

The Perilous Dialogue

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Five months before his retirement, Justice William Brennan wrote in a dissent: “the Framers of the Bill of Rights did not purport to ‘create’ rights. Rather, they designed the Bill of Rights to prohibit our Government from infringing rights and liberties presumed to be pre-existing.”¹ Professor Stephen Holmes reminds us in his lecture that such rights and liberties do not impede progress: they embody it.² The rules preserving rights and liberties can help to focus action by bringing clarity to the present, while still preserving a long-term political perspective. Yet, time and again, both these rights and the rules designed to protect them are sacrificed in the name of national security.

The master metaphor in each sacrifice is, indeed, “security or freedom,” and it is on this metaphor that I would like to focus. It dominates the counterterrorist discourse both in the United States and abroad.³ Transcripts from debates in Ireland’s Dáil Éireann, Turkey’s Büyük Millet Meclisi, and Australia’s Parliament are filled with reference to the need to weigh the value of liberty against the threat posed by terrorism. Perhaps nowhere is this more pronounced than in the United Kingdom, where, for decades, counterterrorist debates have turned on this framing.⁴ However, owing in part to different

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1. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 288 (1990) (Brennan, J., dissenting).

2. Steven Holmes, *In Case of Emergency: Misunderstanding Tradeoffs in the War on Terror*, 97 CALIF. L. REV. 301 (2009).

3. *See id.* at 312-13.

4. *See, e.g.*, Ian Paisley, 940 PARL. DEB., H.C. (5th ser.) (1977) 1737; William Whitelaw, 1 PARL. DEB., H.C. (6th ser.) (1981) 341; Prime Minister’s interview with CNN, *We are at War with Terrorism*, Sept. 16, 2001, available at <http://www.number10.gov.uk/Page1599>; Lord Goldsmith, *Speech to the Royal Services Institute*, May 10, 2006, available at http://news.bbc.co.uk/2/hi/uk_news/politics/4760031.stm. *See generally* LAURA K. DONOHUE, *COUNTER-TERRORIST LAW AND EMERGENCY POWERS IN THE UNITED KINGDOM, 1922-2000* (2007).

constitutional structures, what “security or freedom” means in America differs from what it means in Britain.

In the United States, we tend to treat “security” and “freedom” as distinct phenomena: policy considerations set against pre-existing, political rights.⁵ Security becomes linked to decisions taken by the executive to preserve life—for example, heightening protection against terrorist attacks by restricting entitlements specified in the Bill of Rights. Thus, Judge Richard Posner argues that in dangerous times, we must adjust constitutional rights to meet the demands of security.⁶ Professors Adrian Vermeule and Eric Posner propose “a basic tradeoff between security and liberty.”⁷ As Professor Holmes points out, the tradeoff framework is not limited to those who come down more heavily on the security side of the equation; civil libertarians also refer to the framework, arguing for the protection of rights in the face of security demands.⁸

In the United Kingdom, in contrast, scholars and policy makers tend to consider security versus freedom as a case of competing rights: the right to life or the right to freedom from fear set against the right to move freely. As Prime Minister Tony Blair announced on 9/11, the exercise of state power would be necessary to protect “the basic civil liberty that people have to go about their business free from [sic] terror.”⁹ This framing—competing rights in tension—reflects Britain’s constitutional structure. Measures introduced by Parliament do not have to conform to a written constitution.¹⁰ While some documents, such as the 1215 Magna Carta, or the 1689 Bill of Rights, carry special significance, they are part of a broader system that encompasses legal and non-legal rules.¹¹ The multiplicity and fluidity of rights, and the constant effort to balance them,

5. DONOHUE, *supra* note †, at 4.

6. See RICHARD A. POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY 9, 31 (2006); Richard A. Posner, *Torture, Terrorism, and Interrogation, in TORTURE: A COLLECTION* 291 (Sanford Levinson ed., 2004).

7. Eric A. Posner & Adrian Vermeule, *Emergencies and Democratic Failure*, 92 VA. L. REV. 1091, 1098 (2006).

8. See, e.g., David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 959 (2002) (arguing that the balance between civil liberties and security be viewed in a manner that respects “the equal dignity and basic human rights of all persons and not succumb to the temptation of purchasing security at the expense of noncitizens’ basic rights.”); DAVID COLE & JAMES X. DEMPSEY, *TERRORISM AND THE CONSTITUTION: SACRIFICING CIVIL LIBERTIES IN THE NAME OF NATIONAL SECURITY* 1 (2002) (highlighting the fundamental tenets of the security versus freedom debate); MORTIN HALPERIM, CENTER FOR NATIONAL SECURITY STUDIES, NATIONAL SECURITY AND CIVIL LIBERTIES: A BENCHMARK REPORT, CNSS Report No. 107, at 37 (Feb. 1981) (suggesting that balance is required between security and freedom instead of wholesale acceptance of national security demands); see also Holmes, *supra* note 2, at 313 (“So powerful is the imaginative grip of this metaphor . . . that even civil libertarians adamantly opposed to extralegal executive discretion during emergencies implicitly accept it.”).

9. Prime Minister Tony Blair, *The War on Terrorism: Prime Minister’s Interview with CNN* (Sept. 16, 2001), <http://www.number10.gov.uk/output/Page1599.asp>.

10. DONOHUE, *supra* note †, at 5.

11. See generally A.W. BRADLEY & K.D. EWING, *CONSTITUTIONAL AND ADMINISTRATIVE LAW* (2003).

reflect Britain's relationship with Europe, where the European Convention on Human Rights (incorporated into British domestic law through the 1998 Human Rights Act) and European Communities law weave together to create a complex system of rights and rules protecting them.¹²

Despite the manner in which the United States and United Kingdom interpret "security or freedom," reflective of their respective constitutional differences, in both countries the dichotomy between rights and security dominates the counterterrorist discourse. And in both regions, because the dichotomy ignores in its narrow terms of reference the far-reaching effects of counterterrorism, it stifles the debate.¹³ As Professor Holmes recognizes, the "hydraulic" assumption inherent in the "security or freedom" framework overlooks the possibility that rules—indeed, the rule of law itself—provide security.¹⁴ There are multiple types of securities and liberties at stake. And the framework distorts the "real tradeoffs" that are being made, such as the risks inevitably entailed in the allocation of limited resources.¹⁵

There are further dangers, but I will concentrate my remarks on how the "security or freedom" framework fails to capture the single most important characteristic of counterterrorist law: increased executive power that shifts the balance of power between the branches of government. At each point where the legislature would be expected to push back against the executive's power—at the introduction of measures, at the renewal of temporary provisions, and in the exercise of oversight—its ability to do so is limited. The judiciary's role is similarly restricted: constitutional structure and cultural norms narrow the courts' ability to check the executive at anything but the margins.

With the long-term political and economic effects of this expanded executive strength masked by the immediacy of the "security or freedom" dichotomy, the true costs of anti-terror legislation in the United States and in the United Kingdom have gone uncalculated. Over the past four decades, both countries have seen the relationship between governmental branches altered, individual rights narrowed, and the relationship of the citizens to the state changed. Counterterrorist law has alienated important domestic and international communities, created bureaucratic inefficiencies, and interrupted commercial activity.¹⁶ As these two countries set global counterterrorist norms

12. Human Rights Act, 1998, c. 42, available at <http://www.opsi.gov.uk/acts/acts1998/19980042.htm>.

13. DONOHUE, *supra* note †, at 6.

14. Holmes, *supra* note 2, at 316-17 ("[T]he tradeoff thesis implies that whenever liberty is curtailed, security is automatically increased.").

15. Holmes, *supra* note 2, at 321 ("[T]he real tradeoffs in the war on terror do not involve a sacrifice of liberty for security, but rather a willingness to increase one risk in order to reduce another risk. . . . The tradeoffs necessary in the war on terror, as I have been arguing, almost always involve this sort of gamble. The question is: who is right to choose the set of security risks that we, as a country, would be better off running?").

16. For more detail see DONOHUE, *supra* note †.

through important multilateral and bilateral organizations, such as the United Nations (“UN”), the UN Security Council, the G7/G8, and the Financial Action Task Force, the risk increases that these detrimental effects will be transferred to other constitutional democracies. American and British provisions, moreover, have evolved outside the specter of terrorist groups actually using weapons of mass destruction to inflict mass casualties. The proliferation of weapons of mass destruction—and I would add biological weapons to Professor Holmes’s concern about fissile material¹⁷—together with a growing willingness on the part of extremists to sacrifice themselves, may drive the two countries to take increasingly severe measures. Such provisions could lead to a shift in the basic constitutional structure of both countries.

I

EXPANDING EXECUTIVE POWER

Counterterrorist law is best described as a spiral, not a pendulum. In this spiral, the single most defining feature of counterterrorist law is hypertrophic executive power. Two examples readily present themselves. The first, antiterrorist finance, centers on stopping the flow of funds to terrorist organizations. New initiatives in this area have almost entirely escaped public scrutiny.¹⁸ The second, surveillance authorities, has attracted more attention. Yet almost without exception, consideration has been narrowly cabined to one particular program or authority, the result being that the broader picture has not been adequately addressed.

A. Antiterrorist Finance

In the closing decades of the twentieth century and the first decade of the twenty-first century, antiterrorist finance initiatives rapidly proliferated. They were closely tied to terrorist attacks. For example, following the Oklahoma City bombings, the 1996 Antiterrorism and Effective Death Penalty Act created a procedure whereby the Secretary of State could designate groups as Foreign Terrorist Organizations (“FTOs”).¹⁹ The statute made it unlawful to provide material support to, or solicit funds on behalf of, the entities so named.²⁰ By 2001 the number of FTOs placed on the list had grown from thirty to forty-four.²¹ Following the 1998 attacks on Nairobi and Dar es Salaam, the Clinton

17. See Holmes, *supra* note 2, at 306, 310-11, 314, 321-22, 343, 346.

18. For a more detailed discussion of antiterrorist finance initiatives and the constitutional implications of these measures, see Laura K. Donohue, *Constitutional and Legal Challenges to the Current Antiterrorist Finance Regime*, 43 WAKE FOREST L. REV. 643 (2008).

19. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified at 50 U.S.C. §§ 224-2267).

20. *Id.*

21. OFFICE OF THE COORDINATOR FOR COUNTERTERRORISM, U.S. DEP’T OF STATE, REPORT ON FOREIGN TERRORIST ORGANIZATIONS (2001), <http://www.state.gov/s/ct/rls/rpt/fto/2001/5258.htm>; OFFICE OF THE COORDINATOR FOR COUNTERTERRORISM, U.S. DEP’T OF STATE,

administration expanded an order, originally issued under the International Emergency Economic Powers Act of 1977 (“IEEPA”), that had created a list of Specially Designated Terrorists. Following 9/11, the Bush administration created a parallel list of Specially Designated Global Terrorists under the IEEPA, similarly empowering the executive branch to freeze the assets of named suspects. A brief discussion of the evolution of authorities under the governing statute will help to illustrate the expansion in executive authority.

The IEEPA empowered the president to declare a national emergency during times of peace “to deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States.”²² The statute authorized the commander-in-chief to:

[I]nvestigate, block during the pendency of an investigation, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest by any person, or with respect to any property, subject to the jurisdiction of the United States.²³

The president may not regulate or prohibit charitable donations related to food, clothing, and medicine, “except to the extent that the President determines that such donations . . . would seriously impair his ability to deal with any national emergency.”²⁴

During the IEEPA’s first two decades, the president primarily issued orders against countries and “nationals thereof,” including Afghanistan,²⁵ Burma,²⁶ Iran,²⁷ Panama,²⁸ the Russian Federation,²⁹ Sierra Leone,³⁰ Sudan,³¹

FACT SHEET: FOREIGN TERRORIST ORGANIZATIONS (2008), <http://www.state.gov/s/ct/rls/fs/08/103392.htm>.

22. 50 U.S.C. § 1701(a) (2004); *see also id.* § 1702 (listing emergency powers) and Donohue, *supra* note 18, at 647.

23. *Id.* § 1702(a)(1)(B).

24. *Id.* § 1702(b)(2).

25. Blocking Property and Prohibiting Transactions with the Taliban, Exec. Order No. 13,129, 3 C.F.R. 200 (2000), *reprinted in* 50 U.S.C. § 1701 (2000).

26. Prohibiting New Investment in Burma, Exec. Order No. 13,047, 3 C.F.R. 202 (1998), *reprinted in* 50 U.S.C. § 1701 (2000).

27. Prohibiting Certain Transactions with Respect to Iran, Exec. Order No. 13,059, 3 C.F.R. 217 (1998), *reprinted in* 50 U.S.C. § 1701 (2000); Prohibiting Certain Transactions with Respect to Iran, Exec. Order No. 12,959, 3 C.F.R. 356 (1995), *reprinted in* 50 U.S.C. § 1701 (Supp. II 1996).

