agree that *“through much of U.S. history, in times of war and tension, the courts have bent to claims of presidential power.”* The Courts have traditionally endorsed Executive action to suppress rights and thus, they do not “guard” the Constitution.³⁴²

On many occasions, therefore, the courts have typically agreed with government actions on the basis that the Executive is best positioned to decide whether an emergency exists and if so, what is necessary by way of counter measures to protect the national security of the nation. Thus, given the situation, judges will often defer to the Executive’s judgment about what is required, i.e. the doctrine of judicial deference. Judicial deference occurs when judges

³³⁸ Ibid at 245 (Jackson, J., dissenting).

³³⁹ Stone, G. R. (2003) ‘Civil Liberties in Wartime’ 28 *Journal of Supreme Court History* 215, 243 at 222–23, 243.

³⁴⁰ Fletcher, G.P. (2002) War and the Constitution, *The American Prospect* (Jan. 1, 2002), at 26, 29.

³⁴¹ See Fortas A. (1968) *Concerning Dissent and Civil Disobedience* (New York: The New American Library) (“It is the courts—the independent judiciary—which have, time and again, rebuked the legislatures and Executive authorities when, under stress of war, emergency, or fear of Communism or revolution, they have sought to suppress the rights of dissenters.”); at 38–39 (pointing to *Taylor v. Mississippi*, 319 U.S. 583 (1943), where “[a]lthough we were in a desperate war against Nazi Germany, the Supreme Court in 1943 reversed the conviction of persons who distributed literature condemning the war and the draft and opposing the flag statute”).

³⁴² Lewis, A. (2003) ‘Civil Liberties in a Time of Terror’ *Wisconsin Law Review* 257, at 270.

assign varying degrees of weight to the judgments of the elected branches, out of respect for their superior expertise, competence or democratic legitimacy.³⁴³

The traditional judicial willingness to defer to the government on national security matters also derives from the assumption that cases involving national security matters are the exception and not the norm. Thus, in matters where the government interest in infringing individual rights is particularly urgent, the courts believe it is legitimate to defer to the government.

The idea of deviating from internationally recognised legislation during times of emergency, e.g. during the Second World War, was also considered in *Liversidge*.³⁴⁴ The question before the House of Lords was a matter of the interpretation of Defence Regulation 18B which provided that the Home Secretary may order a person to be detained ‘if he has reasonable cause to believe’ the person to be of hostile origin or associations. A majority of four held that if the Home Secretary thinks he has good cause that is good enough.

However, Lord Atkin rejected the majority view and argued that the statute required the Home Secretary to have reasonable grounds for detention. He reiterated that: ‘amid the clash of arms the laws are not silent,’ and warned against judges who “when face to face with claims involving the liberty of the subject show themselves more Executive minded than the Executive.”³⁴⁵

Nevertheless, the House of Lords in *Liversidge*, effectively held that the detention of persons in wartime under reg.18B of the Defence (General) Regulations 1939 could only be successfully challenged if the Home Secretary could be shown not to have acted in good faith. This approach meant that the balancing of the interests of national security against those of the individual was the sole prerogative of the Home Secretary.

³⁴³ See *Smith and Grady v UK* [2000] 29 EHRR 493. The European Court held that, in the circumstances of the applicants, judicial review did not provide an effective remedy within the meaning of Article 13 ECHR because the threshold for judicial intervention was set far too high. “*The threshold at which the High Court and the Court of Appeal could find the Ministry of Defence policy irrational was placed so high that it effectively excluded any consideration by the domestic courts of the question whether the interference with the appellants’ rights answered a pressing social need or was proportionate to the national security and public order aims pursued.*” [para 138].

³⁴⁴ *Liversidge v Anderson* [1942] A. C. 206

³⁴⁵ *Ibid.*

Despite his lone dissent, the judgment by Lord Atkin is significant. It emphasised the idea of the deep rooted principle of the judiciary as guardians of the Rule of Law and thus, rejects Schmitt's claims regarding exclusive sovereignty without adversarial scrutiny. Similarly, Dyzenhaus provides a critique of arguments of those who, like Schmitt, defend extra-constitutional powers. He argues that claims for suspension of the normal Rule of Law leads to the creation of constitutional "black holes" into which rights and legality fall.³⁴⁶ Furthermore, the case is important as despite the difference on a mere point of statutory interpretation, it is illustrative of the recurring clash of fundamentally different views about the role of courts in times of crisis.³⁴⁷

