

## SEPTEMBER 11<sup>TH</sup> AND GOOD GOVERNANCE

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“Amid the clash of arms, the laws are not silent, they may be changed but they speak the same language in war as in peace.”  
Lord Atkin, *Liversidge v Anderson*<sup>1</sup>

### INTRODUCTION<sup>2</sup>

The murder of some 3,000 people in New York, Washington and Pennsylvania, on September 11<sup>th</sup> by suicidal terrorists profoundly affected the American psyche.<sup>3</sup> Political seismic shock waves reverberated around the globe and governments lined up behind President Bush's swift declaration of 'war on terrorism'. This paper addresses the terms of that declaration by examining the relationship of good governance with executive and legislative responses introduced in the USA and the UK.

In times of social, economic and political calm the application of good governance is relatively easy. But in times of unrest, war and emergency the extraordinary problems that arise test the mechanics of good governance. Essentially, do the responses to September 11<sup>th</sup> constitute good governance by observing the rule of law?<sup>4</sup> Should these responses fail this test, how do they fare when examined for their criminal justice efficiency? What does a cost-benefit analysis of these responses tell us?

In a world dominated by one super-power, that power may, in large part, choose between proceeding on the basis of law or on the basis of pure

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<sup>1</sup> [1941] 2 All ER 612. This is a dissenting judgment for, in essence, the House of Lords stated it is not for the courts to interfere with the executive in security matters in wartime.

<sup>2</sup> I wish to recognize the support of the Research Committee of Cardiff Law School for providing funds that allowed me to benefit from the student research support of Kirat Nagra now of New Delhi and Ashima Arora now of Houston, Texas. In addition I thank David Campbell, Ruth Costigan, Peter Fitzpatrick, Paddy Hillyard, Urfan Khaliq, and Penny Smith for constructive comments. This paper was completed in November 2002.

<sup>3</sup> The American press carried statements such as “In a few minutes the world changed” and not just the world, “a universe is now lost.” *San Francisco Chronicle* 30 December 2001. Between 1966 and 1999 there were 3,636 deaths in Northern Ireland related to political violence. D. McKittrick, S. Kelters, B. Feeney and C. Thornton, *Lost Lives* [1999].

<sup>4</sup> The *World Development Report*, published annually by the World Bank, consistently recognizes and affirms that establishing the rule of law is one of the five fundamental tasks which governments must perform. World Bank, Washington D.C. (1997) 4. The OECD recognizes that democracy, good governance and the rule of law are central to the achievement of the development goals of the 21<sup>st</sup> century. OECD, *Final Report of the Ad Hoc Working Group on Participatory Development and Good Governance*, (1997). Good governance is seen as including support for the rule of law as described by K. Ginther, E. Denters and P.de Waart (eds) *Sustainable Development and Good Governance* (1995) 20. See generally, R.A.W. Rhodes, *Understanding Governance, Policy Networks, etc* (1997); N.D. Lewis, *Law and Governance* (2001).

political, economic and military power. If a country is uninterested in the development of an international criminal court, declares itself not bound by international treaties<sup>5</sup> or important bilateral agreements concerning the protection of the environment, and moves against international violence with scant regard to established legal principles, then the rule of law is downgraded to a secondary position to be used only when politically expedient.

Nevertheless, in modern, democratic states that operate under the rule of law the criminal justice system should be subject to certain expectations. These include the principles of reasonable cause; no detention without trial; innocence until proven guilty; an open trial in a judicial court; legal advice and representation of choice; punishment reflecting the seriousness of the crime. These principles are sometimes blurred at their edges but they are both expected and present in matters of crime control.

The total immersion of society in legal culture is nowhere better illustrated than in the USA. A century and a half ago, de Tocqueville wrote “Scarcely any political question arises in the United States that is not resolved sooner or later into a judicial question.”<sup>6</sup> More recently, Hertog has argued “Throughout American history law was inescapably, at times overwhelmingly, present . . .”<sup>7</sup> As another observer put it, “The United States has become probably the most law-run and lawyer-run country in the history of mankind.”<sup>8</sup> The importance of law as a cultural icon and the backbone of good governance cannot be over emphasised.

However, a major exception may be found in times of national emergency. At such moments executive action may become the dominant force. The traditional triumver balance, between the judiciary, the legislature and the executive, becomes stressed and is reconfigured in the attempt to address the crisis. The outbreak of war is the paradigm case that produces challenges to good governance.<sup>9</sup> The fear of gross terrorist threats produces similar tensions and reactions.<sup>10</sup>

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<sup>5</sup> For example, in December 2001 President Bush pulled out of the ABM treaty with Russia saying “it hinders us from developing an anti-missile shield that will deter an attack from a rogue state.” *New York Times*, 13 December 2001. See also, C. Douzinas, “Postmodern just wars: Kosovo, Afghanistan and the new world order” in *Law After Ground Zero* ed J. Strawson (2002) 29.

<sup>6</sup> A. de Tocqueville, *Democracy in America* (1984) 280.

<sup>7</sup> H. Hertog, “Abigail Bailey’s Coverture” in *Law in Everyday Life*, eds Sarat and Kearns, (1993) 107.

<sup>8</sup> H. Berman, W. Greiner and S. Saliba, *The Nature and Functions of Law* (1996) 3. Today, there are over one million lawyers in the USA out of a national workforce of some 110 million. Each year, the country’s law schools graduate another fifty thousand lawyers, a number that roughly corresponds to the total number of lawyers in China. In two years the US law graduates outstrip the total number of practicing lawyers in the UK.

<sup>9</sup> The best illustration is the work of A.W.B. Simpson, *In the Highest Degree Odious: Detention without Trial in Wartime Britain* (1992). W.H. Rehnquist, *All the Laws but One* (1998) 218. “Without question, the government’s authority to engage in conduct that infringes civil liberty is greatest in time of declared war.”

<sup>10</sup> A recent and new illustration of the use of ‘national emergency’ is the bio-emergency associated with the foot and mouth epidemic in the UK. During that

Emergency legislation passed as a consequence of national catastrophe associated with terrorism has a predictable pattern. It involves an unseemly scramble amongst the executive and legislature so that they are seen to be doing ‘something’.<sup>11</sup> Policy and law are hastily tightened, with scant recourse to reasoned chamber debate or recognition of standard procedures, in order to respond to media and public outcry.<sup>12</sup> Thus, the politicians’ anxiety to be viewed as resolving the crisis overrides both established process and rational action. Indeed, such hasty responses may even have a negative effect in isolating vulnerable groups and disenchanting sections of society. The result is predictably disturbing: enhanced powers given to security agencies and the police; deviation from established principles of law; alienation of innocent, affected people; and disappointing results, even alienating consequences, of these attempts to control anti-terrorist activities which have not been subject to normal standards of scrutiny. This is a sequence evident both within the USA and the UK as a consequence of September 11<sup>th</sup>.

The state’s responses to terrorism are invariably ‘extraordinary’ in the way wartime responses are extraordinary, although the former has a disturbing habit of being transformed from the category of ‘abnormal’ to ‘normal’ legislation, or at the very least affecting subsequent criminal legislation.<sup>13</sup> These events test the executive’s commitment to the rule of law and to good governance. Because of the extreme powers given by such extraordinary legislation, there is an incumbent requirement to provide limits to its terms, scope and life span. Legal responses of this nature should be restricted in terms of time to the shortest and most clearly stated period; should refer to closely defined groups or people in order to limit the likelihood of innocent people being dragged into the anti-terrorist legislative net, and, finally, should always remain within the boundaries of good governance. This paper is based on the inviolability of these principles and explores the ways in which various governments have responded. In addition, it considers the importance of the legislative process recognising that the failure to honour them leaves open the door to executive exploitation and the misuse of power. It also reflects on the issues of the efficiency of anti-terrorist legislation. Does this legislation stop, deter or punish criminals; is it ‘comfort legislation’ directed towards producing and maintaining public confidence; or is it counter productive through the alienation of innocent victims and ethnic, religious and immigrant groups?

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period it is claimed that the rule of law and natural justice were suspended in order to respond to the epidemic. See the forthcoming work of D. Campbell and R. G. Lee, Cardiff Law School.

<sup>11</sup> “At a time of threat, to be seen to be doing something rather than nothing is a natural human – and perhaps particularly ministerial – reaction.” Lord Jenkins of Hillhead, House of Lords, 27 November 2001, col 199.

<sup>12</sup> “Circumstances and *public opinion* demand urgent and appropriate action after the September 11<sup>th</sup> attacks.” [itals added] D. Blunkett, House of Commons, 19 December 2001, col 22.

<sup>13</sup> J. Sim and P. A. Thomas “The Prevention of Terrorism Act: normalising the politics of repression” (1983) *Journal of Law and Society* 71.

## The Experience Of History

The most striking recent examples of ill-considered legislation are the responses to terrorist activities. There is a strong and clear parallel between the current legislative processes in both the USA and the UK. First, by way of illustration, I examine the Parliamentary passage of the Prevention of Terrorism (Temporary Provisions) Act 1974. It was subject to a mere 17 hours of debate in the House of Commons before its ‘draconian powers’ were approved. Parliamentary debate was driven by the public outrage caused by the Birmingham pub bombings that resulted in the death of 21 people and the injury to a further 180. Brian Walden MP stated in the House of Commons: “The justification for the Bill to my mind, is overwhelming, and I make no bones about the fact that I shall not listen with too much patience to any anxieties about whether this or that or the other civil right may temporarily be somewhat abridged. . . . Let us be frank. The overwhelming mood in my constituency and I believe in my city, is one of vengeance.”<sup>14</sup> The absence of rational discussion and the presence of vengeance fuelled by public outrage characterised the mood of both Parliament and the nation. Clare Short attended the debate on the Bill in her previous capacity as a Home Office civil servant. She whispered to her neighbour, the man who drafted the Bill, that it would do nothing to prevent terrorism. His reply was “that is not what it is about”.<sup>15</sup> Dafydd Elis Thomas MP told me at the time that despite his personal reservations it was more than a person’s seat was worth to vote against the Bill given the extreme level of public shock and outrage. Thus, even concerned politicians were tempted to place their principles on hold during this tense and extraordinary period.