28. Termination of Emergency with Respect to Panama, Exec. Order No. 12,710, 55 Fed. Reg. 13,099 (Apr. 5, 1990).

29. Blocking Property of the Government of the Russian Federation Relating to the Disposition of Highly Enriched Uranium Extracted from Nuclear Weapons, Exec. Order No. 13,159, 3 C.F.R. 277 (2001), *reprinted in* 50 U.S.C. § 1701 (2000).

30. Prohibiting the Importation of Rough Diamonds from Sierra Leone, Exec. Order No.

and Yugoslavia.³² But in the mid-1990s the emphasis shifted to include terrorist organizations.

In 1995 President Clinton issued an order against Jewish and Palestinian groups threatening the Middle East peace process, creating a list of Specially Designated Terrorists.³³ Three years later, the administration added Usama bin Ladin, al Qaeda, Abu Hafs al-Masri, and Rifa'i Ahmad Taha Musa to the list.³⁴ Clinton issued a separate order targeting members of the União Nacional para a Independência Total de Angola ("UNITA").³⁵ In July 1998, building on an earlier order under the IEEPA, Clinton applied sanctions to those attempting to contribute to the proliferation of weapons of mass destruction.³⁶

Less than a fortnight after the attacks in New York and Washington, D.C., President Bush further expanded executive power under the IEEPA by issuing Executive Order ("EO") 13224, an initiative he declared "draconian."³⁷ Stating the existence of a national emergency, EO 13224 creates a Specially Designated Global Terrorists list, blocking "all property and interests in property" of those providing material support to terrorism.³⁸ The order lists

13,194, 3 C.F.R. 741 (2002), *reprinted in* 50 U.S.C. § 1701 (2000); *see also* Exec. Order No. 12,730, 3 C.F.R. 305 (1991), *reprinted in* 50 U.S.C. § 1701 (Supp. V 1993) (regarding export controls); Exec. Order No. 13,464, 73 Fed. Reg. 24,491 (Apr. 30, 2008) (blocking property and prohibiting certain transactions).

31. Blocking Sudanese Government Property and Prohibiting Transactions with Sudan, Exec. Order No. 13,067, 3 C.F.R. 230 (1998), *reprinted in* 50 U.S.C. § 1701 (2000).

32. Lifting and Modifying Measures with Respect to the Federal Republic of Yugoslavia (Serbia and Montenegro), Exec. Order No. 13,192, 3 C.F.R. 733 (2002), *reprinted in* 50 U.S.C. § 1701 (Supp. I 2001); Blocking Property of the Governments of the Federal Republic of Yugoslavia (Serbia and Montenegro), the Republic of Serbia, and the Republic of Montenegro, and Prohibiting Trade Transactions Involving the Federal Republic of Yugoslavia (Serbia and Montenegro) in Response to the Situation in Kosovo, Exec. Order No. 13,121, 3 C.F.R. 176 (2000), *reprinted in* 50 U.S.C. § 1701 (2000); Blocking Property of the Governments of the Federal Republic of Yugoslavia (Serbia and Montenegro), the Republic of Serbia, and the Republic of Montenegro, and Prohibiting New Investment in the Republic of Serbia in Response to the Situation in Kosovo, Exec. Order No. 13,088, 3 C.F.R. 191 (1999), *reprinted as amended in* 50 U.S.C. § 1701 (2000).

33. Prohibiting Transactions with Terrorists Who Threaten to Disrupt the Middle East Peace Process, Exec. Order No. 12,947, 60 Fed. Reg. 5079 (Jan. 23, 1995).

34. Prohibiting Transactions with Terrorists Who Threaten to Disrupt the Middle East Peace Process, Exec. Order No. 13,099, 3 C.F.R. 208 (1999), *reprinted in* 50 U.S.C. § 1701 (2000).

35. Blocking Property of UNITA and Prohibiting Certain Transactions with Respect to UNITA, Exec. Order No. 13,098, 3 C.F.R. 206 (1999), *reprinted in* 50 U.S.C. § 1701 (Supp. IV 1998); Prohibiting Certain Transactions with Respect to UNITA, Exec. Order No. 13,069, 3 C.F.R. 232 (1998), *reprinted in* 50 U.S.C. § 1701 (Supp. IV 1998).

36. Proliferation of Weapons of Mass Destruction, Exec. Order 12,938, 3 C.F.R. 950 (1995), *reprinted as amended in* 50 U.S.C. § 1701 (2000); Proliferation of Weapons of Mass Destruction, Exec. Order No. 13,094, 3 C.F.R. 200 (1999), *reprinted in* 50 U.S.C. § 1701 (2000).

37. Brian Groom, John Willman & Richard Wolffe, *Bush Targets Terrorist Funds: Threat to Freeze US Assets of International Financial Institutions that Fail to Co-Operate with Clampdown*, FIN. TIMES (London), Sept. 25, 2001, at 1; *see also* Donohue, *supra* note 18, at 650.

38. Exec. Order No. 13,224, 3 C.F.R. 786, 787 (2002), *reprinted in* 50 U.S.C. § 1701 (Supp. I 2002). The national emergency has since then been continued on an annual basis. *See*

twenty-seven foreign individuals who, according to the secretary of state, pose a risk to national security, to foreign policy, to the economy, or to U.S. citizens.³⁹ It empowers the secretary of the Treasury to designate more Specially Designated Global Terrorists, requiring only that the designated party act “for or on behalf of” or is “owned or controlled by” a designated terrorist group.⁴⁰ Anyone who or any organization that assists, sponsors, or provides “services to” or is “otherwise associated with” a designated terrorist group can themselves be listed and have their assets frozen.⁴¹ It is illegal for anyone to deal in the blocked assets, for any U.S. entity to try to avoid the prohibitions, or to make donations to relieve humanitarian suffering thereby caused.⁴² The instrument requires that foreign banks provide information to the government about designated terrorist groups, or risk having their assets frozen.⁴³

The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (“USA PATRIOT Act”) amended the IEEPA to give the president the authority to block assets pending an investigation.⁴⁴ Where an individual or organization files a challenge to a blocking order with the courts, an agency record containing classified information may “be submitted to the reviewing court *ex parte* and *in camera*.”⁴⁵ Just over a year after signing EO 13224, President Bush amended it to enable the secretary of state to consult the secretary of Homeland Security in determining which entities should be listed.⁴⁶ In 2005 the president again altered the order to clarify that the IEEPA’s humanitarian-aid exception does not authorize targets whose assets have been blocked to provide humanitarian aid to anyone, even unblocked persons, without prior authorization from the

Continuation of the National Emergency with Respect to Persons Who Commit, Threaten to Commit, or Support Terrorism, 72 Fed. Reg. 54205 (Sept. 20, 2007); Continuation of the National Emergency with Respect to Persons who Commit, Threaten to Commit, or Support Terrorism, 71 Fed. Reg. 55725 (Sept. 21, 2006); Continuation of the National Emergency with Respect to Persons Who Commit, Threaten to Commit, or Support Terrorism, 70 Fed. Reg. 55703 (Sept. 21, 2005); Continuation of the National Emergency with Respect to Persons Who Commit, Threaten to Commit, or Support Terrorism, 69 Fed. Reg. 56923 (Sept. 21, 2004); Continuation of the National Emergency with Respect to Persons Who Commit, Threaten to Commit, or Support Terrorism, 68 Fed. Reg. 55189 (Sept. 18, 2003); Continuation of the National Emergency with Respect to Persons Who Commit, Threaten to Commit, or Support Terrorism, 67 Fed. Reg. 59447 (Sept. 19, 2002).

39. Exec. Order No. 13,224, 3 C.F.R. 786, 787 (2002), *reprinted in* 50 U.S.C. § 1701 (Supp. I 2001); *see also* Donohue, *supra* note 18, at 650.

40. 3 C.F.R. at 787; *see also* Donohue, *supra* note 18, at 650.

41. *Id.*

42. *Id.* at 787-88.

43. *Id.* at 789; *see also* Donohue, *supra* note 18, at 650.

44. Pub. L. 107-56, Title III (Oct 26, 2001).

45. 50 U.S.C. § 1702(c) (2000) (emphasis added). Pursuant to this provision, a court has reviewed the classified portions of the agency record in *Islamic Am. Relief Agency v. Unidentified FBI Agents*, 394 F. Supp. 2d 34 (D.D.C. 2005).

46. Exec. Order No. 13,284, 3 C.F.R. 161 (2004), *reprinted in* 50 U.S.C. § 1701 (Supp. IV 2004).

Department of the Treasury (“Treasury”).⁴⁷

EO 13224 was not the only instrument Bush introduced under the IEEPA to address antiterrorist finance. In 2005, like Clinton before him, Bush targeted those involved in the proliferation of Weapons of Mass Destruction (“WMDs”). Bush expanded the sanctions to apply beyond individuals materially contributing to the proliferation of WMDs, though, to reach those engaged in transactions posing a *risk* of materially contributing to the same.⁴⁸ The new order further prohibited financial support and made efforts to evade the order, to avoid the order, or to conspire to evade or avoid the order a violation of the IEEPA.⁴⁹

These orders allow officers of the executive branch, on the basis of secret evidence, to indefinitely freeze the assets of anyone suspected of contributing to terrorism without first obtaining a guilty verdict in any court of law. The procedures lack even minimal due process protections: any prior or subsequent hearings, any independent arbiter of fact, and any demonstration of an underlying crime. It is also a violation of the law to provide legal advice to any individual thus targeted.

To bring suit against Treasury for being improperly listed, the target must ask Treasury to release his or her own funds, creating a certain conflict of interest. This is not just a technical point: in the case of the Al Haramain International Foundation in Oregon, Treasury refused to allow the group to use its U.S. funds to pay for attorneys. After four years, Treasury relented and said that the organization could hire two attorneys, while Treasury itself employed five to defend the government.⁵⁰

Considerable use has been made of this order: between October 2001 and April 2005, 743 people and 947 organizations had their assets frozen under EO 13224.⁵¹ Such expansions in executive agency authority are not limited to antiterrorist finance. Regulation and surveillance of phone and internet usage by federal agencies, which have attracted considerably more attention, follow a similar pattern.

B. Domestic Surveillance

In the United States, the USA PATRIOT Act has become iconic. This

47. Clarification of Certain Executive Orders Blocking Property and Prohibiting Certain Transactions, Exec. Order No. 13,372, 3 C.F.R. 159 (2006), *reprinted in* 50 U.S.C. § 1701 (Supp. V 2005).

48. Blocking Property of Weapons of Mass Destruction Proliferators and Their Supporters, Exec. Order No. 13,382, 3 C.F.R. 170, 170 (2006), *reprinted in* 50 U.S.C. § 1701 (Supp. V 2005).

49. *Id.*

50. See Memorandum in Support of Plaintiffs’ Motion for Summary Judgment and Opposition to Defendants’ Motion to Dismiss and for Summary Judgment at 2, *Al Haramain Islamic Found. Inc. v. U.S. Dep’t Treasury*, Civ. No. 07-1155-K1 (D. Or. 2008).

51. See Laura K. Donohue, *Anti-terrorist Finance in the United Kingdom and United States*, 27 MICH. J. INT’L L. 303, 407 (2006).

legislation altered the Foreign Intelligence Surveillance Act, introduced delayed-notice search warrants, and extended the application of National Security Letters. But in many ways, the USA PATRIOT Act is just the tip of the proverbial iceberg.⁵²

Almost unnoticed in the security-dominated atmosphere post-9/11 is that entirely outside USA PATRIOT Act authorities, the Department of Defense (“DoD”) has increasingly focused on domestic surveillance.⁵³ Northern Command, created in the months following the terrorist attacks of 9/11, quickly established domestic intelligence-gathering centers in Colorado and Texas.⁵⁴ The 290 intelligence agents at these centers outnumber the number of analysts at the State Department’s Bureau of Intelligence and Research, and include substantially more agents than the number of intelligence agents at the Department of Homeland Security (“DHS”).⁵⁵ According to Robert W. Noonan, Department of the Army Deputy Chief of Staff for Intelligence, military intelligence agents can not only *collect* information about persons within the United States but they can also “receive” information “from anyone, anytime.”⁵⁶ In his November 2001 memo, Deputy Chief of Staff Noonan wrote that the enemy moves in “a shadowy underworld operating globally with supporters and allies in many countries, including, unfortunately our own.”⁵⁷ Military intelligence would, he stated, “play a pivotal role in helping to defeat” the terrorist threat.⁵⁸

Given this understanding, the DoD has initiated various information-gathering programs. For example, Operation Eagle Eyes, initially meant to identify suspicious activity at military installations, morphed into Threat and Local Observation Notice (“TALON”).⁵⁹ TALON authorized the military to gather information domestically from “concerned citizens and military members regarding suspicious incidents.”⁶⁰ The information in the reports is

52. See USA PATRIOT Act, Pub. L. 105-56 §§ 218, 213, 505.

53. See DONOHUE, *supra* note †, at 244-48.

54. See Walter Pincus, *Pentagon Expanding Its Domestic Surveillance Activity: Fears of Post-9/11 Terrorism Spur Proposals for New Powers*, WASH. POST, NOV. 27, 2005, at A6, available at http://www.washingtonpost.com/wp-dyn/content/article/2005/11/26/AR2005112600857_pf.html; Military: U.S. Northern Command, <http://www.globalsecurity.org/military/agency/dod/northcom.htm> (last visited Oct. 14, 2008); DONOHUE, *supra* note †, at 246.