The level to which contemporary decisions reflect the philosophy of Lord Atkin is far from clear. The national security approach maintains courts must always defer to the Executive and this is logical because the Executive are the elected representatives of the nation. An alternative view, however, is that although courts must take into consideration the relative constitutional competence of branches of government to decide particular issues, they must never, on constitutional grounds, surrender the constitutional duties placed on them.³⁴⁸

Executive action was therefore left unquestioned by the Courts during wartime. In dealing with conflicts between national security and civil liberties, the Courts have traditionally adopted the principle of judicial deference, and therefore presumed that restriction of civil liberties in wartime were constitutionally justified because the Executive was acting to protect the national security of the nation.

3.4 National security arguments

From a national security perspective, the Courts lack authority to address questions regarding legitimacy of detaining individuals indefinitely. This viewpoint suggests the President, as the Commander in Chief, is best placed to decide on the necessary actions during times of war and therefore, such issues are not to be questioned by the Courts as times of war require quick and effective decisions to be made. Therefore, the 'national security perspective' upholds the

³⁴⁶ See Dyzenhaus, D. (2006) *The Constitution of Law: Legality in a Time of Emergency* (New York and Cambridge: Cambridge University Press), p 102.

³⁴⁷ *Liversidge v Anderson* [1942] A. C. 206

³⁴⁸ Jowell J. (2003) 'Judicial Deference: Servility, Civility or Institutional Capacity?' *Public Law* 592

right to curtail individual rights in times of emergencies. The model is based upon the claim that the Rule of Law may have little or no application in an exceptional situation.

Thus, supporters of this model, including Schmitt, insist that judicial deference is completely justified because the decision of when and what amounts to an emergency undoubtedly lies with the Executive.³⁴⁹ Therefore, the Executive is considered to be beyond the realms of the law during times of emergency and conflict. Indeed, Carl Schmitt argued that such emergencies permit suspension of the normal Rule of Law and a venturing into extra-constitutional power. Schmitt claims, “*Sovereign is he who decides on the state of exception.*”³⁵⁰ He thus asserted that in abnormal times the sovereign is legally uncontrolled.

Furthermore, academics such as Zechariah Chafee Jr,³⁵¹ Thomas I. Emerson,³⁵² and Sanford Levinson,³⁵³ maintain that threats to national security require the judiciary to adopt a jurisprudential stance that leads it to restrict rights and liberties it otherwise would not. Such academics would argue that when conflicts arise between national security and civil liberties during times of war, judges should begin by affording much deference to the Executive. Several reasons for this have been identified.

First, such cases rarely arise and so individual judges have relatively little first-hand experience with national security matters. Therefore judges are “relative novices” when it comes to assessing the possible implications of their decisions for national security. Second, the risks of ineffective responses may be substantial. The potential consequences of a judge’s misjudged decision regarding national security may lead to devastating effects across the nation. Lastly, Stone argues deference is favourable for “institutional reasons”. He argues that military and Executive officials are best placed to make decisions in such conflicts and

³⁴⁹Schmitt, C. (1988) *Political Theology: Four Chapters on the Theory of Sovereignty* (George Schwab translation, Cambridge: MIT Press), page 5.

³⁵⁰ Ibid.

³⁵¹ Chafee Jr. Z. (1941) *Free Speech In The United States* (Cambridge: Harvard University Press) at 97 (“*It is extremely ominous for future wars that the Supreme Court at the close of the World War was so careless in its safeguarding of the fundamental human need of freedom of speech, so insistent in this sphere that the interests of the government should be secured at all costs.*”).

³⁵² Emerson, T. J. (1968) ‘Freedom of Expression in Wartime’ 116 *University of Pennsylvania Law Review* 975 at 975.

³⁵³ Levinson, S. (2001) *What Is the Constitution’s Role in Wartime?: Why Free Speech and Other Rights Are Not as Safe as You Might Think* (Oct. 17, 2001) (noting that “*the Constitution is often reduced at best to a whisper during times of war*”), at http://writ.findlaw.com/commentary/20011017_levinson.html.

therefore “*judges should be reluctant to second-guess these judgments.*”³⁵⁴ Thus, he argues judicial interference should be kept to a minimal and issues arising in times of conflict should be deferred to the Executive.