A similar legislative response was made both in Ireland and the UK over the Omagh bombings in Northern Ireland in August 1998.<sup>16</sup> In Dublin the Offences Against the State (Amendment) Bill was published on 31<sup>st</sup> August, debated in the Dail on September 2<sup>nd</sup> between 10 am and 11.30 am, and thereafter in the Seanad on the 3<sup>rd</sup>, followed by an immediate quasi-presidential signing (this was because the President of Ireland was overseas).

In Westminster a similarly complex Bill, that quickly became the Criminal Justice (Terrorism and Conspiracy) Act, was pushed through Parliament in 27 hours. It was published and made available to members for reading at 6 pm on the day previous to the House of Commons debate. Tony Benn, in debate, compared the procedure with that associated with the former USSR “What a way to treat Parliament. . . as though we were the Supreme Soviet, simply summoned to carry through the instructions of the Central Committee.”<sup>17</sup> From across the Chamber, Richard Shepherd, a Conservative MP, stated “not in the face of terrorism or anything should we abandon the liberty and freedom to discuss these matters. This is no way for the House to

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<sup>14</sup> Hansard, vol 882, 28 November 1974, cols 648-50.

<sup>15</sup> F.Wheen, *The Guardian*, 2 September 1998. See also, C.A.Gearty and K.A.Kimbell, *Terrorism and the Rule of Law* (1995) 17.

<sup>16</sup> For a detailed account of the Parliamentary passage of this legislation see P.A.Thomas “Emergency Terrorist Legislation” *Journal of Civil Liberties* (1998) 240.

<sup>17</sup> Hansard, House of Commons, 2 September 1998, col 717.

conduct its business. The government is acting manipulatively. We have been knee-jerked here.”<sup>18</sup> In the House of Lords Sir Patrick Mayhew, former Northern Ireland Secretary from 1992 to 1997, declared: “We are invited to make law which may turn out to be dangerous and therefore bad law for a purpose which will probably not be achieved in practice.”<sup>19</sup> Thereafter, the Queen proved exceedingly obliging. Whilst on holiday in Scotland, she gave the Royal Assent to the Act sometime before it had completed its Parliamentary passage.

Should the reader be tempted to think that emergencies and zealous executive action are restricted to world wars and terrorism, they would be wrong. Ireland provides illustration after illustration of executive detention from early times of its occupation up to, and including, the present.<sup>20</sup>

### **Balancing Freedom And Safety**

Immediately after September 11<sup>th</sup> David Blunkett, the Home Secretary, stated: “We could live in a world which is airy-fairy, libertarian, where everyone does precisely what they like and we believe the best of everybody and then they destroy us.”<sup>21</sup> In the House of Lords, during the second reading of the Antiterrorist, Crime and Security Act [ATCSA], Lord Roker, Home Office Minister, stated “It [the Bill] strikes a balance between respecting our fundamental liberties and ensuring that they are not exploited. The problem is that in a tolerant liberal society, if we are not guarded we will find that those who do not seek to be part of our society will use our tolerance and liberalism to destroy that society. That is a reality.”<sup>22</sup> Identical sentiments, albeit expressed more elegantly, were offered earlier by the American judge, Learned Hand, whilst commentating on the delicate balance applicable in time of warfare. He wrote “a society in which men recognise no check upon their freedom soon becomes a society where freedom is the possession of only a savage few.”<sup>23</sup> Thus the argument runs that the pursuit of safety in the war against terrorism carries a price: the temporary diminution of freedom. The increased demands for the assurance of public safety brings with it the necessary and lamented reduction in individual freedom. The interests of the many trump those of the individual. In turn, the institutions and principles that support and promote individual freedom must also be trimmed in these unusual times.

The true cost of emergency legislation is that the social unity achieved through the single goal of defeating terrorism results in the discreditation,

<sup>18</sup> *Supra* Cols 714-5.

<sup>19</sup> Hansard, House of Lords, 3 September 1998, col 36.

<sup>20</sup> For example, The Protection of Life and Property (Ireland) Act 1871; An Act for the Better Protection of Person and Property in Ireland, 1881. The history of Northern Ireland, including modern times, is replete with such Emergency legislation.

<sup>21</sup> Guardian, 12 November 2002. For an analysis of this statement see P. Hillyard “In defence of civil liberties” in *Beyond September 11<sup>th</sup>* [ed] P.Scraton, (2002) 107.

<sup>22</sup> House of Lords, Hansard, 27 November 2001, col 143.

<sup>23</sup> *The Spirit of Liberty* (1952) 191. See, R. Posner “Security versus Civil Liberties” *The Atlantic*, December 2001, and, R.D. Gastil “What kind of Democracy?” *The Atlantic*, June 1990.

loss or suspension of established symbols that include cherished rules governing the control of criminal behaviour and also the protection of the rights of the individual. The united, lock-step march of society in its fight against terrorism results in the suppression of the dissident voice.<sup>24</sup> Freedom of speech suffers. Critical comment about the executive is interpreted as being unpatriotic. One is either with or against the executive: there is no other position. The wartime spirit produces national unity in a single cause.

In this way, the rule of law is both challenged and damaged and thereafter takes on a new, unhealthy form. A closed military tribunal replaces the right to a public, judicial trial and imposes assigned counsel rather than permitting legal counsel of choice. Rules of criminal evidence and procedure are changed to ensure or at least increase the likelihood of a criminal conviction. Witnesses give testimony anonymously, behind screens;<sup>25</sup> juries are replaced by sole judges;<sup>26</sup> convicted criminals appear as ‘supergrass’ witnesses for the prosecution; people convicted of no offence are detained without trial through the internment process; the police are given extraordinary powers to combat terrorist activities.<sup>27</sup> Legal formalism remains but the spirit of the law is lost.<sup>28</sup>

The media adopts a supportive position when terrorism threatens and the executive is given uncritical media support in its activities.<sup>29</sup> For example, the editor of *New Republic* wrote “This nation is now at war. In such an environment, domestic political dissent is immoral with a prior statement of national solidarity, a choosing of sides.”<sup>30</sup> Additionally, such executive action in democratic states<sup>31</sup> provides an extended licence to repressive regimes that nakedly exploit these moments of terrorism to further control and suppress minority voices and those who adopt a critical stance concerning the values and actions of the state. For example, the Chinese

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<sup>24</sup> A.G., John Ashcroft questioned the patriotism of those speaking out for civil rights: “Your tactics only aid terrorists, for they erode our national unity and diminish our resolve. They give ammunition to America’s enemies.” *Washington Post* 7 December 2001.

<sup>25</sup> R. Costigan and P. A. Thomas “Anonymous Witnesses” *NILQ* (2000) 326.

<sup>26</sup> As in the Diplock courts in Northern Ireland.

<sup>27</sup> There is much literature on these issues but for a recent and valuable overview see, N. Whitty, T. Murphy and S. Livingstone, *Civil Liberties Law: The Human Rights Act Era*, (2001).

<sup>28</sup> Classic examples are found in Germany under National Socialism. See F. Neumann, *The Rule of Law* and also *Behemoth: the structure and practice of National Socialism*.

<sup>29</sup> E.W. Said, *Covering Islam: How the media and the experts determine how we see the rest of the world* (1997) and *Orientalism* (1978).

<sup>30</sup> A pundit on Fox News demanded that US forces invade Libya and Iraq. On September 12<sup>th</sup> an NBC announcer stated “some of the freedoms we have we may no longer be able to take for granted and may to give up.” These examples are taken from L. Lapham “Notebook: American Jihad” Harper’s, January 2002.

<sup>31</sup> See for example the Anti-Terrorist legislation introduced post September 11<sup>th</sup>; Australia; Canada; Italy; New Zealand; South Africa; India; Colombia; Jordan and the European Union.

government has used the events of September 11<sup>th</sup> to crack down on signs of Uighur resistance to Chinese rule in the province of Xinjiang.<sup>32</sup>

Not only does terrorism produce widespread distress, anxiety, fear, but as stated, provokes public responses of unity through adversity. In addition, the threat of terrorism offers financial and growth opportunities to private enterprise,<sup>33</sup> bureaucrats<sup>34</sup> and to institution builders. For example, an ailing airline industry may receive financial support from the state to keep the country 'flying'.<sup>35</sup> Security forces may be offered a 'new enemy' when traditional enemies have been defeated or have diminished in power.<sup>36</sup> The new enemy demands increased, specialist attention and therefore a larger budget is required to respond to the new threat.<sup>37</sup> The arms industry is offered an expanded market and larger profits via an increased defence budget<sup>38</sup> and the investment market responds accordingly.<sup>39</sup> The defence

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<sup>32</sup> For a detailed account of these developments in China see the Financial Times, 27 July 2002. In other countries the USA responses have encouraged further repressive executive actions in the Philippines; Russia; Uzbekistan; Egypt and in Israel, the Prime Minister, Ariel Sharon described the Palestinian leader, Yassar Arafat, as "our Bin Laden".