55. See Pincus, *supra* note 54; DONOHUE, *supra* note †, at 246.

56. Memorandum from Robert W. Noonan, Jr., Lieutenant Gen., GS, Deputy Chief of Staff for Intelligence, Dep’t of the Army on Collecting Information on U.S. Persons 1 (Nov. 5, 2001), <http://www.fas.org/irp/agency/army/uspers.pdf>; DONOHUE, *supra* note †, at 246.

57. *Id.*

58. *Id.*

59. See DONOHUE, *supra* note †, at 245.

60. Memorandum from Paul Wolfowitz, Deputy Sec’y of Def. on Collection, Reporting, and Analysis of Terrorist Threats to DoD Within the United States to the Sec’y of the Military Dep’ts et al. 1 (May 2, 2003), <http://wikileaks.org/leak/us-talon-memo.pdf>; DONOHUE, *supra* note †, at 245.

non-validated and “may or may not be related to an actual threat.”⁶¹ The program focuses on non-specific threats made against the DoD’s interests—anything “reasonably believed to be related to terrorist activity directed against DoD personnel, property, and activities within the United States.”⁶²

What constitutes a threat to the United States? In June 2004, ten activists went to Halliburton’s corporate headquarters to protest the firm’s war profiteering.⁶³ The protesters wore papier-mâché masks and handed out peanut-butter-and-jelly sandwiches.⁶⁴ The incident made its way into a TALON report.⁶⁵ In April 2006, the Department of Defense released documents in response to a Legal Defense Network Freedom of Information Act request, which showed that TALON reports were filed on lesbian, gay, bisexual, and transvestite student groups opposed to the military’s “Don’t Ask, Don’t Tell” policy.⁶⁶ Various other anti-war meetings and opposition to military recruiting have also made it in to TALON reports.⁶⁷

This information, along with other data, such as financial records and information obtained from National Security Letters, is now fed to Counterintelligence Field Activity (“CIFA”), an organization created by DoD in February 2002 to coordinate military intelligence.⁶⁸ CIFA was initially intended as a clearinghouse for information from other agencies, but its role quickly expanded. Within four years, the organization had grown to incorporate nine directorates.⁶⁹ Congressional sources suggest that in the first four years of its operations CIFA spent in excess of \$1 billion.⁷⁰ One counterintelligence

61. Memorandum from Paul Wolfowitz, *supra* note 60, at 1; DONOHUE, *supra* note †, at 245.

62. Memorandum from Paul Wolfowitz, *supra* note 60, at 2; DONOHUE, *supra* note †, at 245.

63. Michael Isikoff, *The Other Big Brother*, NEWSWEEK, Jan. 30, 2006, at 32, available at <http://www.newsweek.com/id/47425>.

64. *Id.*

65. *Id.*

66. Talon Report 902-03-02-05-071_full_text, Feb. 3, 2005; and Talon Report 902-21-04-05-358_full_text.txt, Apr. 21, 2005 (on file with author); see also *Servicemembers Legal Defense Network v. Dept. of Defense and Dept. of Justice*, 471 F. Supp. 2d 78, 82-83 (D.D.C. 2007) (verifying the existence of the TALON Reports); see also DONOHUE, *supra* note †, at 246.

67. See Walter Pincus, *Pentagon Will Review Database on U.S. Citizens: Protests Among Acts Labeled ‘Suspicious’*, WASH. POST, Dec. 15, 2005, at A1.

68. See *id.*; see also DEPT. OF DEFENSE, DIRECTIVE 5105.67 (2002), available at www.fas.org/irp/doddir/dod/d5105_67.htm; Mark Mazzetti, *Pentagon Is Expected to Close Intelligence Unit*, N.Y. TIMES, April 2, 2008, at A24, available at http://www.nytimes.com/2008/04/02/washington/02intel.html?_r=1; Eric Lichtblau and Mark Mazzetti, *Military Expands Intelligence Role in U.S.*, N.Y. TIMES, Jan. 14, 2007, at A1, available at <http://www.nytimes.com/2007/01/14/washington/14spy.html>; see also DONOHUE, *supra* note †, at 247.

69. See Counterintelligence Field Activity Fact Sheet, <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB230/03b.pdf> (last visited Feb. 19, 2009).

70. See Walter Pincus, *Counterintelligence Officials Resign*, WASH. POST, Aug. 10, 2006, at A4 [hereinafter Pincus, *Resign*]; see also Pincus, *supra* note 54, at A6; Walter Pincus, *Defense Facilities Pass Along Reports of Suspicious Activity*, WASH. POST, Dec. 11, 2005, at A12 (discussing CIFA’s expanded remit) [hereinafter Pincus, *Defense*].

official cited by the *Washington Post* estimated in August 2006 that CIFA employed approximately 400 full-time workers and 800 to 900 contractors.⁷¹ The agency's mission is to "transform" counterintelligence by "fully utilizing 21st century tools and resources."⁷² The Pentagon states that CIFA uses "leading edge information technologies and data harvesting," and uses "commercial data"—suggesting that it contracts with private industry to collect information.⁷³

The DoD has expanded its power in other important ways. For example, following 9/11, the National Security Agency began monitoring telephone traffic,⁷⁴ the Defense Intelligence Agency created a Defense Counterintelligence and Human Intelligence Center to carry out "strategic offensive counterintelligence operations" on U.S. soil and abroad,⁷⁵ and the National Geospatial-Intelligence Agency began collecting information on 133 U.S. cities, thus acquiring the capability to identify the occupants of each house, their nationality, and their political affiliation.⁷⁶ In February 2007, the Defense Intelligence Agency stated that it intended to hire some 1,000 new analysts, engineers, acquisition specialists, and other professionals.⁷⁷

The Department of Defense is not the only beneficiary of the heavy weight placed on the security side of the scale. At the Department of Justice, new Attorney General Guidelines eliminated the wall between prosecution and intelligence investigations, enabling either side to initiate, operate, or expand Foreign Intelligence Surveillance Act searches or surveillance operations.⁷⁸ The Federal Bureau of Investigation ("the Bureau") obtained authority to enter any place already open to the public to collect information potentially relevant to criminal activity.⁷⁹ No suspicion of actual criminal or terrorist activity is

71. See Pincus, *Resign*, *supra* note 70, at A4.

72. Pincus, *Pentagon*, *supra* note 54, at A6 (quoting CIFA brochure).

73. *Id.* (quoting a February 2004 Pentagon budget document).

74. Press Briefing by Attorney General Alberto Gonzales and General Michael Hayden, Dec. 19, 2005, *available at* <http://www.whitehouse.gov/news/releases/2005/12/20051219-1.html> (confirming NSA wiretapping operation).

75. Walter Pincus, *New Unit of DISA Will Take the Offensive on Counterintelligence*, WASH. POST, Aug. 18, 2008, at A9, *available at* <http://www.washingtonpost.com/wp-dyn/content/article/2008/08/17/AR2008081202244.html> (discussing covert counterintelligence agency created by DIA).

76. William M. Arkin, *Mission Creep Hits Home*, L.A. TIMES, Nov. 23, 2003, at M-2 (discussing National-Geospatial Intelligence Agency plans).

77. Carroll Publishing, *Who's News*, <http://www.carrollpub.com/whoentry.asp?entrynumber=54756&archiveType=New&last=12> (last visited Feb. 19, 2009).

78. See, e.g., The Attorney General (John Ashcroft), *Guidelines for Disclosure of Grand Jury and Electronic, Wire, and Oral Interception Information Identifying United States Persons* (Sept. 23, 2002), *available at* <http://www.usdoj.gov/olp/section203.pdf>; The Attorney General (John Ashcroft), *Coordination of Information Relating to Terrorism* (April 11, 2002), *available at* <http://www.usdoj.gov/olp/agdirective6.pdf>; see also DONOHUE, *supra* note †, at 249.

79. OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, THE ATTORNEY GENERAL'S GUIDELINES ON GENERAL CRIMES, RACKETEERING ENTERPRISE AND TERRORISM ENTERPRISE INVESTIGATIONS 6 (2002), *available at* <http://www.usdoj.gov/olp/generalcrimes2.pdf> [hereinafter

required.⁸⁰ Magic Lantern, a keystroke-logging program, gives the Bureau the ability to penetrate private computers, capturing information and automatically sending it back to the Bureau via the Internet.⁸¹ This program allows agents to break encryption by identifying pass phrases used to access information. It can also recreate emails and documents neither saved nor sent, as well as other information that was never meant to move beyond the immediate computer.⁸²

Various other surveillance programs emerged. The Bush administration, for instance, sought to recruit “millions of American truckers, letter carriers, train conductors, ship captains, utility employees, and others” as informers through the Terrorism Information and Prevention System (“TIPS”).⁸³ TIPS would have co-opted one in every twenty-four Americans living in the largest ten cities to report anything perceived as “unusual or suspicious.”⁸⁴ Watch lists proliferated.⁸⁵ Of the twelve federal terrorism watch lists, perhaps the most well-known is what is popularly termed the “no fly list,” which is actually two lists: the “no fly list” and the “selectee list.”⁸⁶ These lists are a subset of the consolidated terrorist watch list maintained by the Bureau. By July 2008, the number of entries on the consolidated list was estimated to have reached one million—although the Bureau maintained that there were only approximately 400,000 unique individuals on the Terrorist Screening Database, suggesting that the remainder of the names were aliases or different spellings of the primary targets.⁸⁷

AG TERRORISM GUIDELINES].

80. See Peter P. Swire, *The System of Foreign Intelligence Surveillance Law*, 72 GEO. WASH. L. REV. 1306, 1335 (2004).

81. See Elinor Mills Abreu, *FBI Confirms ‘Magic Lantern’ Project Exists*, REUTERS, Dec. 12, 2001, <http://www.commondreams.org/headlines01/1212-07.htm>; Alex Salkever, *A Dark Side to the FBI’s Magic Lantern*, BUS. WK. ONLINE, Nov. 27, 2001, http://www.businessweek.com/bwdaily/dnflash/nov2001/nf20011127_5011.htm; Bob Sullivan, *FBI Software Cracks Encryption Wall*, MSNBC, Nov. 20, 2001, <http://seclists.org/isn/2001/Nov/0105.html>; *Warning: The FBI Knows What You’re Typing*, ZDNET, Dec. 5, 2001, <http://zdnet.com.com/2100-1107-504142.html>; see also Christopher Woo & Miranda So, Note, *The Case for Magic Lantern: September 11 Highlights the Need for Increased Surveillance*, 15 HARV. J.L. & TECH. 521, 521 (2002); see also DONOHUE, *supra* note †, at 250.

82. For details on keystroke logging programs, including Magic Lantern, and the extent of some of their capabilities, see <http://www.keyloggers.com/bigbrother.html>.

83. See The Memory Hole: Website for Operation TIPS Quietly Changes, <http://www.thememoryhole.org/policestate/tips-changes.htm> (last visited Oct. 14, 2008) (reprinting the original Operation TIPS July 16 and August 8, 2002 web pages); DONOHUE, *supra* note †, at 251-254.

84. DONOHUE, *supra* note †, at 251; see The Memory Hole: Website for Operation TIPS Quietly Changes, *supra* note 83.

85. See DONOHUE, *supra* note †, at 254-56.

86. See Transportation Security Administration, *Myth Buster: TSA’s Watch List is More than One Million People Strong*, http://www.tsa.gov/approach/mythbusters/tsa_watch_list.shtm (last visited Feb. 19, 2009); Transportation Security Administration, *Secure Flight*, http://www.tsa.gov/approach/secure_flight.shtm (last visited Feb. 19, 2009); Brock N. Meeks, *Faces of the ‘No Fly’ List*, MSNBC, Jul. 26, 2005, <http://www.msnbc.msn.com/id/8705746>.