3.5 Civil liberties arguments

On the other hand, from a ‘civil liberties perspective’, the decisions of the government are always subject to judicial review, and as the Constitution requires Courts to uphold the Rule of Law, it is undoubtedly the responsibility of the Courts to ensure that government decisions, even in times of war, are subject to judicial review. Civil libertarians argue individual rights must always be protected and they must not be curtailed even during times of state emergencies. Furthermore, national security arguments are not justifiable to infringe civil liberties. Therefore judges must fulfil their constitutional duty to uphold the Rule of Law.

Dyzenhaus for example responds to Schmitt’s challenge and argues that legislatures can enact and courts enforce policies to protect national security in times of emergency without threatening the law’s inner morality. Whilst recognising that “*Political reality seems to triumph again and again over any effort to impose the Rule of Law in exceptional circumstances,*”³⁵⁵ Dyzenhaus still contends that extraordinary times do not require extraordinary governmental powers that enhance legislative or Executive authority at the expense of Rule of Law, rights and judicial review. He asserts therefore, that it is entirely possible to respond to emergencies while respecting Rule of Law, and judges have a duty to preserve the law and therefore ensure the government do not act beyond the realms of the law.³⁵⁶

Moreover, Professor Allan, writing from a liberal perspective, describes the doctrine of judicial deference as “*pernicious*”,³⁵⁷ arguing that it permits “*the abdication of judicial responsibility in favour of reliance on the good faith or good sense or special expertise of public officials, whose judgments about the implications of rights in specific cases may well*

³⁵⁴ Stone, G. R. (2006) ‘Civil Liberties v. National Security in the Law’s Open Areas’ 86 *Boston University Law Review* 1315 at 2.

³⁵⁵ Dyzenhaus, D. (2006) *The Constitution of Law: Legality in a Time of Emergency* (New York and Cambridge: Cambridge University Press), page 160.

³⁵⁶ Ibid.

³⁵⁷ Allan, T. R. S. (2006) ‘Human Rights and Judicial Review: a Critique of ‘Due Deference’” *Criminal Law Journal* 671.

be wrong.”³⁵⁸ He further argues, the end result is “*the conferral on either Parliament or the Executive of a wholly unfettered power to strip...individual right[s]...of any practical effect*”.³⁵⁹ Professor Allan’s concerns of the end result reflect a Schmittian view that the President, as Commander in Chief, should be totally empowered to decide whether an emergency exists and if so, what measures should be taken to deal with such an emergency. It places the actions of the President and the Executive, as a whole, above the level of judicial oversight and democratic accountability.

3.6 Judicial deference

It is, therefore, clear that the principle of judicial deference “*assumes that those making the critical judgments are properly taking the relevant factors into account in a fair and reasonable manner. If they fail to do so, the underlying rationale for deference is destroyed.*”³⁶⁰ Stone identifies three reasons why this essential requirement, that would make judicial deference successful, is, or could be, lacking. Firstly, government officials tend to exaggerate dangers faced by the nation, “*both to protect themselves in the event they fail and to persuade legislators and the public to grant them as much power as possible.*” Second, Stone also argues that government officials are quick to sacrifice civil liberties in order to achieve their primary goal of safeguarding national security. Finally, “*opportunistic politicians tend to exploit periods of real or perceived crisis for partisan and personal gain.*”³⁶¹

Such reasons explain why judicial deference to the Executive can sometimes lead to controversial decisions like *Schenck*, *Hirabayashi* and *Korematsu*. By deferring to the Executive, whose judgments may be distorted by such influences, officials are allowing national security concerns to prevail over civil liberties. This means that although judges should be cautious when questioning the actions of the Executive, judicial review requires a rigorous approach to ensure decisions such as *Schenck*, *Hirabayashi* and *Korematsu* are avoided. Such decisions, which failed to question the legitimacy of Executive power, allowed the Executive to act without judicial or administrative oversight. By failing to uphold the

³⁵⁸ Ibid at 675.

³⁵⁹ Ibid at 692.

³⁶⁰ Stone, G. R. (2006) ‘Civil Liberties v. National Security in the Law’s Open Areas’ 86 *Boston University Law Review* 1315, page 14.

³⁶¹ Ibid.

Rule of Law, the judiciary has allowed Executive action to remain unquestioned and allowed specific communities to be targeted based on mere suspicion and not fact.