<sup>33</sup> Vice President, Dick Cheney, is the former CEO of Halliburton corp. A subsidiary is now involved in a \$16 million project to construct cells at Guantanamo Bay for new internees from Afghanistan. It is also providing services at Force Provider military camp, Afghanistan. The oil lobby is strongly represented in the US Executive: former President Bush is linked with the Carlyle Group; C. Rice was formerly with Chevron; D. Rumsfeld, formerly of Occidental and President Bush, formerly of Harken.

<sup>34</sup> On September 11<sup>th</sup>, Jo Moore, a special adviser in the Department of Transport, wrote an email stating that the terrorist attacks in the USA offered an opportune moment to release stories that the department wished to bury.

<sup>35</sup> The President produced an emergency package for the airlines: £5 billion in cash and \$10 billion in loan guarantees though their financial problems existed prior to September 11<sup>th</sup>. See, S. Tombs, "Markets, Regulation and Risk: The US Airlines Industry and Some Fallout from September 11<sup>th</sup>" in *Beyond September 11<sup>th</sup>*, ed P. Scraton, (2002) 157.

<sup>36</sup> The USA 'war on drugs' is being scaled down because of cost and the growing importance of the anti-terrorist programme. *The Guardian*, 21 October 2002.

<sup>37</sup> The Homeland Security Act November 2002, establishes a department employing 170,000 staff with a \$38 billion budget. *Indian Express*, 21 November 2002. The FBI director has announced "a dramatic departure from the past" by making terrorism prevention the FBI number one task. Mr. Mueller requested 900 extra agents. Currently, 3,700, one third of the agency staff, are working on these issues. There will also be a total restructuring of the FBI. *The Guardian*, 30 May 2002. In the UK the Prime Minister blamed tax rises on the impact of September 11<sup>th</sup>. *The Guardian*, 15 May 2001.

<sup>38</sup> President Bush avoided a "guns and butter" budget by cutting taxes and certain social programmes whilst simultaneously increasing the defence budget, since September 11<sup>th</sup>, by \$50 billion. *The Guardian*, 12 July 2002. Boeing is currently working overtime to produce sufficient equipment for the proposed invasion of Iraq. *The Guardian*, 29 July 2002.

<sup>39</sup> Companies that marketed security devices, bomb detection devices, and surveillance and bio-warfare technologies rocketed up 146 percent after September 11<sup>th</sup> as did a number of defence contractors. "Picking Warstocks is Hell" *San Francisco Chronicle* 20 December 2001.

budget increases dramatically.<sup>40</sup> Thus, terrorism provides opportunities for both ailing and aggressive industries and an unchallengeable expansion programme for national security agencies<sup>41</sup> and the military.<sup>42</sup> The *Wall Street Journal* called on the President to take full advantage of the “unique political climate” to “assert his leadership not just on security and foreign policy but across the board.”<sup>43</sup> Because these developments occur in strained times, the normal checks and balances that would be employed to ensure appropriate use of public finances are suspended or short circuited.<sup>44</sup> Immediacy and results are the order of the day.

Dworkin argues that the claim of the executive that there is an essential balance to be drawn between safety and freedom constitutes a false dichotomy.<sup>45</sup> The popular political argument that such is the terrorist threat to our security that the levels of freedom to which we are constitutionally entitled and often experience must be reduced. Thus, safety trumps freedom in special circumstances and for a limited time. This should mean that when the emergency is over, the previous levels of freedom, having been preserved and protected, can return and be enjoyed. However, strengthening safety exposes alleged terrorists to a higher risk of unjust conviction because traditional procedural safeguards associated with the rule of law are subject to temporary suspension. Dworkin states that the idea of a trade-off suggests that the general population must be willing to accept limitations on their personal freedom. In fact, very few people will be affected by this new relationship. Middle America, like middle England, will continue to operate in ways oblivious and untouched by the new politics introduced by executive action. Those who will be ensnared and possibly victimised by the new and lower standards of justice are resident aliens, first generation immigrants, ethnic minorities and followers of Islam, just as the general Irish community living in mainland Britain were stigmatised by their accents and names at the height of the IRA bombing campaigns.<sup>46</sup> These are the people who will be targeted through the new procedures for special attention, surveillance, interrogation and possible criminal convictions. It is not a question of how

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<sup>40</sup> The defence budget for 2003 is the biggest in military spending, in both absolute amount and in percentage terms, since the first years of the Reagan administration. It amounts to \$1 billion a day. Senator Kent Conrad, North Dakota, who chairs the Budget Committee, said: “We’re at war and when the president asks for additional resources for national defense, he generally gets it.” See, [www.wsj.com](http://www.wsj.com) 6 February 2002.

<sup>41</sup> MI5, MI6 and GCHQ were given significant budget increases in July 2002, rising over 7% annually over the next three years: £896 million in 2002 to £1.18 billion. This rise excludes the cost of new head quarters for the GCHQ estimated at £800 million. *The Guardian*, 16 July 2002.

<sup>42</sup> In the UK, the Chancellor of the Exchequer, Gordon Brown, announced in his budget speech that the Ministry of Defence would receive an extra £1 billion a year which is the highest increase since the end of the ‘cold war’. Rising from £29.3 billion to £30.2 billion. Brown stated this reflects the need to “meet the urgent moral challenge of global terrorism.” *Ibid*.

<sup>43</sup> Editorial, September 19, 2001. It encouraged more tax cuts, oil drilling in Alaska, and use of Social Security surpluses.

<sup>44</sup> For an enthralling account of ‘conspiracy theory’ see G. Vidal, *The Observer*, 27 October 2002.

<sup>45</sup> *The Threat to Patriotism*, New York Review of Books, 28 February 2002.

<sup>46</sup> P. Hillyard, *Suspect Communities*, (1993)

much liberty will the reader of this paper sacrifice. The answer is little or none. The appropriate question is what does justice require in order to be just?

The idea of trading off freedom for safety on a sliding scale is a scientific chimera, which, in reality, is misleading. Are murderers offered less protection through law than those who commit social security fraud or embezzle? The punishment will differ but similar rules of practice and evidence are applied to the murderer and the fraudster. Thus, the denial of rights to some that are available to others represents a slippery slope, particularly when those to whom rights are denied are themselves members of a vulnerable group such as aliens or members of an ethnic or religious minority. Their risk of false conviction for terrorist offences is no less than that of the fraudster and indeed is greater if their rights are minimised.<sup>47</sup> The history of terrorist trials in the UK is significantly marred by miscarriages of justice.<sup>48</sup> Balance should not enter the equation: it is false and misleading. Instead, it is an issue of reducing the constitutional and civil rights of possibly vulnerable people and groups who are alleged terrorists in the name of national security.

### USA Legislative Responses<sup>49</sup>

Commenting on President Franklin Roosevelt's support for the wartime internment of Japanese immigrants and Japanese Americans, Professor Francis Biddle wrote "The constitution has not greatly bothered any wartime President. That was a question of law, which ultimately the Supreme Court must decide. And meanwhile – probably a long meanwhile - we must get on with the war."<sup>50</sup> President Bush's declaration of 'war' against terrorism differs in that he used the word 'war' rhetorically, not in its legal and constitutional sense, and that he originally intended the war to be 'ongoing'

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<sup>47</sup> For example, Ali al-Maqtari, a Muslim visitor to the US, was arrested on September 15<sup>th</sup> and jailed for eight weeks. Apparently, he was arrested because his wife wore an Arab headdress, they spoke a foreign language, French, and because he had box cutters on him which he used in his job in a market and she in a shipping room of a plant nursery. His testimony before the Senate Judiciary Committee, [judiciary.senate.gov/te120401f-almaqtari.htm](http://judiciary.senate.gov/te120401f-almaqtari.htm)

<sup>48</sup> The most infamous "terrorist" miscarriages of justice are the Birmingham 6, the Guildford 4, Maguire 7 and Judith Ward.

<sup>49</sup> It is not intended to provide a detailed analysis of the US and UK anti-terrorist legislation. This is available elsewhere, e.g. D. Cole, "Enemy Aliens" *Stanford Law Rev* [2002] 953; H. Fenwick, "The Anti-Terrorism, Crime and Security Act 2001: A Proportionate Response to 11 September" *Modern Law Rev* (2002) 724; R. Talbot "The balancing act: counter-terrorism and civil liberties in British anti-terrorist law" in *Law After Ground Zero*, ed. J. Strawson [2002]; A. Tomkins, "Legislating against terror: The Anti-Terrorism, Crime and Security Act 2001" *Public Law* [2002] 205; C. Bowden "CCTV for inside your head: blanket traffic data retention and the emergency anti-terrorism legislation" *Computer and Telecommunications Law Review* [2002] 21; Editorial "Anti-Terrorism, Crime and Security Act 2001" *Criminal Law Rev* [2002] 159.

<sup>50</sup> *In Brief Authority* (1962) 219.

against individuals and organisations rather than against a nation state.<sup>51</sup> This commitment was illustrated by the cosmic name he initially gave to his campaign against international terrorism: “Infinite Justice”.