87. Jeanne Meserve, *Terrorist Watch Lists Shorter than Previously Reported*, CNN, Oct.

Data mining operations grew in concert with these and other surveillance programs.⁸⁸ Initiatives range from Octopus and Quantum Leap, run by the Central Intelligence Agency (“CIA”), to Insight Smart Discovery and Pathfinder, run by the Defense Intelligence Agency.⁸⁹ The Department of Education operates Project Strikeback, while DHS oversees Notebook I2.⁹⁰ Perhaps the most well-known is the Total Information Awareness (“TIA”), a program run by the Information Awareness Office within the Defense Advanced Research Projects Agency at the Department of Defense. TIA aimed to combine all publicly and privately available databases worldwide in an effort to know what people were going to do before they did it. Even though this program was formally dismantled when its (former) director John Poindexter created a futures market to predict the next terrorist attack, military coup, or assassination of a foreign dictator, many of the projects created under the program simply continued under the auspices of other intelligence agencies.⁹¹

The United Kingdom, modeling its practice on that of the United States, has followed a similar pattern of the expansion of executive authority in relation to antiterrorist finance and surveillance programs. Most recently, for instance, the *London Times* reported that, as part of the fight against terrorism, the Government intends to create a single database that will include telephone, email, and Internet information.⁹² For twelve months, the data will be available to the police and security services. Billions of records are subject to collection: in 2007, there were around 57 billion text messages sent annually and around 3 billion emails sent per day.⁹³

In both countries, the expanded executive activity has serious implications: the state could use the information it acquires through anti-terrorist surveillance to prevent popular dissent, to manipulate the other branches, or to exert social control. Yet broad executive power is an integral part of counterterrorist law.

22, 2008, <http://www.cnn.com/2008/TRAVEL/10/22/no.fly.lists/index.html>.

88. See DONOHUE, *supra* note †, at 256-261.

89. U.S. General Accounting Office, *Data Mining: Federal Efforts Cover a Wide Range of Uses, Report to the Ranking Minority Member, Subcommittee on Financial Management, the Budget, and International Security, Committee on Governmental Affairs, U.S. Senate*, app. 4, at 30 (May 2004), available at www.gao.gov/new.items/d04548.pdf.

90. *Id.* app. 4, at 37.

91. Shane Harris, *TIA Lives On*, NAT'L J., Feb. 23, 2006, available at <http://www.nationaljournal.com/about/njweekly/stories/2006/0223nj1.htm>; Matt Kelley, *Feds Sharpen Secret Tools for Data Mining*, USA TODAY, July 20, 2006, available at http://www.usatoday.com/tech/news/techpolicy/2006-07-19-data-mining_x.htm; Siobhan Gorman, *NSA's Domestic Spying Grows as Agency Sweeps up Data*, WALL ST. J. ONLINE, Mar. 10, 2008, http://online.wsj.com/public/article_print/SB120511973377523845.html.

92. See Richard Ford, *'Big Brother' Database for Phones and E-mails*, TIMES (London), May 20, 2008, at 1, available at http://business.timesonline.co.uk/tol/business/industry_sectors/telecoms/article3965033.ece?&EMC-Bln=NLZF09.

93. *Id.*; see also Draft Communications Data Bill, 2008/9, available at <http://www.commonleader.gov.uk/output/page2667.asp>.

II

THE LEGISLATIVE RESPONSE

It could easily be assumed that the most effective check on the growing strength of the executive in the United States or the United Kingdom would be the legislative branch.⁹⁴ After all, outside of insulated Article II claims or the assertion of the British Royal Prerogative, it is the legislature that passes the statutes governing executive action. But as a practical matter, when confronting terrorism, the legislatures in both countries operate under severe constraints. Moreover, once passed, provisions meant to apply only to terrorism often are construed to be applicable to ordinary criminal law, where the measures take on a life of their own. Lawmakers' ability to conduct oversight is also restricted.

A. Limitations on the Legislature

Consider first the introduction of counterterrorist law. Almost without exception, new provisions emerge in the wake of a major terrorist attack.⁹⁵ The bias towards aggressive action, discussed by Professor Jack Goldsmith in his account of the Bush administration, is not unique to the executive.⁹⁶ Legislators must appear responsive to the life and property interests of citizens. In the four months following 9/11, 97 percent of all bills, resolutions, and amendments proposed by Congress, totaling more than 450 measures, were related to terrorism.⁹⁷ Britain also introduced new counterterrorist laws, despite the passage of permanent anti-terrorist provisions just seven months earlier.⁹⁸

New initiatives launched by officials to counter national security threats tend to have a sort of omnibus security character.⁹⁹ The 1922-45 Special Powers Acts provide a good example. Between 1920 and 1922 in Northern Ireland—long before 9/11—more than 400 people died as a result of political violence.¹⁰⁰ The 1922 Civil Authorities (Special Powers) Act subsequently empowered the government to impose a curfew, close premises, and detain or intern private citizens.¹⁰¹ It granted extensive powers of entry, search, and seizure.¹⁰² The Act also gave the state the power “to take all such steps and issue all such orders as may be necessary for preserving the peace and

94. See DONOHUE, *supra* note †, at 11.

95. *Id.*

96. JACK GOLDSMITH, *THE TERROR PRESIDENCY* (2007); see also Holmes, *supra* note 2, at 320 (asserting that Goldsmith's conception “clashes with observable reality,” specifically in light of attempts by Bush Administration officials to “avoid responsibility for their actions”).

97. Author compiled statistics, based on reviewing and reading all bills, resolutions, and amendments introduced in the four months following the attacks and listed by the Library of Congress at www.thomas.gov. See also DONOHUE, *supra* note †, at 11-12 (giving further statistical analysis).

98. See, e.g., Anti-terrorism, Crime and Security Act (“ATCSA”), 2001, c. 24 (Eng.).

99. See generally Holmes, *supra* note 2, at 318-23; DONOHUE, *supra* note †, at 12.

100. DONOHUE, *supra* note †, at 12.

101. *Id.*

102. Civil Authorities (Special Powers) Act, 1922, § 3(4) (N. Ir.).

maintaining order.”¹⁰³ This provision led to over one hundred new regulations, whose substance ranged from preventing gatherings to outlawing the wearing of an Easter lily, and thousands of new orders under these regulations.¹⁰⁴

New laws passed in the context of fears of terrorism tend to be extreme.¹⁰⁵ Part of the problem is that terrorist organizations are secretive: their survival depends upon hiding their activities and members from state scrutiny. In the *Minimanual of the Urban Guerrilla*, a basic text for numerous terrorist movements, Carlos Marighella writes, “The urban guerrilla must know how to live among the people and must be careful not to appear strange and separated from ordinary city life.”¹⁰⁶ The 1956 *Handbook for Volunteers of the Irish Republican Army* similarly emphasizes the importance of being able to move among the population, as does the al Qaeda *Training Manual*.¹⁰⁷ The modus operandi of terrorist organizations is, precisely, to remain hidden—thereby creating greater fear among the population about the strength of the terrorist group and potential for terrorist violence.

Another part of the problem is that technology and the proliferation of weapons ensure that the destructive capabilities of non-state actors are increasing. The state is concerned not just with fertilizer bombs or improvised explosive devices, but also with the potential use of fissile material, chemical weapons, or biological agents. Cyber-terrorism and efforts to sever energy supplies provide equally chilling scenarios. Unable to calculate the risk to the state, legislators err on the side of caution, as worst-case scenarios drive the magnitude of preventative measures. In such a heated atmosphere, authorities previously rejected or considered unnecessary often pass.¹⁰⁸ For example, roving wire taps, excluded from the 1996 Anti-terrorism and Effective Death Penalty Act, became incorporated into the USA PATRIOT Act.¹⁰⁹ New provisions, moreover, may well go one step further than those previously rejected. The USA PATRIOT Act also provided for a broad range of information from criminal investigations to be shared with intelligence agencies and other parts of the government.¹¹⁰

In essence, at the time of an attack governments recalculate the “security versus freedom” framework that Professor Holmes rightly decries: the impact on rights is held constant, while the perceived security risk posed by terrorism

103. Civil Authorities (Special Powers) Act, 1922, § 1(1) (N. Ir.).

104. See DONOHUE, *supra* note 4, at 12.

105. DONOHUE, *supra* note †, at 11.

106. CARLOS MARIGHELLA, *MINIMANUAL OF THE URBAN GUERRILLA*, available at <http://www.latinamericanstudies.org/marighella.htm>.

107. IRISH REPUBLICAN ARMY IRELAND STAFF, *HANDBOOK FOR VOLUNTEERS OF THE IRISH REPUBLICAN ARMY: NOTES ON GUERRILLA WARFARE 2-10* (1985); AL QAEDA TRAINING MANUAL 20-27 (recovered from a training house in Manchester and placed online by the U.S. Department of Justice), http://www.usdoj.gov/ag/manualpart1_1.pdf (last visited Feb. 19, 2009).

108. See, e.g., DONOHUE, *supra* note †, at 12, 123-46.

109. USA PATRIOT Act, §§ 201, 206.

110. USA PATRIOT Act, §§ 203(b) and (d).

dramatically increases and eclipses other types of security concerns (such as security from undue government interference or arbitrary power).¹¹¹

In this context, new antiterrorist laws often speed through legislatures under extraordinary procedures.¹¹² The 1974 Prevention of Terrorism Act was passed within a week of the Birmingham bombings.¹¹³ The Criminal Justice (Terrorism and Conspiracy) Bill was sent to Westminster just two weeks after the Omagh bombing.¹¹⁴ The USA PATRIOT bill bypassed committee markup and went straight behind closed doors.¹¹⁵ The House held only one hearing on the USA PATRIOT bill, at which Attorney General Ashcroft served as the sole witness.¹¹⁶ At 3:45 a.m. on the morning of the vote, the final bill reached print. Legislators could only vote thumbs up or thumbs down with no chance for further amendment.

During abbreviated timelines and heated atmospheres, formal inquiry into the recent disasters creates an untenable delay in legislative action.¹¹⁷ The irony is that by the time an inquiry does occur, new legislation has already been enacted.¹¹⁸ The introduction of legislation, therefore, is not the point in time when legislators are in the strongest position to limit the growth of executive power. Instead, legislators hedge; reluctant to hamstring the executive, they think that temporary measures will provide the executive the necessary flexibility while preventing the arbitrary behavior of which Professor Holmes disapproves.

It is very difficult, however, to repeal temporary authorities, or “sunset provisions.” To do so legislators must make one of three very difficult demonstrations: (1) that terrorism is no longer possible, which cannot be done in a liberal, democratic state; (2) that terrorism will not occur as a result of repealing the authorities, which cannot be proven; or (3) that a level of violence commensurate with the last attack is somehow acceptable, which is a politically untenable position. As a result, legislators almost never allow temporary powers to lapse, nor do they repeal counterterrorist laws. New provisions thus become a baseline upon which further measures build to expand executive

111. DONOHUE, *supra* note †, at 13.

112. *Id.*

113. See 882 PARL. DEB., H.C. (5th ser.) (1974) 634-943; 354 PARL. DEB., H.L. (5th ser.) (1974) 1500-70; CLIVE WALKER, *THE PREVENTION OF TERRORISM IN BRITISH LAW* (2d ed. 1992).

114. Compare *Omagh Bombing Kills* 28, BBC NEWS, Aug. 16, 1998, available at http://news.bbc.co.uk/2/hi/events/northern_ireland/latest_news/152156.stm, with Criminal Justice (Terrorism and Conspiracy) Act, 1998, c. 40 (September 4, 1998) available at http://www.opsi.gov.uk/acts/acts1998/ukpga_19980040_en_1.

115. Interview with Representative James Sensenbrenner, Member, United States House of Representatives, in Palo Alto, Cal. (April 2002) (noting the absence of any committee hearings).

116. See Jim Dempsey, *Who is Watching You? The Patriot Act and Electronic Surveillance*, Ctr. for Democracy and Tech., D.C., Guest Lecture at Stanford Univ. Law Sch. (Jan. 24, 2005).

117. DONOHUE, *supra* note †, at 13.

118. *Id.* at 14.

authority and promise citizens more security at the expense of civil liberties.¹¹⁹

The United Kingdom followed precisely this pattern. For nearly a century, despite periods of almost no political violence, the state continued “temporary” authorities to deal with Ireland.¹²⁰ The rare exceptions to the ratcheting effect—such as the repeal of indefinite detention and the suspension of internal exile within the United Kingdom—arose not because of limits or controls within the state but because of the demands of European courts.¹²¹ The United States has followed a similar pattern: in 2006, Congress made fourteen of the sixteen temporary provisions in the USA PATRIOT Act permanent and continued the remaining two.¹²²

Thus antiterrorist legislation, although it may originally be intended to be temporary to allow for later expiration or repeal, tends to become permanently entrenched upon enactment.