However, it is important to note that the judiciary's role in enforcing individual civil liberties is similar. Judges in common law systems have typically been considered as "protectors of freedom"³⁶² and those involved in preserving civil liberties are more likely to protect individual rights and freedom over restrictive government actions. However, the challenge faced by judges goes far beyond protecting civil liberties.

Judges must ensure they protect civil liberties without unduly preventing or restricting the government from protecting national security. The failure of the courts to protect national security concerns can ultimately lead to violation of individual rights also. For example, undetected threats posed by terrorism caused by legal constraints may lead to terror attacks, and therefore cause loss of life and property. Therefore, amidst turmoil of conflicting concerns, judges are likely to turn to deference as "*judges, like other citizens, do not wish to hinder a nation's 'war effort'.*"³⁶³ Judges do not want to be responsible for losing a war or for a mass tragedy. This is evident by the decision of the US District Court in *Hamdi* in which it was held that "*political branches are best positioned to comprehend this global war in its full context,*"³⁶⁴ Therefore a certain level deference is considered preferable. Establishing the correct level of deference can pose great difficulties however.

It is clear that wartime has traditionally indicated repeated restriction of civil liberties because of the courts' failure to question the judgment and actions of the Executive on matters concerning national security. However, the above decisions indicate that a logical presumption of deference to the Executive can be dangerous. Therefore, "*courts must closely*

³⁶² Lewis, A. (2003) *Security and Liberty: Preserving the Values of Freedom, in the War on Our Freedoms: Civil Liberties In An Age Of Terrorism* (edited by Leone, R C and Greg Jr., A. 47 New York: Public Affairs). The framers were aware of this: "*This independence of the judges is equally requisite to guard the constitution and the rights of individuals from the effects of those ill humours which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information and more deliberate reflection, have a tendency in the mean time to occasion dangerous innovations in the government, and serious oppressions of the minor party community.*" The Federalist No. 78, at 397 (Alexander Hamilton) (Garry Wills ed., 1982).

³⁶³ Rehnquist, W. H. (1998) *All The Laws But One: Civil Liberties In Wartime* (New York: Knopf) at 221.

³⁶⁴ *Hamdi v. Rumsfeld*, 296 F.3d 278, 284 (4th Cir. 2002) at 284

scrutinize invocations of military necessity and national security as justifications for limiting civil liberties.”³⁶⁵

3.7 Summary

The above discussion demonstrates the changing role of the judiciary when ruling on conflicts between national security and civil liberties. Both the US and the UK have traditionally upheld the power of the Executive to determine threats to national security, through the doctrine of judicial deference. However, in more recent times, the Courts have upheld the right for greater judicial oversight into such areas and thus, rejected the idea of automatic overriding of civil liberties by national security.

Nevertheless, judicial oversight of the Executive has differed markedly between the two countries. In the United Kingdom, the Courts, fortified by the 1998 Human Rights Act, have challenged the Government on the detention without charge of foreign terror suspects and the subsequent use of control orders.³⁶⁶ In doing so, the Courts have shown that the Government has acted in ways that are incompatible with provisions found in the European Convention on Human Rights and have in many ways asserted a new level of judicial control over the Executive.

Lord Bingham’s explicit reference to the function of independent judges in interpreting and applying the law as a cornerstone of the Rule of Law links the House’s decision in *Belmarsh I* with the opinions of the US judges, for example Justice Breyer and Judge Rogers in *Boumediene*. The common theme amongst the judges is the constitutional responsibility of the courts to ensure that the Rule of Law is consistently maintained, particularly during the course of government responses to the threats of terrorism.

In contrast, the Supreme Court in the United States, have wavered in their approach to Executive action, and its decisions have focused primarily on the detention of terror suspects at Guantánamo Bay. The *Hamdi* decision ruled that detainees who were U.S. citizens had the right to *habeas corpus* even if they were classified as “enemy combatants.” In *Hamdan*, the

³⁶⁵ Stone, G. R. (2006) ‘Civil Liberties v. National Security in the Law’s Open Areas’ 86 *Boston University Law Review* 1315, page 16.

³⁶⁶ *A. v. Secretary of State for the Home Department*, [2004] UKHL 56, [2005] 2 A.C. 68 (appeal taken from Eng.).

Court found that the proposed military commissions for trying terror suspects violated the Uniform Code of Military Justice and the four Geneva Conventions.