The principal legislative response to September 11<sup>th</sup> is the anti-terrorist legislation, entitled, “Uniting and Strengthening of America to Provide Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001”. This creates the powerful acronym, the USA PATRIOT Act of 2001. It is a monster piece of legislation amounting to 342 pages, covering 350 subject areas, encompassing 40 federal agencies and carrying 21 legal amendments.<sup>52</sup>

House Judiciary Committee chairman F. James Sensenbrenner introduced this legislation on October 2<sup>nd</sup>. It became law on October 26<sup>th</sup>. This record breaking speed was made possible only by forcing the pace to the point where serious debate and discussion was rendered impossible by the restricted time scale and the public demand for political action. Indeed, even Congressional procedure thus truncated was challenged by Attorney General John Ashcroft who stated that it would be dangerous to delay the Bill’s passage for more than a few days.<sup>53</sup> Senate Majority leader Tom Daschle said “all hundred of us could go through this bill with a fine-tooth comb and cherry pick and find improvements. . . . We’ve got a job to do, the clock is ticking and the work needs to get done.”<sup>54</sup> In the Senate only Russell Feingold voted against the Patriot Act, with sixty-six against it in the House of Representatives. With Congressional staff locked out of their offices due to the anthrax scare, few members of Congress had time to read the summaries of the Bill let alone the fine print of the document that was passed in such haste. Indeed, what red-blooded American politician, with an eye on re-election, would vote against such legislation?<sup>55</sup> Bush, whose sabre-rattling rhetoric demanded immediate political support, urged on the representatives. He declared that “in order to win the war, we must make sure that the law enforcement men and women have got the tools necessary, within the Constitution, to defeat the enemy. . . . We’re at war. . . a war we’re going to win.”<sup>56</sup> The Act moulded by these warrior words and passed

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<sup>51</sup> Subsequently, President Bush expanded his ‘war’ to include nations which collectively constitute the “axis of evil” with Iraq being identified as the principal protagonist.

<sup>52</sup> See the following section for a brief account of some of the controversial powers in the new legislation. However, this paper does not set out to provide a detailed analysis of the US and the UK anti-terrorist legislation.

<sup>53</sup> R. Dworkin “The Threat to Patriotism” *New York Review of Books*, 28 February 2002.

<sup>54</sup> CNN.com 12 October 2001.

<sup>55</sup> Compare with the words of Dafydd Elis Thomas, MP, page 369. Similar sentiments were expressed in that public pressure and the continuance as an MP demanded that the politician restrain from adopting a principled but unpopular position.

<sup>56</sup> He further declared that 2002 would also be “a war year. Our war against terror extends way beyond Afghanistan”. *The Guardian*, 27<sup>th</sup> December 2001. Draft plans trailed in the media in July 2002 indicate that Iraq is likely to be invaded in January 2003. *The Observer*, 6 July 2002. Vice President Dick Cheney referred to “forty or fifty countries” that could need military disciplining. J. Pilger, “The real story behind America’s war” *New Statesman*, 17 December 2001.

in furious and frustrated haste, left federal prosecutors, defenders, regulators and administrators throughout the country scrambling to decipher what Congress and the Bush administration had packed into the legislation. The public responded in positive terms. Pre-September the approval rating of Bush was 44% but that leapt to 86% in December 2001.<sup>57</sup> In various public polls, roughly two-thirds said they supported the actions of the administration. However, a quarter of those polled stated that President George Bush and Attorney General John Ashcroft had not acted in a sufficiently aggressive manner.<sup>58</sup> More recently, those who demanded a more vigorous response would be pleased to read in the President's National Security Strategy of the United States that he contemplates pre-emptive action and also the possibility of unilateral action.<sup>59</sup>

### **USA Patriot Act**

The Act provides, *inter alia*, the following sweeping powers:

Powers of detention and surveillance are given to the Executive and law enforcement agencies; the courts are deprived of meaningful judicial oversight of the exercise of those powers.

The Secretary of State is empowered to designate any group, foreign or domestic, as 'terrorist'. This power is not subject to review.

A new crime, 'domestic terrorism', is created. It includes acts dangerous to human life that are a violation of the criminal law if they appear to be intended (i) to intimidate or coerce a civilian population; (ii) to influence the policy of government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping.

It permits investigations of activities otherwise protected by the First Amendment activity if those activities can be tied to intelligence purposes.

It undermines the privacy protection of the Fourth Amendment by eroding the line between intelligence gathering and gathering evidence for criminal proceedings. It expands the ability of the government to spy by wiretaps and computer surveillance. It provides access to medical, financial, business and educational records and allows secret searches of homes and offices.

It undermines due process procedures by permitting the government to detain non-citizens indefinitely even if they have never been convicted of a crime.<sup>60</sup>

The possible uses and outcomes of this legislation have horrified many constitutional lawyers and civil rights groups. For example, domestic spying is given a renewed lease of life. Firewalls were erected after the Watergate scandal and the subsequent Senate investigation in 1975 chaired by Senator Frank Church. Church warned that domestic intelligence gathering was a "new form of governmental abuse", unconstrained by law, which had been abused by Nixon and by the FBI which spied on over half a million

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<sup>57</sup> Washington Post 21 December 2001; *New York Times*, 3 January 2002.

<sup>58</sup> [www.publicagenda.org/specials/terrorism/terror\\_pubopinion.htm](http://www.publicagenda.org/specials/terrorism/terror_pubopinion.htm).

<sup>59</sup> *The Guardian*, 21 September 2002.

<sup>60</sup> My precis of the sections of the Act is based on the paper prepared by the ACLU of Michigan, [www.aclumich.org](http://www.aclumich.org).

Americans during and after the McCarthy era. One reform was the separation within the FBI of criminal investigation and intelligence gathering against foreign spies and international terrorists. The Act foreshadows the end of that separation by making key changes to the underpinning law: the Foreign Intelligence Surveillance Act (FISA) 1978. FISA demanded that wiretaps and searches for intelligence purposes, as opposed to evidence, are undertaken only if the 'primary purpose' was to listen to a specific foreign spy or terrorist. The new Act lowers the level to a 'significant purpose'. Roving wiretaps throughout the USA now operate on a single warrant. Americans engaged in civil disobedience or other forms of civil protest might be charged with "domestic terrorism" if violence occurs. Senator Patrick Leahy, the Senate negotiator on the Bill, said on the day it was passed: "The bill enters new and uncharted territory by breaking down traditional barriers between law enforcement and foreign intelligence." Morton Halperin, a defence expert, stated that if a government intelligence agency "thinks you're under the control of a foreign government, they can wiretap you and never tell you, search your house and never tell you, break into your home, copy your hard drive, and never tell you they have done it." Some of the surveillance provisions expire, or 'sunset', after a period of four years, unless renewed. U.K. experiences of the 'temporary' nature of its anti-terrorist legislation would suggest that it is likely that the sun will never set on this Act.

For a modern nation created largely by immigrants the new US laws covering non-citizens are ironically harsh. Section 412 of the Act permits indefinite detention of immigrants and other non-citizens. It requires that immigrants 'certified' by the Attorney General be charged within seven days with a criminal offence or an immigration violation, which need not be on the grounds of terrorism. Those detained for non-terrorist offences face the possibility of life imprisonment if their country of origin refuses to accept them. Detention would be allowed on the Attorney General's finding of 'reasonable grounds to believe' in the detainee's involvement in terrorism or an activity that poses a danger to national security, or the safety of the community or any person. A review of the detention takes place at six-monthly intervals, but what is striking is the absence of a trial in open court to test the state's case for prosecution.

During the Second World War President Roosevelt authorised the incarceration of more than 110,000 people of Japanese origin, 70,00 of whom were American citizens of Japanese descent,<sup>61</sup> 11,000 of German origin and 3,000 of Italian origin. President Bush is replicating this process through the rhetoric of undeclared war. Should it be thought that these new detention powers are merely precautionary and unlikely to be utilised, the actions of Attorney General Ashcroft constitute a sobering reality. He began by authorising the detention of 1,200 non-citizens. Some were held for months and as of July 2002 there were still 74 people held on charges of immigration violations, whilst 131 Pakistanis were deported to Pakistan in June aboard a privately chartered Portuguese plane amidst great secrecy. Some those who were deported had lived in the US for many years and left

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<sup>61</sup> See, M.Gradzins, *Americans Betrayed: Politics and the Japanese Evaluation* (1949).

their families and their jobs. None of the deportees were said to have links with terrorism.<sup>62</sup>

It is lawful under section 412 to detain people indefinitely. Legal advice is available but solely funded by the detainee. The government stopped updating the tally of those detained, so firm figures became unavailable. After refusing to make any information public about the detainees, including their names, location of detention, or nature of the charges, Ashcroft finally announced on November 27<sup>th</sup> 2001 that 548 detainees were being held on immigration charges and that federal criminal charges had been filed against 104 of them. The Justice Department also announced a plan for investigators to interview 5,000 people: Middle Eastern males between the ages of 18 to 33 who had arrived in the USA after January 2000. In response to a claim that this is a racially based roundup Ashcroft declared that “we are being as kind and as fair and as gentle as we can”.<sup>63</sup> Of particular concern was the CNN poll that revealed 45 per cent of those polled would not object to the use of torture if it provided information about terrorism. There was also media discussion about the possible need for the use of ‘truth serums’ or sending suspects to countries where harsher interrogation measures were common.<sup>64</sup> It is important to remember that the ‘disappeared’ and tortured people of South American countries in the 1970s and 1980’s were killed and tortured by military personnel trained by the CIA.<sup>65</sup> It was also announced that the US government is considering plans to send elite military units on overseas missions to assassinate al-Qaida leaders, without informing the foreign governments. Dick Cheney, the vice-president, was asked whether such action is lawful. He replied that he thought it was legal but “he would have to check with the lawyers on that.”<sup>66</sup>

The final illustration of the new wave of executive action is the Military Order signed by the President on November 13<sup>th</sup> which allows for non-US citizens suspected of involvement in ‘international terrorism’ to be tried by special military commissions. The term ‘alien’ included combatants captured in Afghanistan and also aliens already resident in the US. These commissions are not subject to the regular rules and safeguards that cover military courts-martial. The President claimed that it was “not practicable” to try terrorists under “the principles of law and the rules of evidence” applicable in the US domestic criminal courts. These commissions were empowered to act in secret, to pass the death penalty by a two-thirds majority, and their decisions cannot be appealed to other courts. Subsequently, after considerable pressure, Donald Rumsfeld, US Defence

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<sup>62</sup> *The Guardian*, 11 July 2002.