B. Transfer to Criminal Law

It is a spiral, not a pendulum, that best characterizes counterterrorist law.¹²³ And in this spiral, special interests take hold. This is where the partisan political agenda to which Professor Holmes refers takes on particular meaning: a government may use terrorist incidents to pursue agendas that reach far beyond the immediate threat.¹²⁴ And once enacted, counterterrorist measures create institutional interests in maintaining the authorities, fusing the changes into the state structure. Moreover, counterterrorist measures often creep into the ordinary criminal realm. Two mechanisms here are noteworthy: first, the normalization of exceptional powers and the explicit transfer of such powers into other areas; and, second, a lack of specificity in the original counterterrorist statute.¹²⁵

1. Normalization

The first mechanism that allows counterterrorist provisions to become mainstreamed is their application to other areas. In an attempt to prevent this, legislators may add language explicitly limiting the new powers to fighting

119. DONOHUE, *supra* note †, at 15.

120. *Id.*; see also DONOHUE, *supra* note 4.

121. See *id.*, *supra* note 4, at 259-61.

122. USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. 109-177, 120 Stat. 192, §§ 102-103 (2006).

123. *But see* POSNER, *supra* note 6, at 44 (“Every time civil liberties have been curtailed in response to a national emergency, whether real or imagined, they have been fully restored when the emergency passed—and in fact before it passed, often long before.”); Colm Campbell, ‘Wars on Terror’ and Vicarious Hegemons: The UK, International Law, and the Northern Ireland Conflict (2005), 54 INT’L & COMP. L.Q. 321 (2005) (arguing that the Draconian nature of legislation runs in cycles depending on how close states feel to the triggering emergency).

124. See, e.g., Holmes, *supra* note 2, at 337.

125. See DONOHUE, *supra* note †, at 15-16.

terrorism. But in practice, once such measures are exercised, the *idea* of using them is no longer extraordinary. The new authorities may be powerful tools for law enforcement or intelligence agents—the very purpose for which they were introduced. As the tools move from being primarily those of intelligence agents to being daily tools of law enforcement, people and the courts begin to accept the use of such powers (and methods authorized by those powers) with less and less comment until finally they are simply just another tool. At that point, subsequent laws can explicitly transfer counterterrorist authorities—extraordinary powers limiting individual rights that would never have been passed into law but for the grave threat to national security—to ordinary criminal law without extensive opposition or public criticism.¹²⁶

Consider anti-terrorist finance authorities in the United Kingdom.¹²⁷ The 1973 Northern Ireland (Emergency Provisions) Act (“1973 EPA”), introduced specifically to redress terrorist violence in Northern Ireland, provided for a police officer to “seize anything which he suspects is being, has been[,] or is intended to be used in the commission of a scheduled offence.”¹²⁸ Any member of Her Majesty’s forces could enter any premises to detain, destroy, or move any property, or to “do any other act interfering with any public right or with any private rights of property.”¹²⁹ The statute allowed the court to forfeit assets where an individual convicted of membership in an illegal organization controlled resources that benefited any of the listed banned organizations.¹³⁰ The legislation made it a criminal offense to solicit or invite support for a banned organization, to knowingly make any contribution to the resources of such an organization, or to knowingly receive any contributions from the same.¹³¹ Contributing to a proscribed organization was a scheduled offense: those accused of this crime automatically entered the Diplock Court system, losing their right to trial by jury.¹³² Other important restrictions applied, such as limits on bail.¹³³

The provisions gradually spread beyond Northern Ireland’s shores, to Great Britain. Unlike the 1973 EPA, the 1974 Prevention of Terrorism

126. The 1954 Flags and Emblems Act came from the 1922-43 SPAs. Flags and Emblems (Display) Act, 1954, c. 10 (N. Ir.).

127. Discussed in detail in DONOHUE, *supra* note †, 129-46. For similar examples drawn from the United States, see *id.* at 151-53 (discussing the manner in which provisions transferred between anti-money laundering and anti-terrorist finance).

128. Northern Ireland (Emergency Provisions) Act, 1973, c. 53, § 11(3) [hereinafter 1973 EPA] (citing authority of Civil Authorities (Special Powers) Act, 1922, c. 5 (N. Ir.) [hereinafter 1922 SPA]); see also DONOHUE, *supra* note †, at 131.

129. *Id.* § 17.

130. 1973 EPA, *supra* note 128, § 19.

131. Summary conviction yielded six months’ imprisonment and a £400 fine. Indictment resulted in up to five years’ imprisonment plus fine. See 1973 EPA, *supra* note 128, § 19(1). In 1978, Westminster increased imprisonment on indictment to 10 years, but these powers otherwise remained largely constant through the twenty-first century.

132. 1973 EPA, *supra* note 128, sched. 1(12).

133. See 1973 EPA, *supra* note 128, §3 (limiting bail in the case of scheduled offences).

(Temporary Provisions) Act (“PTA”) did not initially allow the court to forfeit assets.¹³⁴ The PTA did, however, make it an offense to fundraise for or contribute to a banned organization—but only one group graced the list: the Irish Republican Army (“IRA”).¹³⁵ In 1976, however, the new PTA added a forfeiture provision that allowed the state to seize any money or other property controlled by an individual convicted of membership in a banned group where the resources were intended for use in an act furthering the cause of the IRA.¹³⁶ Similarly, the Act made it an offense to solicit contributions for a proscribed organization if the solicitor intended, knew, or suspected that the money would be funneled to terrorist activities.¹³⁷

Government powers introduced and meant to narrowly apply only to violence linked to the political status of Northern Ireland were soon applied to other terrorist threats. In 1989, for instance, the PTA severed the dependence of the financial provisions from a list of proscribed organizations and created a new, broader offense of financial contributions to acts of terrorism.¹³⁸ These provisions applied to both Northern Ireland-related violence and acts of international terrorism.¹³⁹

In turn, counterterrorist provisions on both sides of the Irish sea expanded beyond terrorism and into the anti-drug realm, where they intensified and bled back into counterterrorist law. For example, the 1989 PTA expanded judicial forfeiture powers: whereas before the state had to *prove* the defendant intended the resources under his or her control to benefit a proscribed organization, beginning in 1989 the court was entitled to *assume* “in the absence of evidence to the contrary . . . that any money or property” in the defendant’s control could be used for terrorist ends.¹⁴⁰ The statute only required the court to give the owner of the property “an opportunity to be heard.”¹⁴¹ In 1991, the EPA further expanded the government’s reach. A new section retained the proscription measures while adding a novel set of powers and terrorist offenses, incorporating all of the offenses listed in the 1989 PTA and adding two more: the first made it illegal to help anyone retain the proceeds of terrorist-related activities,¹⁴² while the second outlawed concealing or transferring the proceeds

134. DONOHUE, *supra* note †, at 132.

135. The state added the Irish National Liberation Army to the list of illegal organizations in 1984. *See* Prevention of Terrorism (Temporary Provisions) Act, 1984, c. 8, § 1 (Eng.).

136. *See* Prevention of Terrorism (Temporary Provisions) Act, 1976, c. 8, § 10 (Eng.).

137. *See id.*; *see also* DONOHUE, *supra* note †, at 132.

138. *See* DONOHUE, *supra* note †, at 133.

139. The statute was limited to acts of terrorism that constituted triable offenses within the United Kingdom. The legislation specifically exempted other acts of terrorism related to British domestic matters. *See* Prevention of Terrorism (Temporary Provisions) Act, 1989, c. 4, §§ 9–13 (Eng.).

140. *Id.*

141. *Id.* § 13.

142. *See* Northern Ireland (Emergency Provisions) Act, 1991, c. 24, § 53. For further discussion, *see* DONOHUE, *supra* note †, at 134.

of terrorist-related activities.¹⁴³ Violations of both would be tried before Diplock judges.¹⁴⁴

By the early 1990s, the line between counterterrorist finance and ordinary criminal law had all but disappeared. Part IV of the 1993 Criminal Justice Act (“CJA”)—a permanent, criminal statute as opposed to a temporary, counterterrorist law—extended confiscation orders to drug trafficking offences, proceeds of criminal conduct, and the financing of terrorism.¹⁴⁵ The statute allowed the judiciary to confiscate assets where obtained as a direct or indirect result of terrorist-related activities.¹⁴⁶ Application for reassessment of whether a defendant had benefited could be filed up to six years following conviction.¹⁴⁷ The legislation altered the standard of proof to a balance of probabilities test for determining whether a person benefited from terrorist-related activities, the value of the proceeds of those activities, and the amount of the required payment under a confiscation order.¹⁴⁸ The statute lifted any protections against self-incrimination, requiring the defendant to provide the court with any information requested.¹⁴⁹ It also created a duty for certain professions to report to the authorities where they knew or suspected an individual was acting in a prohibited manner.¹⁵⁰ Finally, in 2002 the Proceeds of Crime Act formally transferred powers previously reserved to counterterrorist law and drug forfeiture to the broader criminal realm.¹⁵¹

What had begun as Provincial measures, initiated in response to the threat of terrorism associated with Northern Ireland, spread to Great Britain and then to other forms of terrorism. From there they were applied to the anti-drug realm, where they intensified and transferred back into counterterrorism. Gradually, these measures applied more broadly—beyond drugs—to ‘ordinary’ criminal activity.

Following 9/11, the steady expansion and transfer between counterterrorism and criminal law continued. For example, the 2001 Anti-terrorism, Crime and Security Act enabled the United Kingdom to confiscate any money whether or not a court had brought proceedings specifically linked to the funds.¹⁵² The statute also prevented the judiciary from playing a role in the freezing of assets of non-U.K. entities. Instead, where the Her Majesty’s

143. See Northern Ireland (Emergency Provisions) Act, 1991, c. 24, § 54.

144. *Id.* § 55.

145. Criminal Justice Act, 1993, c. 36, §§ 7, 27, 36.

146. *Id.* § 37(4).

147. See *id.* § 37.

148. See *id.* § 36.

149. See *id.* § 39.

150. Donohue, *supra* note 51, at 336; see Criminal Justice Act, 1993, c. 36, §§ 48, 51.

151. Proceeds of Crime Act, 2002, c. 29, §§ 1, 6-13 (detailing the formation of the Assets Recovery Agency and the exercise of confiscation orders in England and Wales for criminal activity, drug-related financial crimes, and terrorist financing); Donohue, *supra* note 51, at 344.

152. See ATCSA, *supra* note 98, c. 24, pt. I. The new provisions replaced § 24 with § 31 of the Terrorism Act 2000; see also DONOHUE, *supra* note †, at 142.

Treasury reasonably believed a non-U.K. person posed a threat to the British economy, British nationals, or U.K. residents, the Secretary of the Treasury could seize that individual's assets.¹⁵³ For the order to continue, each House of Parliament had to pass a resolution every twenty-eight days.¹⁵⁴

In each of these statutes, the normalization of authorities otherwise considered extraordinary enabled their transfer from counterterrorism to other areas of law. While the above examples are drawn from the United Kingdom, a similar pattern marks the progress of antiterrorist finance statutes in the United States.¹⁵⁵

2. *Lack of Specificity*

The second mechanism allowing counterterrorist law to seep into the criminal realm derives from a lack of specificity in the original power granted. The USA PATRIOT Act provides a good example. The statute expanded the number of institutions that could be served with National Security Letters (NSLs).¹⁵⁶ These administrative subpoenas quickly extended beyond the realm of terrorism. By 2004 the Bureau was issuing more than 56,000 NSLs per year, many in cases unrelated to terrorism.¹⁵⁷ The Bureau began routinely using them in the preliminary investigation and "threat assessment" stage, well before a formal criminal investigation had even commenced.¹⁵⁸ More than five dozen supervisors were authorized to sign NSLs.¹⁵⁹ In similar fashion, use of delayed notice search warrants, introduced in Section 213 of the USA PATRIOT Act, began appearing in investigations unrelated to terrorism.¹⁶⁰ In July 2005, the Department of Justice reported to the House Judiciary Committee that only 12 percent of the 153 delayed notice search warrants it received were related to terrorism investigations.¹⁶¹ These are not the only instances of powers designed

153. DONOHUE, *supra* note †, at 142.

154. ATCSA, *supra* note 98, pt. II.

155. *See, e.g.*, DONOHUE, *supra* note †, at 146-52.

156. USA PATRIOT Act § 215.

157. U.S. Department of Justice Office of the Inspector General, *A Review of the FBI's Use of National Security Letters: Assessment of Corrective Actions and Examination of NSL Usage in 2006*, March 2006, at 110, <http://www.usdoj.gov/oig/special/s0803b/final.pdf>.

158. Barton Gellman, *The FBI's Secret Scrutiny*, WASH. POST, Nov. 6, 2005, at A01, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/11/05/AR2005110501366.html>.