In the United States, there are mixed reviews for the activities of the Supreme Court, which has focused its attention primarily on the detention of terror suspects at Guantánamo Bay. The *Hamdi v. Rumsfeld* decision in 2004 ruled that detainees who were U.S. citizens had the right to *habeas corpus* even if they were classified as ‘enemy combatants’.³⁶⁷ The *Hamdan* decision found that the proposed military commissions for trying terror suspects violated the Uniform Code of Military Justice and the four Geneva Conventions.³⁶⁸

Although initially, it may appear that *Hamdi* was a triumph for international law and human rights, the decision was somewhat more complex. *Hamdi* had been detained for over three years before the Supreme Court considered his case, as previous decisions by lower courts insisted that the President had the authority to detain him. Next, only Justice Stevens and Justice Scalia, believed that the US Constitution guaranteed Hamdi a trial by jury.³⁶⁹ Justice Thomas emphatically rejected this argument, insisting that the President had the power to “unilaterally decide to detain an individual if the Executive deems this necessary for the public safety even if he [was] mistaken.”³⁷⁰

This opinion by has been received by some as shocking as it affords the President unilateral power to deal with a threat to the nation, an argument also supported by Schmitt. This is evident of the argument that the democratically elected leader of a country is in the best position to make decisions on when an emergency exists and the necessary measures to deal with it.

However, Ackerman argues that the opinion appears to “vindicate the president’s authority unilaterally to declare an emergency in response to any perceived threat [imminent or otherwise] . . .” and to detain indefinitely without charge any US citizen, even if the President is mistaken.³⁷¹ It is important to note, however, that Justice Thomas’s view is in the minority, as Justice O’Connor agreed with the majority opinion that *habeas corpus* does apply to

³⁶⁷ *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

³⁶⁸ *Hamdan v. Rumsfeld*, 547 U.S. 1016 (2006).

³⁶⁹ *Hamdi* at 573 (Scalia, J. & Stevens, J., dissenting)

³⁷⁰ *Ibid* at 590 (Thomas, J., dissenting).

³⁷¹ Ackerman, B. (2006) *Before the Next Attack* (Yale University Press), p 28

Hamdi. However, the difference in opinions indicates the continued precariousness of the Bill of Rights in the United States.

A striking difference between the approach of the courts in the US and the UK is, therefore, demonstrated by UK courts' obligation to comply with the HRA 1991. Although the HRA governs the UK government in many ways, the US is not limited in such a manner.

However, what is clear is that because the 'war on terror' is a term deployed by the US, it has led to many actions not previously seen in times of crisis. Thus, judicial deference to the level afforded previously becomes difficult. For example, complete judicial deference with respect to the war on terror would inevitably mean that the nations' actions domestically, and internationally, would be left unlimited and unchallenged. On the other hand, total judicial oversight of Executive actions may mean that the Executive is unable to adequately react to immediate threats posed to the nation and responsibility for this would lie with the judiciary.

A certain level of judicial review into the actions of the Executive appears necessary, therefore to ensure the judiciary is fulfilling its role of upholding the Rule of Law, particularly in times of wars and emergencies. Decisions regarding national security imperatives, such as whether an emergency exists and what actions are necessary, are generally considered to be that of the Commander in Chief. However, in more recent times, the courts have reiterated that they are within their jurisdiction to ensure any actions taken are proportionate and therefore do not unnecessarily infringe individual rights.

However, many feel it is not for judges to decide on such matters as they are unaware of the consequences. This is an opinion which is clearly demonstrated by referring to a statement by Charles Clarke, the former Home Secretary. When giving evidence to a Parliamentary Committee, he protested that, "*The judiciary bears not the slightest responsibility for protecting the public and sometimes seems utterly unaware of the implications of their decisions for our society*".³⁷²

Requiring courts to abstain from ruling on such matters can cause difficulties, however, as recognised in the ruling of *Boumediene*. The judges made it clear that "*Abstaining from*

³⁷² *Judiciary Jeopardising Fight Against Terrorism Warns Clarke* (2007), Mail Online, available at <http://www.dailymail.co.uk/news/article-429523/Judiciary-jeopardising-fight-terrorism-warns-Clarke.html>

questions involving formal sovereignty and territorial governance is one thing. To hold the political branches have the power to switch the Constitution on or off at will is quite another. The former position reflects this Court's recognition that certain matters requiring political judgments are best left to the political branches. The latter would permit a striking anomaly in our tripartite system of government, leading to a regime in which Congress and the President, not this Court, say 'what the law is.'"