<sup>63</sup> In August 2002, a Federal judge ruled that the Bush administration had no right to conceal the identities of hundreds of people detained after September 11<sup>th</sup> and ordered that most of their names be released within 15 days. N.A.Lewis, *New York Times*, 2 August 2002.

<sup>64</sup> J. Alter, “Time to Think about Torture” *Newsweek*, 5 November 2001. “We’ll have to think about transferring some suspects to our less squeamish allies even if that’s hypocritical. Nobody said this was going to be pretty.”

<sup>65</sup> The CIA had plans to murder Fidel Castro and Patrice Lumumba of the Congo.

<sup>66</sup> *The Guardian*, 13 August 2002. In November, 6 alleged Al-Qaida terrorists were killed in Yemen by a CIA drone bomb. It is reported the Yemen government was not informed of this impending attack. *Guardian Weekly*, 13 November 2002.

Secretary, refined the rules created by executive order by giving suspected terrorists the rights to the presumption of innocence; to choose counsel; to see the prosecution's evidence; trial in public; and to remain silent with no adverse inference being drawn. However, in such trials no jury will be introduced; hearsay will be accepted in evidence; and there will be no civilian review on appeal.<sup>67</sup>

The US base in Cuba, Guantanamo Bay, was identified by General Tommy Franks, head of Central Command, as suitable to hold Taliban and al Qaeda terrorists. Cuba was preferred ahead of Guam, a Pacific island. Subject to modification the Cuban base can detain as many as 2,000 prisoners. On January 12<sup>th</sup> Camp Delta received its first unlawful combatants and placed them in chain link cages. Ninety men manacled, hooded, with shaved beards, and some sedated, were flown in from Afghanistan. Subsequently, press photographs depicted them as hooded, shackled and kneeling in front of US soldiers. By October 2002 the figure had risen to six hundred and twenty prisoners. It is expected to house a further two hundred by Christmas 2002.<sup>68</sup> The base is to be included in a '20 year plan' for Guantanamo's naval base.

The men are detained in wire 'cages', measuring eight feet by six feet eight inches. They are exposed to the elements. The conditions are described by Amnesty International as "falling below the minimum standards for humane behaviour". This is perhaps unsurprising given that Donald Rumsfeld described the men as "the hardest of the hard core" adding "I do not feel the slightest concern over their treatment".<sup>69</sup> He described the base as "the least worst place".<sup>70</sup> President Bush described all of them as "killers", prior to any tribunal hearings, and that they would not be granted the status of prisoners of war.<sup>71</sup> Bush stated that "non-US citizens who plan and/or commit mass murder are more than criminal suspects. They are unlawful combatants who seek to destroy our country and our way of life."<sup>72</sup> The term 'unlawful combatant' is used because the US government has not defined the Taliban as prisoners of war, thereby denying them their rights under the 1949 Geneva

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<sup>67</sup> *New York Times*, 21 March 2002.

<sup>68</sup> *The Guardian*, 26 July, 29 October 2002 and *The Observer* 3 November 2002. There are seven British nationals held there.

<sup>69</sup> *The Guardian*, 17 January 2002. Brigadier-General Rick Baccus, the camp commander at Guantanamo Bay, was relieved of his duties in October 2002 after a newspaper report quoted a defence source as saying he was "too nice" to the inmates. *The Guardian*, 16<sup>th</sup> October 2002. Arc lights provide a 24 lighting system. One detainee is 15 years of age some are in their seventies. Each man spends 30 minutes a week showering and exercising. The remainder of the time is spent alone in his 'cell'. Trips to the clinic involve the man being shackled to the trolley and then chained to the clinic bed. The men are exercised in shackles on their ankles, waist and hands. Psychological techniques, including sleep deprivation, are used as part of the interrogation process. There have been four serious attempts at suicide. Thirty other men have tried to injure themselves. *The Observer*, 4 November 2002.

<sup>70</sup> *Mercury News*, 2<sup>nd</sup> January 2002.

<sup>71</sup> R. Dworkin, *New York Review of Books*, 28 February 2002. Pakistani anti-terrorist experts are quoted as believing that 55 of the 58 Pakistani militants held in Cuba have no ties to al-Qaeda. *New Straits Times*, 25 August 2002.

<sup>72</sup> *The Washington Post* 30 November 2001. See also L. H. Tribe in *The New Republic*, 10 December 2001.

Convention; nor have they been defined as criminals, thereby denying them their rights under the US Constitution.<sup>73</sup> Organising a defence from within this camp will prove extremely difficult, assuming that it is the intention to try the men in front of military commissions. The alternative is that the men are interrogated and detained at the pleasure of the President. Indeed, on 28 March 2002 Rumsfeld suggested that detainees who had not been tried, or those who had been tried and acquitted, might nevertheless be kept in detention “for the duration of the conflict”. Asked how he would define the end of conflict, he said it would be: “when we feel that there are no effective global terrorist networks functioning in the world that these people would be likely to go back to and begin again their terrorist activities.”<sup>74</sup> Pierre-Richard Prosper, ambassador at large for war crimes issues, who stated that “the judicial process may have to wait until after the war on terror is won”, reinforced this position.<sup>75</sup>

### United Kingdom

The ink was hardly dry on the Terrorism Act 2000 that came into force in February 2001 before a fresh commitment to yet stronger anti-terrorist legislation was issued by the Labour government. Again, the brevity of its passage is exceeded only by the extent of the powers it provides.<sup>76</sup> The government allowed 16 hours for Commons debate. The Terrorism Act extended the powers of the police to investigate, arrest and detain. It created new offences allowing our courts to deal with terrorist activities which occurred outside our national borders. The moral panic that consumed the USA was reflected in its most constant ally, the UK.

David Blunkett, the Home Secretary, introduced the government’s Anti-terrorism, Crime and Security Bill into the Commons on November 12<sup>th</sup>. It was a big Bill, containing 118 pages, 125 clauses and 8 Schedules. After a concentrated House of Lords savaging it became law on December 15<sup>th</sup>. The Home Secretary said “strengthening our democracy and reinforcing our values is as important as the passage of new laws. . . the legislative measures which I have outlined will protect and enhance our rights, not diminish them . . .”<sup>77</sup> Whilst claiming the powers were measured, reasonable and necessary on the day of the Bill’s Parliamentary presentation, Blunkett laid a Human Rights Derogation Order. The UK thereby derogated from the European Convention on Human Rights Article 5 of which guarantees the right to liberty and prohibits detention without trial. The UK is the only signatory to

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<sup>73</sup> *The Washington Post*, 30 November 2001.

<sup>74</sup> [www.Crimesofwar.org](http://www.Crimesofwar.org) 17 May 2002.

<sup>75</sup> *The Guardian*, 21 September 2002. “Criminal proceedings generally occur after the end of hostilities. We will make it clear at that time whether these people are to be fed into the judicial process or whether they will be released.” There are seven U.K. citizens held in Camp Delta.

<sup>76</sup> “The result of the passage of the Anti-terrorism, Crime and Security Act 2001 is once again a legislative morass. . . There was no time for considered or sustained review.” C. Walker, *The Anti-Terrorist Legislation* (2002) 7.

<sup>77</sup> HC Debs, 15 October 2001, col 925. Similar descriptions can be seen attached to previous anti-terrorist legislation. For example, Jack Straw, when introducing the Terrorism Act 2000, stated that it was “simply protecting democracy”. *The Guardian* 14 November 1999.

the ECHR to feel it necessary to derogate as a result of this particular terrorist threat. The derogation occurred despite the statement by the Home Secretary that “there is no immediate intelligence pointing to a specific threat to the UK.”<sup>78</sup>

The speed of the Bill’s passage through the House of Commons, a total of 16 hours, is reminiscent of previous emergency legislation.<sup>79</sup> The Bill was given its Second Reading on November 19<sup>th</sup>. A timetable motion was passed which provided that the Committee Stage and the Third Reading should be completed in a further two days. The Derogation Order was debated for 90 minutes. The Committee Stage of the full House occurred on November 21<sup>st</sup> and November 26<sup>th</sup>. It finished at 11.57 pm and was immediately followed by the Third Reading that was concluded at midnight. The Home Secretary spoke for three minutes and Oliver Letwin, the Shadow Home Secretary, responded by saying: “I shall be brief. . .”. Indeed, he was. He was interrupted mid-sentence for the vote that went 323 to 79. Royal Assent to the Act was granted on December 14<sup>th</sup>.<sup>80</sup>

Whilst the passage of the Bill through the democratically elected House of Commons travelled at the same whirlwind speed as that of the Patriot Act through Congress, the House of Lords refused to participate in the legislative stampede. Paradoxically, it fell to the un-elected House of Lords to offer a degree of meaningful reflection and opposition to the Bill. Thus it was the liberal lords who held the line for the democratic demand for civil liberties. Lord Corbett of Castle Vale said “after the outrage of 11<sup>th</sup> September, the way to defend democracy is not to dismantle it; it is to strengthen it. Otherwise. . . the Mother of Parliaments is being asked to put its name to achieving some of the aims of those who carried out the events of September 11<sup>th</sup>.”<sup>81</sup> The Lords made 70 amendments and although most were reversed in the Commons, several were maintained and constituted significant defeats for the government. It was the issue of indefinite detention without charge that raised major opposition. A person reasonably suspected of being an international terrorist could be detained indefinitely and without charge. It was, the Home Secretary claimed, to cover “dozens of foreign” people who could not be prosecuted for insufficiency or inadmissibility of evidence and who could not be deported if they faced either torture or death overseas. The detainee’s appeal against detention is through the Special Immigration Appeal Commission [SIAC] that will sit in secret. A security-cleared special advocate appointed by the Commission will represent the detainee. The special advocate cannot take client’s instructions without express permission

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<sup>78</sup> Hansard, House of Commons, 15 November 2001, col. 925. See, *Lawless v Ireland* (1960) 1 EHRR 1.