159. *See* USA PATRIOT Act § 215 (delegation authority); General Counsel National Security Law Unit, Federal Bureau of Investigation, *National Security Letter Matters*, 2, Nov. 28, 2001, http://epic.org/privacy/terrorism/usapatriot/foia/fbi_nsl_memo.pdf (subsequent formal delegation specifying individuals within the Bureau authorized to issue NSLs).

160. *America After 9/11: Freedom Preserved or Freedom Lost?: Hearing Before the S. Comm. on the Judiciary*, 108th Cong. 8 (2003) (statement of James X. Dempsey, Executive Dir., Ctr. for Democracy & Tech.), available at <http://www.cdt.org/testimony/031118dempsey.pdf> (referencing a Department of Justice letter of Oct. 24, 2003 to Senator Stevens detailing the use of § 213 for non-terrorism-related purposes).

161. Letter from the Honorable F. James Sensenbrenner to the Chairman of the Comm. on the Judiciary (July 12, 2005), http://www.house.gov/judiciary_democrats/responses/

to combat terrorism applied to non-terrorist criminal activity; according to one Congressional report, the USA PATRIOT Act powers were used in hundreds of cases that had nothing to do with terrorism.¹⁶²

Sometimes the two principal mechanisms of (1) normalization of exceptional powers and explicit transfer into other areas, and (2) the lack of specificity in the original, counter-terrorist statute, work together to further entrench counterterrorist law. Juryless trial in the United Kingdom provides a good example.

In an effort to address the threat of intimidation posed by paramilitary organizations, the 1973 EPA removed jury trials and created special rules for single-judge courts.¹⁶³ The legislation enumerated a range of crimes that were indicative of, albeit not limited to, terrorist activity.¹⁶⁴ Individuals charged with these crimes would automatically be sent before Diplock judges.¹⁶⁵ By the mid-1980s, some 40 percent of cases coming before juryless courts bore no relationship to paramilitary (i.e., terrorist) activity.¹⁶⁶ In concert with the lack of specificity in the application of the extraordinary system, the idea of using single-judge courts gradually became normalized. These procedures were retained well beyond the cessation of violence and gradually applied to other areas of the law.¹⁶⁷ In 2003, the Criminal Justice Act provided for the creation of single-judge tribunals throughout England and Wales for cases involving complex fraud or where a high danger of jury tampering existed.¹⁶⁸

Where counterterrorist measures transfer to other areas of the law, their impact on rights is troubling.¹⁶⁹ Often, counterterrorist provisions are allowed because of the seemingly extraordinary challenge that the government perceives at a particular time.¹⁷⁰ Absent that extraordinary challenge, however,

dojpatriothrgquestionresp71205.pdf.

162. See Eric Lichtblau, *U.S. Uses Terror Law to Pursue Crimes from Drugs to Swindling*, N.Y. TIMES, Sept. 28, 2003, at A1; *FBI Abused Patriot Act Powers, Audit Finds*, GUARDIAN (London), Mar. 9, 2007, <http://www.guardian.co.uk/usa/story/0,,2030542,00.html>.

163. Northern Ireland (Emergency Provisions) Act 1973, c. 53, § 2 (“A trial on indictment of a scheduled offence shall be conducted by the court without a jury”); Provisions later transferred to the Terrorism Act 2000, c. 11, § 75.

164. Northern Ireland (Emergency Provisions) Act 1973, c. 53, Schedule 4 §§ 1-4 (listing, e.g., common law offences of murder, manslaughter, arson, and riot).

165. *Id.* § 2.

166. Laura K. Donohue, *Terrorism and Trial by Jury: The Vices and Virtues of British and American Criminal Law*, 59 STAN. L. REV. 1321, 1339 (2007).

167. See U.K. HOME OFFICE, JURIES IN SERIOUS FRAUD TRIALS ¶ 3.18 (1998).

168. See Criminal Justice Act, 2003, c. 44, § 43(2), (5) (Eng.). The Lord Chief Justice, or a judge nominated by him, has to agree. See *id.* § 43(4). In the latter instance, the prosecution applies to a judge of the Crown Court, which must be satisfied “that there is evidence of a real and present danger that jury tampering would take place” and that “notwithstanding any steps (including the provision of police protection) which might reasonably be taken to prevent jury tampering, the likelihood that it would take place would be so substantial as to make it necessary in the interests of justice for the trial to be conducted without a jury.” *Id.* § 44(4), (5).

169. DONOHUE, *supra* note †, at 16.

170. *Id.*

governments seem hard-pressed to explain the grounds for allowing the erosion of protections such as probable cause antecedent to arrests, the presumption of innocence, and the right to jury trial.

C. Oversight

Although the legislature does not effectively limit the executive at the introduction of counterterrorist laws or at the renewal of such laws, the legislature could still help push back through its oversight function. Here the United Kingdom and the United States differ in important ways.

1. The United Kingdom

Unlike its American counterpart, the British parliamentary system is not built on a strict separation of powers.¹⁷¹ Because the Prime Minister's political party generally holds a majority in the House of Commons (except in the case of a coalition government), the executive and legislative functions are intertwined.¹⁷² The system gives the ruling party both legislative and executive power. The Lords of Appeal in Ordinary, who constitute the final court of appeal for many judicial matters, also sit in the House of Lords, a parliamentary body.

Despite the absence of a strict separation of powers, however, there are checks on the executive branch.¹⁷³ The official Opposition forms a shadow government, whose members sit in the front bench of the House of Commons, directly opposite (and two sword lengths apart from) their counterparts.¹⁷⁴ The Opposition cannot set the agenda, but it can bring substantial political pressure to bear.¹⁷⁵ In the House of Lords, cross-benchers have no affiliation with either the Government or the Opposition and take an active role in legislative debates. The power of the House of Lords, while less than that of the House of Commons, is not inconsequential.¹⁷⁶ In light of the recent constitutional reforms that power is growing, providing yet further restriction on Government action.

In addition to these constitutional protections inherent in the structure of

171. *Id.* at 17.

172. *Id.*

173. *Id.*

174. *Visiting Parliament*, BBC NEWS, Sept. 11, 2001, available at http://news.bbc.co.uk/2/hi/uk_news/politics/1491006.stm.

175. In at least some cases, there is cross-party support for Opposition party members to chair Parliamentary Select Committees. But note that as a practical matter, the last two chairs of the Intelligence and Security Committee, both appointed by the Prime Minister, have been drawn from the Prime Minister's own party.

176. The House of Lords is weaker than the House of Commons: it can only delay public legislation for twelve months, and only if that public legislation originates in and is approved by the lower chamber; for "money bills"—legislation concerning government appropriations—it can only delay passage for one month. See Parliament Act, 1911, 1 & 2 Geo. 5, c. 13 (Eng.); Parliament Act, 1949, 12, 13, & 14 Geo. 6, c. 103 (Eng.).

government are legal and institutional checks developed precisely to counter the expansion of counterterrorist authority. Within agencies, detailed administrative systems ensure that warrant applications must first progress vertically through each agency and, ultimately, to the Secretary of State—a public official answerable to Parliament.

Britain routinely uses independent reviewers, senior members of the judiciary chosen for their stature and not their political affiliation (relinquished upon entering judicial service), to issue reports on the operation of counterterrorist statutes.¹⁷⁷ The 1973 Northern Ireland (Emergency Provisions) Act and its progeny were reviewed by one individual, and the 1974 Prevention of Terrorism (Temporary Provisions) Act and its subsequent reenactments and amendments were reviewed by another. In 2000, the Terrorism Act, a permanent statute, replaced these instruments. Thereafter, formal reviews were annually conducted of the Terrorism Act 2000, as well as the 2001 ATCSA.¹⁷⁸

Parallel to formal examination of each counterterrorist statute, two separate reviewers audit the exercise of surveillance authorities: one commissioner examines the interception of communications and the other focuses on electronic bugs and other surveillance. These reviewers are required to be senior members of the judiciary, and they are selected, again, because of their prominence.¹⁷⁹ British law requires the intelligence services to open their records to the commissioners (a.k.a. reviewers), who ask whether the information provided to the Home Office was accurate, whether the operations were conducted properly, and whether the records of the agencies are in order.¹⁸⁰ The commissioners also, by custom, make recommendations for the agencies and suggest future changes to the laws governing the agencies.¹⁸¹

When a commissioner arrives at an agency to inspect it, the directors of the agency are put on notice: any mistakes or misuse of authorities would be considered shameful and, if reported—even privately—the agency and sitting Government would have to act.¹⁸² As former Director of Government Communications Headquarters (the agency tasked with national security signals intelligence) Sir David Omand put it, “It is inconceivable that you would find the U.K. agencies going outside [the Regulation of Investigatory Powers Act 2000 (“RIPA”)] and running black operations that they were not prepared to tell the commissioner about. It would be more than their jobs were

177. See DONOHUE, *supra* note †, at 265.

178. LORD CARLILE OF BERRIEW, REPORT ON THE OPERATION IN 2007 OF THE TERRORISM ACT 2000 AND OF PART I OF THE TERRORISM ACT 2006, June 2008, available at <http://statewatch.org/news/2008/jun/uk-carlile-report-2007.pdf>. See generally ATCSA, *supra* note 98.

179. See Regulation of Investigatory Powers Act, 2000, c. 23, § 8 (Eng.).

180. See *id.* § 8(4).

181. Interview with Lord Lloyd of Berwick, House of Lords, in London, England (June 2007).

182. See DONOHUE, *supra* note †, at 264.

worth.”¹⁸³ As the commissioners inspect *all* agencies engaged in surveillance, everyone—from Government Communications Headquarters to the local egg inspectors—gets audited.¹⁸⁴

Formal inquiries supplement these annual reviews. The inquiries have a direct impact on the state’s counterterrorist policies, allowing the Government to change course without detrimental effect—indeed, the changes occur in a manner that actually strengthens the Government’s hand.

In the early 1970s, for instance, as complaints of abuse during interrogation skyrocketed, the Government appointed a committee of three Privy Counsellors, headed by Lord Parker, to consider whether the procedures authorized for the interrogation of terrorist suspects required amendment.¹⁸⁵ In a conversation echoed three decades later in the United States, the majority report issued by the Parker Committee questioned whether the Geneva Conventions applied to terrorism and probed the “wide spectrum between discomfort and hardship at the one end and physical and mental torture at the other end.”¹⁸⁶ The problem, the committee suggested, was that “no rules or guidelines had been laid down to restrict the degree to which these techniques can properly be applied.”¹⁸⁷ The same five techniques used following 9/11—hooding, wall-standing, noise, sleep deprivation, and food and water deprivation—had, according to the majority, saved innocent lives and could be used “subject to proper safeguards limiting the occasion on which and the degree to which” they could be applied.¹⁸⁸ That is, only where it was “considered vitally necessary to obtain information” should coercion be used.¹⁸⁹

Lord Gardiner, writing the minority report, took a different view. The procedures for coercive interrogation, known in Britain as “deep interrogation,” had not been written down in any document.¹⁹⁰ Indeed, Gardiner suggested, they could not be written down, nor could any minister authorize the procedures, as such authorization would have violated domestic statutes and possibly international law as well.¹⁹¹ Placing a hood over a man’s head against his will and handcuffing him for trying to remove the hood would be an assault—both a tort and a crime—as would a number of the other interrogation

183. Interview with Sir David Omand, former Dir. of U.K. Gov’t Commc’ns Headquarters (GCHQ), in Palo Alto, Cal. (Mar. 16, 2007); DONOHUE, *supra* note †, at 265.

184. See sources cited *supra* note 183.

185. DONOHUE, *supra* note †, at 50. For further discussion, see *id.* at 50-54.

186. Committee of Privy Counsellors Appointed to Consider Authorized Procedures for the Interrogation of Persons Suspected of Terrorism, Report, 1972, Cm. 4901, ¶ 9 [hereinafter Parker Report].

187. *Id.* ¶ 12.

188. *Id.* ¶ 31.

189. See *id.* ¶ 35.

190. See *id.* ¶ 6.

191. See *id.* ¶ 8.

methods.¹⁹² Because these practices violated domestic law, Gardiner did not need to address the questions raised by international law; he nevertheless considered whether they might potentially run afoul of Common Article III of the Geneva Conventions (incorporated into domestic U.K. law¹⁹³), Article 5 of the Universal Declaration of Human Rights, Articles 7 and 10 of the International Covenant on Civil and Political Rights, and Article 3 of the European Convention on Human Rights.¹⁹⁴ Gardiner further asserted that, as a practical matter and leaving all moral issues aside, it was not clear that deep interrogation actually worked.