The cases relating to recent terrorist threats illustrate the courts approach in affording a certain level of deference to the Executive during times of war and perceived dangers to the nation, albeit not complete deference as was previously the case. This is indicative of a shift of balance from almost uncritical deference to deference only if shown to be necessary and proportionate. This has, to some extent, shifted the onus of proof to the government to ensure the action they are taking is necessary and required by the exigencies of the situation.

However, as demonstrated throughout this section, achieving a constitutional balance between national security and civil liberties can be extremely difficult and challenging for the courts. Although the role of the judiciary is to uphold the Rule of Law, the Executive may, in times of crisis and emergency, require the judiciary to leave the actions of the Executive unquestioned. Issues regarding national security raise questions regarding the level of judicial review necessary, if at all any.

Conclusion

This analysis of the response to terrorism in the US and the UK shows that the governments in both countries have resorted to exceptional powers used primarily in times of war. Having compared the approaches of the two countries, it is now possible to identify what each nation can learn from the other in striking a legitimate constitutional balance between national security and human rights.

Firstly, the classification by the US of this struggle as the ‘war on terror’ has most significantly authorised the President to exercise total authority as Commander in Chief to combat the threat of terrorism, with little Congressional or judicial oversight and/or authorisation. However, using the term ‘war’ involves a potential risk of treating these individuals as soldiers and not criminals. This is counterproductive and can inevitably lead to legitimising the cause of the terrorists and increasing sympathy

Nevertheless, the US government has used the AUMF to detain suspected terrorists incommunicado, with no indication of how long such detention may last. This is indicated by the military base at Guantanamo Bay. Although President Obama vowed to close this down, there are still a number of detainees detained at the military base. Similarly, the UK enacted ATCSA, which attempted to indefinitely detain non-British nationals suspected of terrorism was declared incompatible with Article 14 of the ECHR.³⁷³ Although the provision is not in use, it raised questions about individual rights under Article 5, which is also the case in relation to control orders established under the PTA 2005.

Additionally, the pre-charge detention provision which allowed for 28 days has not been renewed and therefore pre-charge detention reverts back to 14 days under CJA 2003. This demonstrates that in comparison to the US, the UK has tried to strike a balance between the necessities of extended detention with the necessity and proportionality of such measures. However, it is important to note that UK’s decision to extend pre-charge detention to 28 days was longer than that of any other European country.

Furthermore, there are numerous models which can be adopted to fight terrorism,

³⁷³ *A and others v Secretary of State for the Home Department* [2004] UKHL 56.

predominantly the criminal Justice Model and the War Model.³⁷⁴ The United Kingdom has in large, adopted the Criminal Justice Model by using its ordinary courts and rules of war to try suspected terrorists. This is despite repeated calls for a “*security model that is not based on fear and suspicion.*”³⁷⁵ The United States, in comparison, has responded to the terrorist threats by using the war model which is based on such fear and suspicion.

This model ultimately relies on the argument that the extraordinary nature of the unconventional threat of terrorism requires the use of extraordinary measures which justify the reduction of individual rights. This is clearly demonstrated by the decision of the US to use military commissions thus preventing the right to petition for an Article III Court review. In contrast, the UK has retained its approach in using the ordinary courts to try suspected terrorists.

It is clear that the UK has, arguably, achieved an adequate balance between protecting national security and also ensuring human rights are not unnecessarily violated. In comparison to the US, the UK appears to have been more successful in achieving a viable balance. Therefore, the US can learn some lessons from the UK in order to establish a criminal justice system that is more consistent with human rights. Firstly, the US could amend legislation relating to detention to ensure greater compliance with human rights. It could also replace its war-like model with that of a largely criminal justice model, using ordinary courts to try suspects, whilst also allowing for exceptional measures if necessary. Adopting such an approach would increase the legitimacy of the actions of the US globally also and thus, would have greater credibility.