<sup>79</sup> The Prevention of Terrorism [Temporary Provisions] Act 1984 took the House of Commons 17 hours.

<sup>80</sup> The Joint committee on Human Rights stated that “many important elements of the Bill were not considered at all in the House of Commons. . . We share the view of the House of Lords Select Committee on the Constitution that the inclusion of many non-emergency measures was inappropriate in emergency legislation which was required to be considered at such speed.” See, Joint Committee on Human Rights, *Anti-terrorism, Crime and Security Bill: Further Report* (2001-02 HL 51, 2001-02 HC 420) para 2.

<sup>81</sup> HL 6 December 2001, col 1005.

of the Commission. Evidence may be adduced without showing it to the detainee or special advocate. Although an appeal on a point of law could go to the Court of Appeal, there was no appeal against the Home Secretary's certificate of detention. The government amended the Bill, in the light of the Lord's opposition, by raising the status of SIAC to that of a superior court of record; thereby ensuring its decision was not subject to judicial review!

In December and January 2002, several arrests were made in London and Leicester. Detainees, who have not been charged, are in the London high security prison, Belmarsh. They are locked up for 22 hours a day and do not see daylight. On detention they were not given access to lawyers or to their families. They cannot speak to families without the presence of an approved translator who visits once a week. They have been denied prayer facilities apart from 15 minutes on Friday but in the absence of an imam. Gareth Pierce, a solicitor who represents several of them, stated that: "these men have been buried alive in concrete coffins and have been told the legislation provides for their detention for life without trial". In July, the appeal of nine of the interned foreigners was allowed by SIAC and two others left the country voluntarily. Neither was arrested in the receiving country.<sup>82</sup> The Home Secretary appealed against the decision of SIAC. On 25<sup>th</sup> October the Court of Appeal, led by the Lord Chief Justice, Lord Woolf, overturned SIAC and held that those men who are subject to indefinite detention without charge are detained lawfully and the detention does not contravene the European Convention on Human Rights.<sup>83</sup>

Wide-scale trawling, retention and availability of data were other highly charged concerns. Currently there are over 50 statutes that allow a number of public authorities to disclose information in the light of criminal proceedings. Oliver Letwin complained: "the Home Secretary is saying that to catch terrorists, he has to allow 81 government agencies – from the BBC to the NHS – to reveal somebody's records, even if they are being investigated for a traffic offence in the USA. I find that a difficult chain of logic to follow." The Bill sought to extend 'criminal proceedings' to include general 'investigations', both within the UK and abroad. The Lords attempted to limit this power and succeeded in so far as the government finally agreed that the Act would carry an express requirement that any such disclosure would be limited by the Human Rights Act. This requires that disclosure be proportionate to what was sought to be achieved by the disclosure. The human rights lawyer, Lord Lester, described this amendment as mere "window dressing".

Serious disagreements also arose over the retention of data. The proposal to adopt criminal justice measures under Title VI of the Treaty on European Union [known as the Third Pillar], including the proposed European arrest warrant, resulted in a defeat for the government. The government agreed that such changes would be introduced through primary legislation and via

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<sup>82</sup> See, J. Wadham and S. Chakrabarti, 'Indefinite Detention without Trial' *New Law Journal* (2001) 1564.

<sup>83</sup> *A, X and Y, and Ors v Secretary of State for the Home Department* [2002] EWCA Civ 1502, and *The Guardian*, 26<sup>th</sup> October 2002. Once again, the evidence put forward by the government to back its argument remained secret on the grounds of national security. The Court of Appeal did not consider this 'closed' evidence.

the backdoor through negative resolution procedure. Nevertheless, the new anti-terrorism measures developed by the Justice and Home Affairs Council [JHAC] and the European Council after September 11<sup>th</sup> will be introduced through powers in the Act.<sup>84</sup>

The Bill was also attacked for carrying irrelevant legislative baggage, some of which is controversial. These were not issues requiring immediate attention and it was felt that the Home Office had enjoyed the opportunity to clear its shelves by adding entitlement cards<sup>85</sup> as well as matters of religious hatred, police powers, asylum, immigration, corruption and bribery. D. Hogg stated that “most of the Bill has simply come out of the Home Office back lobby. It has a lot of stuff that it wants to put before Parliament and it has attached it to this Bill.”<sup>86</sup>

Finally, the Lords successfully introduced expanded sunset clauses and reviews into the Bill. Thus, the provisions for detention without charge will lapse after five years unless renewed by primary legislation. In the meantime the provisions will be reviewed after 15 months and thereafter, annually. The entire Act is to be reviewed by a body of Privy Councillors within two years of Royal Assent. However, the Home Secretary announced that the review body will have no access to the detailed cases that have gone through SIAC, nor to the evidence that was presented in private.

The Bill is a classic example of legislation drafted too quickly, too loosely and thereafter passed too hastily.<sup>87</sup> Nevertheless, concerns voiced by judges and legal experts over the scope and likely efficiency of the Act did little to cool the government’s ardour. The Lord Chief Justice, Lord Woolf took the unusual step of expressing concern about the passage of the Act, writing: “In previous wars, things have happened which, with hindsight, are now known to have been wrong. We have to be astute to avoid that happening, so far as possible.”<sup>88</sup> Michael Zander noted that “this was complex and controversial legislation rushed through Parliament at breakneck speed. We are unlikely to know whether it contributes to making this country a safer place.”<sup>89</sup>

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<sup>84</sup> See T. Mathiesen, “Expanding the Concept of Terrorism” in *Beyond September 11<sup>th</sup>: An Anthology of Dissent*, ed P. Scraton, (2002).

<sup>85</sup> In May 1993, Earl Ferrers stated in the House of Lords that he could not think of a single terrorist offence that would have been avoided had terrorists been obliged to carry identity cards, and that the government was reviewing “every conceivable method of trying to prevent terrorism but ID cards do not feature high on the list.” HL Debs 18<sup>th</sup> May, cols 1555-56. Lord Lloyd also rejected ID cards as a useful tool in the fight against terrorism. *Inquiry into Legislation against Terrorism*, Cm 3420, 1996, para 16.31. P. A. Thomas “Identity Cards” 58 *Modern Law Review* (1995) 702.

<sup>86</sup> Hansard, House of Commons, 19 November 2001, col 94.

<sup>87</sup> O. Letwin MP: “I want to say a word about process. I have discerned across the house, as everyone here must have done, a strong feeling that a few days – three days, in the case of this House, are not enough fully to scrutinize the Bill.” Hansard, 19 November 2001, col. 39. Lord Dixon-Smith: “The Bill has achieved three day’s discussion, pretty nearly on the trot, in another place. That is not sufficient time to consider a measure of this significance.” Hansard, House of Lords, 13 November 2001, col 155.

<sup>88</sup> *Daily Telegraph*, 17 December 2001.

<sup>89</sup> “The Anti Terrorism Bill: What Happened?” *New Law Journal* (2001) 1880. However, Lord McIntosh of Haringay, did feel that the Bill would be of some

Zander questions the efficacy of the legislation, but considers that there is a lack of evidence that would allow us to make an informed judgment. However, some evidence does exist and this paper moves to consider this point.

### Does Anti-Terrorism Legislation Work?

There are strong reasons and powerful interests promoting the expansion and continuation of legislation reputed to defeat terrorism. Whilst the widely promoted arguments of ‘warfare’ and ‘balance’ do not justify the powers found within the most recent legislation, nevertheless, history shows that civil rights consistently come out second best when terrorism dominates the political agenda.<sup>90</sup> Terms such as ‘national security’ and ‘public safety’ trump the vocabulary of civil rights. The courts display reluctance in challenging the state’s decision in such cases;<sup>91</sup> the media becomes an uncritical supporter of executive action<sup>92</sup> and the general public are encouraged to see the terrorist as demonic, unstable and a random threat to each and everyone.

Given that civil rights arguments are relatively unsuccessful within the context of the response to terrorism, a more fruitful argument might be via a functional, rational account based upon the review of results. Does this legislation work and if so for whom? A set of practical questions, which seek to isolate issues, classify responses and ‘de-terrorise’ the political atmosphere, may help in promoting a rational account of the efficiency and effects of this corpus of law. There is a range of questions which could be addressed, such as ‘how many people have been successfully charged under anti-terrorist legislation’; ‘does it have deterrent value’;<sup>93</sup> ‘do politicians really believe in the legislation’; ‘what unintended harm has occurred’; ‘how is terrorism defined’?