The same day the Parker Report was published, the Government adopted the minority report.¹⁹⁵ Prime Minister Edward Heath announced: “The Government, having reviewed the whole matter with great care and with reference to any future operations, ha[s] decided that the techniques . . . will not be used in future as an aid to interrogation.”¹⁹⁶ Prime Minister Heath issued a directive prohibiting coercive interrogation, particularly the five techniques listed in the majority report, and instituted mandatory medical examinations, comprehensive records keeping, and immediate reporting of complaints of ill treatment.¹⁹⁷

In short, the inquiry was beneficial for the government: it allowed for a full, independent airing of the legal, moral, and political aspects of deep interrogation; it subjected the current Government’s policy to outside scrutiny; and, as the Government adopted the minority report—essentially reversing its previous position—it provided an opportunity to save face. The inquiry legitimized the new course, ultimately strengthening the Government’s hand while allowing it to correct a poorly-conceived and harmful approach to political violence in Northern Ireland.

There are further checks on the exercise of counterterrorist law in Britain. For instance, a Parliamentary Select Committee oversees expenditures, including how monies below the line are used by intelligence bodies, while an

192. See *id.* ¶10; DONOHUE, *supra* note †, at 52.

193. The Geneva Convention is incorporated into the domestic law of the United Kingdom via the Joint Directive on Military Interrogation in Internal Security Operations Overseas. Lord Parker of Waddington, Report of the Committee of Privy Counsellors appointed to consider authorised procedures for the interrogation of persons suspected of terrorism, March 1972, available at <http://www.cain.ulst.ac.uk/hms0/parker.htm>. This law serves as the equivalent in the United Kingdom as the UCMJ in the United States.

194. Universal Declaration of Human Rights, G.A. Res. 217A (III), Art. 5, U.N. Doc. A/810 (Dec. 10, 1948); International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), Art. 7, 10, U.N. Doc. A/6316 (1966), entered into force Mar. 23, 1976; Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 3, 213 U.N.T.S. 222, entered into force Sept. 3, 1953, available at <http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm>.

195. DONOHUE, *supra* note †, at 54.

196. 832 PARL. DEB., H.C. (5th ser.) (1972) 744.

197. Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A), ¶ 135 (Giorgio Balladore Pallieri, President, citing special instructions issued to the army and RUC); see also DONOHUE, *supra* note †, at 54.

ombudsperson oversees complaints.¹⁹⁸ Any private citizen concerned about being the target of state surveillance can apply to the ombudsperson for review of his or her case.¹⁹⁹

Admittedly, these oversight authorities are not perfect. The annual reviewers of counterterrorist law and surveillance authorities have limited time and resources, yet they are responsible for reviewing a great number of agencies and authorities. The reports tend to highlight errors, but not substantive violations, and portions of the report that might have sensitive information remain classified. Senior members of the judiciary, moreover, are not necessarily experts in surveillance technology. The complaints tribunals, in turn, only rarely uphold complaints. The ombudsperson established under the 1989 Security Service Act, for instance, considered approximately 338 complaints between 1989 and 1999.²⁰⁰ In no case did the tribunal find in favor of a complainant.²⁰¹ In similar fashion, until the 2005-06 report, the Investigatory Powers Tribunal never found in favor of an applicant.²⁰² Finally, in February 2007, the Tribunal reported a finding in favor of two complainants who filed a joint application—a rather paltry showing after nearly twenty years in business.²⁰³

Even recognizing the many limitations, though, the complex web of oversight mechanisms in the United Kingdom does offer some check on untrammelled executive power—protections that for the most part do not exist in the United States.

2. *The United States*

The paucity of oversight authority in the United States stems in part from the country's original constitutional structure and the failure of the federal government to maintain sufficiently rigorous oversight to counter the growth of party politics.²⁰⁴ The Framers sought to provide checks neither by embedding government ministers in the legislature nor by placing the judiciary in the upper

198. See Regulation of Investigatory Powers Act, 2000, c. 23, § 65 (providing for the creation of an Investigatory Powers Tribunal to inquire into complaints and oversee remedies for violation of the statute); DONOHUE, *supra* note †, at 199 (discussing implementation of the ombudsperson under RIPA); DONOHUE, *supra* note †, at 263-64 (detailing financial oversight in Parliament).

199. Regulation of Investigatory Powers Act, 2000, c. 23, § 65.

200. See SECURITY SERVICE COMMISSIONER, ANNUAL REPORT ¶ 37 (1999), available at <http://www.archive.official-documents.co.uk/document/cm47/4779/4779-01.htm>.

201. *Id.* ¶ 36 (citing 1997 report: "It will be noted that in all cases neither the Tribunal nor myself had found in the favour of the complainant"); *id.* ¶39 (stating that for the 1999 figures, "[n]o determination has been made in favour of a complainant").

202. See, e.g., COMMISSIONER, ANNUAL REPORT FOR INTERCEPTION OF COMMUNICATIONS ACT ¶ 32 (1999), available at <http://www.archive.official-documents.co.uk/document/cm47/4778/4778.htm>.

203. See INTELLIGENCE SERVICES COMMISSIONER, ANNUAL REPORT, 2005-6, H.C. 314 at 8, available at <http://www.official-documents.gov.uk/document/hc0607/hc03/0314/0314.pdf>.

204. See DONOHUE, *supra* note †, at 18-20.

chamber, but by separating power between the branches and offsetting those branches: “Ambition must be made to counteract ambition.”²⁰⁵ If individual interests could be aligned with the constitutional rights of the office, government would be obliged to control itself.²⁰⁶

This system did not envision contemporary party politics. Where one political party controls both the executive and legislative branches, it can be extremely difficult for Congress to perform oversight.²⁰⁷ The majority party in the House of Representatives sets the rules for how the House will conduct business. For years, this has meant that the majority party has chaired every committee and had the final word on what hearings would be held, who would be invited to testify, whether subpoenas would issue, and what information would be made public.²⁰⁸

Limited by a structure that relies upon the separation of powers, the United States has no external judicial audit function equivalent to that which operates in the United Kingdom. Instead, audits are conducted by the intelligence agencies themselves. This check may at times be effective: it was the Department of Justice’s inspector general who, in accordance with statutory requirement, revealed that the Bureau had been misusing National Security Letters. The Department of Justice is not the only entity with an inspector general: the CIA has one, appointed by the president and confirmed by the Senate. However, it would be a mistake to place too much reliance on the role that the inspectors general play. The breadth of their powers is limited, as are the powers granted to the administrative inspectors general of the Defense Intelligence Agency, the National Reconnaissance Office, the National Security Agency, the National Geospatial Intelligence Agency, and the Director of National Intelligence.²⁰⁹ In these agencies, the inspectors general are appointed by the head of each agency and have less autonomy than, for instance, the CIA’s inspector general.²¹⁰

Professor Holmes’s call for transparency particularly resonates in this context.²¹¹ Even as executive authority is expanding, secrecy surrounds the activities of the executive branch: use of classification is increasing; Attorney General Ashcroft reversed the policy for granting Freedom of Information Act (“FOIA”) requests to prevent more information from entering the public

205. THE FEDERALIST NO. 51, at 319 (James Madison) (Issac Kramnick ed., 1987); DONOHUE, *supra* note †, at 19.

206. DONOHUE, *supra* note †, at 19.

207. Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2312, 2314-15 (2006) (providing thoughtful argument and evidence on this point); DONOHUE, *supra* note †, at 19.

208. DONOHUE, *supra* note †, at 19.

209. See generally S. Rep. No. 109-265, §§ 408, 433 (2007), available at http://www.globalsecurity.org/intell/library/congress/2006_rpt/s-109-265.htm.

210. See *id.*

211. Holmes, *supra* note 2, at 330-31, 333-34.

domain; and new FOIA exemptions protect the National Security Agency (“NSA”) and private industry.²¹² Taken together, these present strong reasons to be concerned.²¹³

III JUDICIAL RESTRAINT

With the legislature restricted in its ability to check and monitor the executive, the task of pushing back falls to the judiciary.²¹⁴ Yet the conscious aim of many counterterrorist provisions is to bypass the courts so that the executive retains control, thus avoiding the very branch entrusted to check the executive. Indefinite detention, the suspension of habeas applications, the protection of information through claims of executive privilege or royal prerogative—these and other protective devices have been recurring features of the counterterrorist regime in both the United States and the United Kingdom.²¹⁵ Using a war metaphor as a way to understand the fight against terrorism encourages this avoidance of a judicial role by reframing the effort as the type of conflict traditionally controlled exclusively by the executive branch. Alternative courts have thus been created, including such features as weakened rules of evidence, the acceptance of hearsay, and the introduction of evidence based on coercive interrogation.²¹⁶

Where cases are retained within the ordinary court system, the judiciary may, on occasion, restrict the expansion of executive power. In *Brandenburg v. Ohio* the Court established protections for political speech in the United States,²¹⁷ while in *Hamdan v. Rumsfeld* the Court limited executive expansion in the context of habeas claims.²¹⁸ More recently, *Boumediene v. Bush* demonstrated the Court’s willingness to provide checks to the expansion of executive power.²¹⁹

On the other side of the Atlantic, *A and others v. Secretary of State for the*

212. For discussion, see DONOHUE, *supra* note †, at 341-43.

213. Part of the problem here is the temporary nature of the provisions. While sunset provisions give the illusion of control, they tend instead to replace up-front reporting requirements with the idea that, when the measures return, the executive will have to demonstrate that the powers have been effective—and are still needed—for them to be renewed. But by side-stepping steady reporting requirements, the legislature insulates the executive from oversight. To whom the reports are made, and whether they are public, also matters.

214. See DONOHUE, *supra* note †, at 20-25.

215. See, e.g., *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A), p. 1; *Brogan and Others v. United Kingdom*, 145-B Eur. Ct. H.R. (ser. A), p. 11; *Brannigan & McBride v. United Kingdom*, 258-B Eur. Ct. HR (ser. A), p. 29.; *Rasul v. Bush*, 542 U.S. 466 (2004); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Boumediene v. Bush*, 553 U.S. ___, 128 S. Ct. 2229 (2008).

216. See, e.g., *Implementation of CSRT Procedures for Enemy Combatants detained at Guantanamo Bay Naval Base, Cuba* (on file with CALIF. L. REV.).

217. *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969).

218. *Hamdan v. Rumsfeld*, 548 U.S. 557, 634-35 (2006).

219. *Boumediene v. Bush*, 553 U.S. ___, 128 S. Ct. 2229, 2269-77 (2008) (holding that the Military Commissions Act is an unconstitutional suspension of the right to habeas corpus).

Home Department led to the repeal of indefinite detention of non-citizens.²²⁰ Only relatively recently, however, has the judicial arm of the House of Lords begun to push back, using the European Court of Human Rights to strengthen its position.²²¹ There are limits to this approach: the European Convention allows states to derogate in times of national crisis.²²² And the European Court exhibits considerable deference to member states when such claims are made. While the United Kingdom's Human Rights Act has special status within the legal system of the United Kingdom, it is not a written constitution. Judicial review focuses on such questions as whether subsidiary measures fall within the remit granted by Westminster (the procedural doctrine of *ultra vires*).²²³ The courts consider whether officials have abused their discretion and oversee the application of remedial guarantees.²²⁴ For the most part, they demonstrate great deference to the government when issues of national security are on the line, thus limiting the ability of the judiciary to check the executive branch's use of power.²²⁵

In the United States, while the judicial branch is responsible for determining the constitutionality of federal law, its ability to do so with respect to counterterrorism is limited.²²⁶ Under Article III of the U.S. Constitution, the authority of the courts is restricted to cases and controversies, which has come to include a "standing" requirement: that is, a party must be locked in dispute with the other party.²²⁷ Yet it may be extremely difficult to meet the standing requirement when bringing a suit with regard to counterterrorism.²²⁸ How does one demonstrate that one is under surveillance when the very existence of the surveillance program is classified?²²⁹ Even when a surveillance program is known, such as the post-9/11 NSA telephone tapping program, it may be

220. *A v. Sec'y of State for the Home Dep't* [2004] UKHL 56, [2005] 2 A.C. 68, available at <http://www.publications.parliament.uk/pa/ld200405/ldjudgmt/jd041216/a&oth-1.htm>.

221. DONOHUE, *supra* note †, at 20.

222. *Id.*; *see, e.g.*, European Convention on Human Rights, Art. 6 (allowing for exclusion of public in times of national security).

223. *See* *Kruse v. Johnson* (1898) 2 Q.B. 91; *Papworth v. Coventry* [1967] 2 All E.R. 41.

224. *See, e.g.*, *Brutus v. Cozens*, [1972] 2 All E.R. 1297; *Kruse*, 2 Q.B. 91; *Papworth*, 2 All E.R. 41.