The UK can also benefit from the analysis of the US experience. For example, in relation to domestic terrorists, US measures in relation to detention have shown that US citizens cannot be detained indefinitely without due process rights.³⁷⁶ Also, if the terrorist threat in the UK culminated in an attack of a similar scale to 9/11, exceptional measures may be required as those during the IRA era. Therefore, US legislation such as the DTA and MCA may become relevant and the UK can use such legislation as the foundation for counter-terrorist measures

³⁷⁴ Large, J. (2005) ‘Democracy and Terrorism: The Impact of the Anti’ 2 *Democracy, Conflict, and Human Security: Further Readings* 140, 143, available at http://www.idea.int/publications/dchs/upload/dchs_vol2_sec4_2.pdf.

³⁷⁵ Gearty, C. (2006) *Can Human Rights Survive?* (Cambridge: Cambridge University Press) at 137.

³⁷⁶ *Rumsfeld v. Padilla* [2004] 124 S.Ct. 2711

if the criminal justice system is no longer considered adequate.

Additionally, the thesis suggests that whilst legislation has been enacted hastily in response to an urgent situation, there appears to have been little questioning of the principles underpinning this situation. For example, why has the fundamental matter of charging terrorists with specific offences not been addressed? It is clear that there are problems because the secretive and covert nature of terrorists means allegations of involvement in terrorism are difficult to investigate. However, the decision to subject individuals to indeterminate restraints of liberty, contravenes levels of due process and the basic rights set out in a multitude of International Charters on Human Rights.

Therefore, the central question is how developments in both countries address the debate regarding the best ways in which to fight terrorism while not undermining a commitment to fundamental European and international human rights? An appropriate response to try and prevent further terrorist attacks would ensure the basic values of democratic countries are not undermined. The foundation of this approach is that the European law on human rights already has criteria established for the conditions under which certain rights may be curtailed.³⁷⁷

Such an approach does not disregard security, nor does it claim that all rights must be protected at all times. Instead, it seeks to establish a legal standard that recognises the need to protect human rights whilst also protecting security. This approach reflects the criminal justice model, which has, in large, been adopted by the UK. As the criminal justice model is consistent with the human rights approach by affording suspected terrorists a fair judicial process, it means that:

“Open and public trials allow the community to see the terrorist for the criminal he [or she] is, and successful prosecutions give them faith the government is protecting them. Judicial review ensures that the methods used are in accordance with the law, and juries enforce community standards of fairness. The adversarial process exposes improper or ineffective law enforcement techniques so they can be corrected. Checks and balances on

³⁷⁷ Office of the High Commissioner for Human Rights, *Note to the Chair of the Counter-Terrorism Committee: A Human Rights Perspective on Counter-Terrorism Measures*, available at <http://www.un.org/Docs/sc/committees/1373/ohchr1.htm>.

*government power and public accountability promote efficiency by ensuring that only the guilty are punished.*³⁷⁸

Therefore as democratic societies have ensured judicial oversight of Executive action, chapter 3 considered the approach of the judiciary in achieving a viable constitutional balance. The cases prior to 9/11 indicate the conflict in both countries between the desire of the Executive to enact and implement certain pre-emption measures on the one hand, against, the wish of the judiciary to adhere to overriding legal principles on the other – in the UK, the European Convention of Human Rights and in the US, the US Constitution. Typically, concerns over national security have led to systematic violations of human rights, as seen in the US cases of *Schenck*, *Hirabayashi* and *Korematsu*.

There has been a move away from such critical deference after the attacks of 9/11; however a certain level of deference to the Executive has been retained, particularly in the US. Nevertheless, the cases illustrate that although courts have criticised unwarranted infringement of rights, they have also provided sufficient leeway to the Executive to respond effectively to terrorism. This level of judicial oversight encourages the Executive to enact counter-terrorist measures which, as far as possible, are compatible with human rights.

Thus, it is always necessary to conduct a balancing act between the rights of citizens to live in peace and security of persons and property, against the rights of individuals who may seek to threaten this. The criminal justice systems in both the US and the UK are founded on a presumption of innocence and the Executive must consider ways in which this can be preserved through the use of expedited investigations and individuals charged or released. Such an approach is consistent with a decision of the Canadian Supreme Court in which it was emphasised that “*The overreaching principle of fundamental justice that applies here is this: before the state can detain people for significant periods of time, it must accord them a fair judicial process.*”³⁷⁹

Nevertheless, the thesis also recognises that a nation that considers some civil liberties of greater importance than its security will eventually fail, as it will be without a means of

³⁷⁸ German, M. (2005) *Law vs. War: Competing Approaches to Fighting Terrorism* ([Strategic Studies Institute, U.S. Army War College](#)) at 14.