The Prevention of Terrorism [Temporary Provisions] Act 1974 [PTA] was described by the then Home Secretary, Roy Jenkins, as a ‘draconian measure’.<sup>94</sup> During the debate on the ATCSA, Roy Jenkins, now Lord

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value when he claimed that it “would be a significant help in combating television.” Hansard, House of Lords, 28 November 2001, col. 417. [itals added].

<sup>90</sup> E. P. Thompson, *Writing By Candlelight*, (1985) argues that the greatest thief of civil liberties is the state.

<sup>91</sup> The classic case is *Liversidge v Anderson*, n 1.

<sup>92</sup> N.Chomsky, *The Irrepressible Chomsky* [2001]. See also, the Russian State Duma voted in November 2002 to impose broad limitations on media coverage of terrorism. *Guardian Weekly*, 13 November 2002.

<sup>93</sup> For example, Faith Mitchell of the National Research Council, National Academy of Science, USA, is reported as saying “during the Cold War, at least in retrospect, it was simpler. You threatened to bomb the Soviet Union to death and they didn’t want that and that effectively deterred them from bombing us. This approach would not work with groups such as Osama bin Laden’s al-Qaeda network. It is more complicated than that because the adversaries are more elusive.” [www.nap.edu](http://www.nap.edu) and New Sunday Times, 25 August 2002. The President’s National Security Strategy for the United States, published in September 2002, states “Traditional concepts of deterrence will not work against a terrorist enemy whose avowed tactics are wanton destruction and the targeting of innocents.”

<sup>94</sup> HC 25 November 1974, col 35.

Jenkins of Hillhead, returned to the original Bill and stated: “I think that it helped to steady a febrile state of opinion at the time and to provide some limited additional protection. However, I doubt it frustrated any determined terrorist. . . . If I had been told at that time that the Act could still be on the statute book 20 years later, I would have been horrified. . . . It is not one of the legislative measures of which I can be most proud.”<sup>95</sup>

The ATCSA re-introduces a discredited power to ‘intern’. Part 4 of the legislation allows for the indefinite detention, without charge of certain foreign nationals suspected of terrorism, based on executive decision. This differs from the Northern Ireland internment power in scale but not in principle. Internment was introduced in 1971 when 27 people were killed in the first eight months of that year. In the following four months, after bringing in that power, 147 people were killed. It has been suggested that the over-reaction of the state fuelled a violent response.<sup>96</sup> During the Parliament debate on the Northern Ireland (Emergency Provisions) Bill, 1998, Frank Dubs stated: “In this Bill, the decision has been taken to get rid of the power of internment. Frankly it has not worked. . . . we believe that the use of internment would strengthen the terrorists.”<sup>97</sup> More recently, in the House of Commons debate on the ATCSA, Douglas Hogg claimed that “the general arguments against internment without trial are very powerful. We normally get the wrong people; it is unjust; we depart from the moral high ground and we alienate folk. It is a jolly bad policy to pursue.”<sup>98</sup> As is noted, the exercise of the ‘internment’ power in the ATCSA was successfully challenged in the SIAC, although not on the grounds of ‘over-reaction’.<sup>99</sup>

Defining ‘terrorism’ is difficult.<sup>100</sup> Definitions of ‘good’ and ‘evil’ are also confusing.<sup>101</sup> For example, Werner von Braun was considered by western states to be evil for inventing the V2 bombers that were used against London but became good when he used his knowledge on behalf of the Americans. Saddam Hussein was described by the USA as good when fighting Iran but was subsequently redefined as evil. Osama bin Laden was also good when,

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<sup>95</sup> Hansard, House of Lords, 27 November 2001, col 199.

<sup>96</sup> N. Whitty, T. Murphy and S. Livingstone, *Civil Liberties Law: The Human Rights Act Era (2001)* 122.

<sup>97</sup> Hansard, House of Commons, 12 January 1998, col. 909. Section 3 repealed the power of internment. However, see *Chahal v UK* (1997) 23 EHRR 413.

<sup>98</sup> Hansard, House of Commons, 19 November 2001, col 95.

<sup>99</sup> See, n 83.

<sup>100</sup> One study considered 109 definitions and concluded that “the search for an adequate definition is still on.” A. Schmid and A. Jongman, *Political Terrorism: A new guide to actors, authors, concepts, data bases, theories and literature* (1988). “The latest British legislation seems to draw the definition so wide as to be somewhat meaningless”. D. Meltzer, “Al Qa’ida: terrorists or irregulars?” in *Law After Ground Zero*, 71, *supra*. See also, [www.statewatch.org/news](http://www.statewatch.org/news) for an account of European Union attempts to define ‘terrorism’. P. A. Thomas and T. Standley “Re-Defining Terrorism” *Australian Journal of Law and Society* 4 (1987) 61. Noam Chomsky does not agree that the definition of terrorism is hard. He keeps to the official US Code and Army Manuals. “They give definitions that are good enough for practical purposes.” (Personal correspondence, 24 October 2002.)

<sup>101</sup> The classic and much quoted illustration is Nelson Mandela: convicted terrorist and prisoner on Robbin Island, Nobel Peace Prize winner, 1994, and President of South Africa thereafter.

supported by the CIA, he acted as a freedom fighter against communism in Afghanistan. The Taliban were also supported as friends when the US strategy towards the country changed after Afghanistan was identified as a possible pipe-line route for the oil due to come from central Asian states.<sup>102</sup> Perhaps the terrorist can be defined as *homo sacer*.<sup>103</sup> In ancient Roman law this person could be killed with impunity and whose death had no sacrificial value as he was, was already considered to be in the realm of the gods. Thus the terrorist becomes a non-person: game to be hunted and destroyed.<sup>104</sup>

Employing the cliché of ‘one man’s terrorist is another man’s freedom fighter’ is inappropriate and unhelpful for lawyers. An established principle of statutory interpretation is that legislation seeking to expand law beyond accepted provisions should be interpreted literally and strictly, as in criminal and tax laws.<sup>105</sup> Expansive definitions of extraordinary laws that stretch the rule of law are contrary to judicial rules of interpretation. Nevertheless, the statutory definition of terrorism as laid out in the Prevention of Terrorism (Temporary Provisions) Act 1989<sup>106</sup> has been increased dramatically by the Terrorism Act 2000<sup>107</sup> and this has been consolidated in the ATCSA.<sup>108</sup> The Terrorism Act 2000 moved away from the Northern Ireland focus and included ‘religious fundamentalists’ and ‘individuals with fanatical leanings’.<sup>109</sup> The expanded definition is found in section 1 (1): “the use of threat, for the purpose of advancing a political, religious or ideological cause, of action which: (a) involves serious violence against any person or property; (b) endangers the life of any person; or (c) creates a serious risk to the health or safety of the public or a section of the public.” This Act makes terrorist legislation permanent, thereby recognising the continuing existence of a terrorist threat to our society. The result is that there now exists emergency legislation against a permanent state of affairs.

Turning detentions into convictions is another sign of an efficient enforcement policy. In *Brannigan and MacBride v UK*<sup>110</sup> Judge Walsh, in a dissenting opinion concerning a terrorist case, stated “The government has not convincingly shown, in a situation where the courts operate normally, why an arrested person cannot be treated in accordance with article 5

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<sup>102</sup> A. Rashid, *Taliban: The Story of the Afghan Warlords* (2001) especially the chapter “Romancing the Taliban: The Battle for Pipelines”. See also, M. Parenti, *The Terrorism Trap* (2002), especially, the chapter on “The Holy Crusade for Oil and Gas”: P. Bergen, *Al Qaeda Holy War Inc* (2002); N. F. Ahmed, *The War on Freedom* (2002): “The Clinton administration has taken the view that a Taliban victory would act as counterweight to Iran. . . and would offer the possibility of new trade routes that could weaken Russian and Iranian influence in the region.” *New York Times* 26<sup>th</sup> May 1997. Regional USA foreign policy is laid out in Z. Brzezinski, *The Grand Chessboard: American Primacy and its Strategic Imperatives* (1997).

<sup>103</sup> G. Agamben, *Homo Sacer: Sovereign Power and Bare Life* (1998).

<sup>104</sup> See, S. Zizek, “Are we in a war?” *London Review of Books*, 23 May 2002, 3.

<sup>105</sup> *DPP v Otwell* [1970] AC 642, *Farrell v Alexander* [1975] 3 WLR 642, *Inland Revenue Commissioners v Ross and Coulter* [1948] 1 All ER 616.

<sup>106</sup> S 20 (1).

<sup>107</sup> S 1.

<sup>108</sup> S 21.

<sup>109</sup> See, *Inquiry into Legislation Against Terrorism* Cm 3420 (1996) paras 1.21-1.24.