³⁷⁹ *Charkaoui v. Almrei*, [2007] 276 D.L.R. (4th) 594 28 (citing *New Brunswick v. G. (J.)*, [1999] 3 S.C.R. 46) as per Chief Justice Beverly McLachlin.

protecting itself from those who seek to destroy it. Constitutions are “*not a suicide pact*”³⁸⁰ and thus, nations are allowed to protect themselves. This is demonstrated by the fact that in the US, Article I is not absolute and allows for suspension of the writ of *habeas corpus*. Similarly, Article 15 of the ECHR allows the UK to derogate from the Convention in certain circumstances.

Thus, whilst this thesis argues that civil liberties must not be unnecessarily or disproportionately curtailed, it also recognises that the governments in the US and the UK would undoubtedly be hindered without the ability to protect its citizens. Thus, certain situations, like those experienced during the American Civil War, the World Wars and the IRA threat in the UK may require temporary infringements on certain civil liberties to try and prevent further attacks. However, such infringements should cease when hostilities towards the nation end or the perceived threat is no longer at a heightened level. The War on Terror, which began in 2001 has continued for nearly a decade now and is longer than both the First and Second World Wars.

It is therefore argued that nations should, as far as possible, adopt a human rights approach which upholds long standing and fundamental values such as a broadly liberal conception of the Rule of Law. This could be done by using the ordinary rules of criminal justice to deal with suspected terrorists. Furthermore, it is argued that to follow such a long term approach would provide an adequate platform for other countries in the struggle against terrorism. However, it is recognised that protecting national security interests is at the heart of all nations, however both the Executive and the judiciary as upholders of the Rule of Law, should ensure the action taken is both adequate and necessary in the sense of proportionate (no more but also no less than what is called for).

Furthermore, the thesis concludes that the UK is in a better position than the US because of the obligations placed upon it by the European Convention of Human Rights. The European model seems a more adequate model to deal with perceived threats of terrorism and those found guilty of involvement in terrorist action. Firstly, the European Convention provides for a hierarchy of rights, -rights which are absolute and can never be curtailed, e.g. the right to life and the right to be free from torture, and also lesser rights which would justify restrictions

³⁸⁰ *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963)

when the Executive claim. Nevertheless, by incorporating Article 15, the ECHR allows for derogation and thus, allows the circumvention of rights in certain situations. This derogation provides the adequate balance in ensuring individual rights are not unnecessarily infringed whilst also ensuring that countries have the necessary means available to deal with emergency situations which would require nations to derogate from their obligations under the Convention.

Also, although the UK has an unwritten Constitution and the US has a written Constitution, the UK courts have historically been more forthcoming in upholding Rule of Law whereas in the US, the Supreme Court has typically deferred to the Executive. However, in doing so the US has retained the constitutional principle of separation of powers by upholding its role as interpreters of the law and not makers of the law.

Therefore, it is suggested that the US adopt a model like that of the UK with a court similar to that of the European Court of Human Rights which is the overriding international supreme body due to the UK's international obligations. This allows the Court to objectively oversee the power of the Executive, irrespective of the Royal Prerogative.

The thesis also concludes that the role of the judiciary includes ensuring that the Executive do not act beyond the realms of their powers. Thus it is argued that Executive action must always be constrained by the judiciary. For example, in relation to the use of control orders in the UK, it is argued that the Home Secretary should be able to justify his reason for issuing a control order to prove it is not just on mere suspicion. However the rights the order curtails after judicial approval of issuing the order, should remain the discretion of the Home Secretary. Therefore, as long as the restrictions do not interfere with absolute rights such as right to life, exceptional times mean that the judiciary should allow the Executive the appropriate discretion to decide the necessary actions.

However, it is important to note that the judicial review process in the US is more developed than that of the UK. The US has more substantive judicial review as it can strike down measures and the judiciary can challenge decisions which it considers are unconstitutional. In contrast, judicial review in the UK is greatly limited as it is more procedural and fails to declare that decisions are incorrect and instead questions the way in which the decision was made. Nevertheless, the UK model is preferred as it is believed that the European Convention

of Human Rights is an adequate model to deal with the threat of terrorism as it strikes a viable constitutional balance between national security and individual rights.

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