<sup>110</sup> (1994) EHRR 539.

paragraph 3. The fact that out of 1,549 persons arrested in 1990 only 30 were subsequently charged, indicates a paucity of proof rather than deficiency in the operation of the judicial function.” Official figures recorded by the police give an indication of the efficiency of the relevant legislation. The latest published arrest figures relating to the Terrorism Act 2000 and the ATCSA suggest that arrest patterns associated with previous anti-terrorism legislation continue today.<sup>111</sup> For example, the Home Secretary announced that 137 arrests have been made since September 11<sup>th</sup> under the Terrorism Act. No convictions have been achieved. 11 people have been detained under Part 4 of the ATCSA. Two of the 11 have left the UK voluntarily.<sup>112</sup> The nine remaining people detained since October 2001 under Part 4 of ATCSA appeared before the Special Immigration Appeals Commission. The commissioners decided that the power to detain foreign nationals only on the grounds that they posed a risk to national security was discriminatory and breached article 14 of the European Convention on Human Rights.<sup>113</sup> Figures on the use of the Criminal Justice (Terrorism and Conspiracy) Act 1998 similarly show that no one has been arrested or charged under that legislation.<sup>114</sup> A similar pattern emerges in the US. Not one of the people detained after September 11<sup>th</sup> has been charged involvement in the crimes under investigation. As of September 2002 only Zaccarias Moussaoui has been so charged and he was arrested before the round up commenced.<sup>115</sup>

Paddy Hillyard’s authoritative study describes in detail the publicly indefensible use to which the Prevention of Terrorism [Temporary Provisions] Act was put.<sup>116</sup> He states that nearly nine out of every ten people detained under this statute on entering Britain were released without any further action taken against them.<sup>117</sup> There were 7,052 people detained under the PTA in connection with Northern Ireland affairs between November 1974 and December 1991. 6,097 were released without charge. Of the rest, 197 were charged with offences under the PTA, 411 were charged under other legislation and 349 were excluded from Britain. Of those charged under the PTA, three-quarters were found guilty. Of these, over half received non-custodial sentences and of those who went to prison the majority were sentenced to one year or less. Of those who were prosecuted under other legislation three-quarters were found guilty. Of this group, 42

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<sup>111</sup> The official published figures from the Home Office, ‘Statistics on the Operation of the Terrorism Legislation’ were published in September 2001. The data in this bulletin includes the first seven weeks of 2001. The Terrorism Act 2000 commenced on 19 February 2001 and is therefore not included. The figures that follow in the body of the article are gleaned from Parliamentary Answers.

<sup>112</sup> Hansard, House of Commons, 18 July 2002, col. 553W and Hansard, House of Lords, 7 May, col WA 160.

<sup>113</sup> See, *A & ORS v Secretary of State for the Home Department*, 30<sup>th</sup> July 2002, ltl 1/8/2002 (Unreported elsewhere).

<sup>114</sup> Hansard, House of Commons, 25 June 1999, col. 471.

<sup>115</sup> As of April 2002, government officials stated that out of the 2,000 detainees in the US 10 or 11 may be members of Al Qaeda. D. Cole, “Enemy Aliens” supra.

<sup>116</sup> *Suspect Community* (1993). D. Cole produces figures which show that the US authorities are using the PATRIOT Act in a similar manner: low-level intelligence gathering from the ‘Suspected Community: the Arabs.

<sup>117</sup> *Ibid* 31.

per cent received non-custodial sentences, 12 per cent were sentenced to less than one year in prison and 35 percent to over five years.<sup>118</sup> He concludes that the principal aim of the ordinary criminal justice system was to take some formal action against those suspected of being involved in crime. On the other hand, the main objective of the PTA was to gather intelligence.

The impact of anti-terrorist legislation on innocent people swept up by that law and those empowered to enforce it, is negative, painful and invariably alienating. Hillyard's research included interviewing 115 people about their experiences in relation to the PTA 1974. Each person has a story of grief, disillusionment, anger or frustration to tell, some more dramatic than others do. One standard illustration is that of a person detained for four days and then released without charge stated: "after the detention I was off work for six or seven weeks. I was like a wreck. . . . You always think they're watching."<sup>119</sup>

### CONCLUSION

It is argued that the normal balance that exists between the executive, legislature and the judiciary is upset in times of national emergency. The judiciary becomes somewhat cautious about challenging the case presented by the state.<sup>120</sup> For example, in *Home Secretary v Rehman* [2001]<sup>121</sup> Lord Hoffman said that the attacks in the USA "underline the need for the judicial arm of government to respect the decisions of ministers of the Crown on the question of whether support for terrorist activities in a foreign country constitutes a threat to national security." The Court of Appeal followed this statement when considering the Home Secretary's ban on the leader of the Nation of Islam, Louis Farrakhan, from entering the UK. The court declared that it was a matter where it is "appropriate to accord a particularly wide margin of discretion to the Secretary of State."<sup>122</sup> However, the Lord Chief Justice Lord Woolf, responded directly to the events arising from September 11<sup>th</sup>. He addressed the "pressures created by the need to protect this country

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<sup>118</sup> *Ibid* 92.

<sup>119</sup> Hillyard, *supra*, 240. One of my law students was stopped in Holyhead. He was detained for four hours, questioned and searched. He was questioned about the academic reading in his bag and his 'civil liberties' syllabus was taken from him and photocopied.

<sup>120</sup> Professor Keane, dean of the Golden Gate University Law School, predicted that 'judges would be more willing to grant wiretap authorizations, search warrants and other types of 4<sup>th</sup> Amendment intrusions. Judges tend to be stampeded in times of danger like this.' Dolan, Maura and Weinstein 'Activist groups on the lookout for erosion of civil liberties', *Los Angeles Times* 14<sup>th</sup> September 2001. Hussein Ibish, spokesman for the American-Arab Anti-Discrimination Committee, Washington, said they had reports of Arab-American lawyers urging clients to find other lawyers 'because of the way they feel they are being perceived by judges' since 9/11. W. Glaberson, 'Arab-Americans see hazards in courtrooms' *New York Times* 3 October 2001.

<sup>121</sup> [2001] UKHL 47, [2002] 1 All ER 122. See also, *Korematsu v USA* 323 U.S. 214, 236 (1944) where the leading civil libertarian, Mr Justice Hugo Black wrote the lead Supreme Court opinion upholding the constitutionality of the relocation of Japanese Americans during World War 11.

<sup>122</sup> *R v Secretary of State for the Home Department ex parte Louis Farrakhan* [2002] EWCA Civ 606, [2002] 3 WLR 481.

from the merciless acts of international terrorists.” He added that it was almost inevitable that, from time to time, under these pressures “parliament or the government will not strike the correct balance between the rights of society as a whole and the rights of the individual.” He placed significant value on the power of the Human Rights Act to “strengthen our democracy by giving each member of the public the right to seek the help of the courts to protect his or her human rights in a manner that was not previously available.”<sup>123</sup>

The legislature may be pushed into hasty and ill-considered action. In addition, legislation passed as a consequence of the reputedly short term but nevertheless altered balance has a disturbing history of creeping into the realm of political and public acceptance and ultimately becoming permanent.<sup>124</sup> The mindset of those employed to enforce such legislation cannot but be influenced by such radical powers. The result is an expansion and hardening of state powers in the domains of social control and criminal law.

It is argued that those at greatest personal risk from ill conceived and tightly enforced legislation are the weakest and most vulnerable in society: immigrants, asylum seekers, non-citizens, ethnic minorities, Muslims<sup>125</sup> and the Irish. Anti-terrorist legislation does not make us safe though it may offer a degree of comfort to ‘middle England’. The price for this comfort is the establishment of dual criminal law structures of police powers, court processes and prison detentions. It also includes the possible loss of confidence in the rule of law from law-abiding people who feel victimised by an incorrectly presumed association with terrorists.

The Rule of Law, equality, proportionality and fairness are challenged by terrorists and also by ill-conceived terrorist legislation. The police and the security services cannot be allowed complete freedom through law to tackle terrorists. The European Court of Human Rights has laid down limits: “The Court, being aware of the danger such a law poses of undermining or even destroying democracy on the ground of defending it, affirms that the Contracting States may not, in the name of the struggle against terrorism, adopt what measures they deem appropriate.”<sup>126</sup> Thus, while terrorism is a threat to democracy, so the legislative responses of nation states, and the European Union, carry similar dangers. In the particularly sensitive area of responses to terrorism it is incumbent upon politicians that their executive and legislative decisions be considered, proportionate, time restricted and

<sup>123</sup> ‘Human Rights: Have the Public Benefited’ Thank-Offering to Britain Fund Lecture, British Academy, 15 October 2002, London. See, the dissenting judgment of Judge Pettiti in *Brannigan and McBride v UK*, *supra*: “If the judiciary is to continue to play its central role under the common law system in upholding the rule of law, it is crucial that it should not only be rigorously independent of the Executive, including the police, and the prosecuting authority, but that it should be seen to be independent.”

<sup>124</sup> J. Sim and P. A. Thomas ‘The Prevention of Terrorism Act: Normalising the Abnormal’ *Journal of Law and Society* [1983] 71.

<sup>125</sup> Hate crimes surged in the US against Muslims and Arabs after 9/11. There was a jump of 1,600 per cent. The FBI stated most incidents involved assaults and intimidation. *International Herald Tribune*, 26 November 2002.

<sup>126</sup> *Klass v Germany* (1978) EHRR 214.

appropriate and also that both content and process accord with the principles of the Rule of Law. Neither the PATRIOT Act nor the Anti-Terrorism, Crime and Security Act meet these basic criteria. Should this argument fail to convince, as has been the case to date, then the alternative, supporting argument of effectiveness can be offered. There is scant evidence that anti-terrorist legislation works to control terrorism. Even the suggestion that it is merely symbolic is misleading for positive damage occurs to the fabric of society and to the rights of individuals, especially vulnerable minorities. In addition, the commitment to social justice appears hollow as is the maintenance of a single and standard legal system.

In 1993 a senior Labour politician stated in Parliament: “If we cravenly accept that any action by the government and entitled Prevention of Terrorism Act must be supported in its entirety without question we do not strengthen the fight against terrorism, we weaken it. I hope that no Honourable Member will say that we do not have the right to challenge powers, to make sure that they are in accordance with the civil liberties of our country.” The speaker? The former Shadow Home Secretary, and current Prime Minister, Tony Blair.<sup>127</sup>

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<sup>127</sup> Hansard, House of Commons, 10 March 1993, col 975.