225. *See, e.g.*, *Sec'y of State for Defence v. Guardian Newspapers Ltd.* [1985] A.C. 339 at 357 (Lord Fraser); *see* *Attorney Gen. v. Newspapers Publ'g Place* [1987] 3 All E.R. 276 (Ch. D); *Attorney Gen. v. Guardian Newspapers Ltd. (No. 2)* [1988] 3 All E.R. 545; *Attorney Gen. v. Observer Ltd.*, [1990] 1 A.C. 109; *Attorney Gen. v. South China Morning Post Ltd.*, No. 114 (Civil) Sept. 8, 1987; *Attorney Gen. v. South China Morning Post Ltd.*, [1987] H.K.E.C. 75.

226. *See* DONOHUE, *supra* note †, at 22-25.

227. *Liverpool, N.Y., & Phila. S.S. Co. v. Comm'rs of Emigration*, 113 U.S. 33, 39 (1885); *see also* *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937).

228. The justiciability doctrine, the richness of which is well beyond the scope of this article, includes advisory opinions, feigned and collusive cases, standing, ripeness, mootness and abatement. Political and administrative issues also come into play in determining whether cases ever even reach the Supreme Court. *See* ROBERT L. STERN ET. AL., *SUPREME COURT PRACTICE*, 809 (8th ed. 2002).

229. DONOHUE, *supra* note †, at 22.

extremely difficult to determine who is under surveillance, who has access to information about the program, and how the information obtained is being used.²³⁰ Efforts to gain access to documents proving the existence of such programs through FOIA can be blocked under the national security exception.²³¹ While the legislature could theoretically write a law creating sufficient standing to bring a case, standing must still be tied to direct injury.²³² The court, moreover, acts in accordance with the principle of self-restraint: it avoids “unnecessary and inappropriate constitutional adjudications.”²³³ Such avoidable adjudications include “generalized grievances” that may be of substantial and broad public importance—the same kind of harm that may arise as a result of counterterrorist law.²³⁴

Administrative law components of counterterrorism further reduce the rigor of scrutiny by Article III courts. EO 13224, discussed earlier, provides a good example.²³⁵ Under the Administrative Procedure Act’s “arbitrary and capricious” standard of review, the court does not undertake its own fact-finding in reviewing the decision of an agency.²³⁶ Instead, the reviewing court more narrowly focuses on the administrative record the agency has already assembled, with a presumption in favor of the validity of the administrative action under review.²³⁷ Where the agency’s decisions meet minimal standards of rationality, they are considered reasonable and must be upheld.²³⁸ An effort to escape inclusion on the SDGT list by Global Relief Foundation, one of the first entities listed under EO 13224, failed for precisely this reason.²³⁹

The nature of counterterrorist law further marginalizes the judiciary. Provisions are often found at the intersections of national security and foreign

230. *Id.*

231. *Id.*; *see, e.g.*, 5 U.S.C. § 552(b)(7)(D) (exempting information obtained in the course of national security intelligence investigations).

232. DONOHUE, *supra* note †, at 22; *see* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).

233. DONOHUE, *supra* note †, at 22; STERN ET. AL., *supra* note 228, at 812.

234. *See, e.g.*, Carroll v. Nakatani, 342 F.3d 934, 940 (9th Cir. 2003) (“The Supreme Court has repeatedly refused to recognize a generalized grievance against allegedly illegal government conduct as sufficient to confer standing.”) (citing United States v. Hays, 515 U.S. 737, 743, (1995)); Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc., 454 U.S. 464, 474-75 (1982) (stating that courts should refrain from adjudicating on matters of broad public significance that amount to generalized grievances).

235. *See supra* notes 37-41 and appended text.

236. *See, e.g.*, Allentown Mack Sales & Serv., Inc. v. N.L.R.B., 522 U.S. 359, 364 (1998) (finding the NLRB’s standard adopted for employer polling, representation management elections, and withdrawals of union recognition not so irrational as to be outside the “arbitrary and capricious” standard set by the Administrative Procedure Act).

237. Administrative Procedure Act of 1946 (codified as amended at 5 U.S.C. § 500), § 706(2)(A).

238. *Id.* § 706(2)(A).

239. *See* Global Relief Found., Inc. v. O’Neill, 207 F. Supp. 2d 779, 785 (N.D. Ill.), *aff’d* 315 F.3d 748 (7th Cir. 2002).

relations—categories firmly within the executive domain.²⁴⁰ As the Supreme Court wrote, “The war power of the national government is the power to wage war successfully. It extends to every matter and activity so related to war as substantially to affect its conduct and progress.”²⁴¹ In World War II, the Court bowed to the executive on issues concerning not only the movement of soldiers and the repelling of enemy forces, but also “every phase of the national defense.”²⁴² It was up to the executive, in concert with the legislature, to determine “the nature and extent” of the threat and to then select “the means for resisting it.”²⁴³ It was not for the Court to “sit in review of the wisdom” of the executive officials or to “substitute its judgment for theirs.”²⁴⁴

Because of this relationship between the executive and the judiciary, perceptions of institutional competence play an important role.²⁴⁵ Britain’s Law Lords have underscored this point. Lord Nicholls wrote, “All courts are very much aware of the heavy burden, resting on the elected government and not the judiciary, to protect the security of this country and all who live here.”²⁴⁶ He continued, “All courts are acutely conscious that the government alone is able to evaluate and decide what counter-terrorism steps are needed and what steps will suffice. Courts are not equipped to make such decisions, nor are they charged with that responsibility.”²⁴⁷ In addition, the Government has better access to classified information and intelligence assessments than do the courts.²⁴⁸

A similar scenario holds true in the United States.²⁴⁹ In 1936, the United States Supreme Court recognized that the president is the “sole organ of the federal government in the field of international relations,”²⁵⁰ with jurisdiction over national defense and war²⁵¹—domains closely related to terrorism. Judge Richard Posner later explained that the judiciary lacks the “machinery for systematic study of a problem. Its staffs are small. It has to wait until it has a case to begin its inquiry into the facts and policy ramifications, and the pressure

240. For further discussion, see DONOHUE, *supra* note †, at 23.

241. *Hirabayashi v. United States*, 320 U.S. 81, 93 (1943) (internal citations and quotation marks omitted); *see also* *Korematsu v. United States*, 321 U.S. 760 (1944).

242. *Hirabayashi*, 320 U.S. at 93. This included “the protection of war materials and the members of the armed forces from injury and from the dangers which attend the rise, prosecution and progress of war.” *Id.*

243. *Id.*

244. *Id.*

245. *See* DONOHUE, *supra* note †, at 24.

246. *Nicholls v. Sec’y of State for the Home Dept.*, [2004] UKHL 56, at 79; *see also* Lord Walker of Gestingthorpe in *A v. Sec’y of State for the Home Dept.*, [2004] UKHL 56, at 192.

247. *Id.*

248. *A v. Sec’y of State for the Home Dept.*, [2004] UKHL 56, at 166.

249. *See* DONOHUE, *supra* note †, at 24.

250. *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936).

251. *See generally*, *Haig v. Agee*, 453 U.S. 280 (1981); *United States v. Snapp* 444 U.S. 507 (1980); *Zemel v. Rusk*, 381 U.S. 1 (1965); *Korematsu*, 323 U.S. 214; *Hirabayashi*, 320 U.S. 81.

of its caseload requires it to decide the case without being able to take the time to study background and circumstances and likely consequences.”²⁵² As generalists, judges are not keen to question the executive branch on matters involving national security.²⁵³ “Judges,” Posner suggests, “aren’t *supposed* to know much about national security; at least they don’t think they are supposed to know much about it.”²⁵⁴

Despite the limits of the American courts and their judges, legislators and executive officers frequently push counterterrorist measures to the limit.²⁵⁵ They rationalize new strategies with an expectation—or at least the hope—that the judiciary will police the constitutional frontier. Thus, in 2006, Senator Arlen Specter, the chairman of the Senate Judiciary Committee, stated his opposition to the Military Commissions Act of 2006 (“MCA”) because it was “patently unconstitutional on its face.”²⁵⁶ However, when it came time to vote, Specter voted for the statute, saying “the court will clean it up.”²⁵⁷ Senator Specter was not alone: thirteen of the legislators similarly opposed to the measure ended up voting for the legislation.²⁵⁸ But the Court’s ability to “clean it up” was limited: the justices later declined to hear two habeas applications specifically because the MCA and the Detainee Treatment Act of 2005 restricted their ability to do so.²⁵⁹ Taking this theory to its logical extreme (and risking heresy), one could see *Marbury v. Madison*²⁶⁰ as having done a disservice by offering a false assurance of judicial oversight beyond the bounds of what the judiciary can actually accomplish.

IV

CONCLUDING REMARKS

Concern about rapidly expanding executive strength in the face of national

252. POSNER, *supra* note 6, at 35-36.

253. *Id.* at 36.

254. *Id.* at 37 (emphasis in original).

255. See DONOHUE, *supra* note †, at 21.

256. Charles Babington & Jonathan Weisman, *Senate Approves Detainee Bill Backed by Bush; Constitutional Challenges Predicted*, WASH. POST, Sept. 29, 2006, at A01; DONOHUE, *supra* note †, at 21; see also R. Jeffrey Smith, *Specter’s Role in Passage of Detainee Bill Disputed*, WASH. POST, Oct. 16, 2006, at A19 (discussing Specter’s efforts prior to the bill’s passage to amend it to restore habeas rights to detainees).

257. Babington & Weisman, *supra* note 256, at A01; Editorial, *Careless Congress: Lawmakers passed a detainee law of doubtful constitutionality. Now They Expect the Courts to Clean It up*, L.A. TIMES, Nov. 3, 2006, at A28; DONOHUE, *supra* note †, at 21; see also Andrew Putz, *The Full Specter*, PHILA. MAG., Nov. 2006; Warren Richey, *Will the Supreme Court Shackle New Tribunal Law?*, CHRISTIAN SCI. MONITOR, Oct. 17, 2006, at USA1; *The Two Arlen Specters*, LOWELL SUN, Oct. 19, 2006 (opinion).

258. Editorial, *Careless Congress*, *supra* note 257, at A28.

259. *Boumediene v. Bush*, 553 U.S. ___, 128 S. Ct. 2229, 2242 (2008); see also DONOHUE, *supra* note †, at 21; Lyle Denniston, *Analysis: Court Denies Detainees’ Habeas Cases*, SCOTUSBLOG, Apr. 2, 2007, <http://www.scotusblog.com/wp/analysis-court-denies-detainees-habeas-cases/>.

260. 5 U.S. 137 (1803).

security threats is not merely a product of the modern era.²⁶¹ As James Madison reflected, “[E]xperience has taught mankind the necessity of auxiliary precautions.”²⁶² But what form ought such auxiliary precautions take to mitigate the risks of counterterrorist law?²⁶³

Safeguards within the executive are a necessary part of any effective design.²⁶⁴ In both the United States and the United Kingdom, for instance, the tradition of protecting the autonomy of administrative agencies may help to balance against political pressure to use the bureaucracy for political advantage. I am skeptical, however, about the extent to which the executive branch will be able to limit its own expanding authority in pursuit of national security.²⁶⁵

The judiciary also has a role to play in policing the boundaries of executive authority.²⁶⁶ Yet that role ought not to be over-emphasized. Administrative law, national security concerns, and foreign relations work together to weaken the courts’ position, as do substantive measures specifically designed to sideline the judiciary. Structural limits further restrict the courts’ involvement. The judiciary, in brief, is not the most important player in ensuring the proper introduction or exercise of counterterrorist authorities.²⁶⁷

Instead, it is the legislative branch that holds the key to cabining rapidly expanding executive strength.²⁶⁸ The legislature represents the people and can simultaneously lead and reflect popular discourse. It can deliberate beyond the limits of “security or freedom,” taking account of the broader political, social, and economic effects of new provisions. It provides the executive with the authority necessary to act. It has the authority to demand that intelligence bodies and administrative agencies report on how new powers are used; it can withhold funding and authority until assured that the executive is working to mitigate costs associated with its power; it can subpoena members of the executive branch; and it can determine which information, if any, to release into the public domain.

I thus conclude by highlighting four specific steps the legislature can take as it crafts counterterrorist law, giving the government the necessary flexibility without endorsing the kind of arbitrary behavior that Professor Holmes rightly decries.²⁶⁹

The first and most important step is to do away with the old assumptions—foremost among them being the need to align security and freedom on opposite sides of a fulcrum that favors security. Indeed, a more

261. DONOHUE, *supra* note †, at 334.

262. THE FEDERALIST NO. 51 (James Madison).

263. For more discussion, see DONOHUE, *supra* note †, at 333-60.

264. DONOHUE, *supra* note †, at 334.

265. *Id.* at 335.

266. *Id.*

267. *Id.*

268. *Id.*

269. Holmes, *supra* note 2, at 304, 316, 322, 324.

expansive view, taking into account the broader effects of counterterrorist law as well as the expanded executive authority, would provide for a more accurate picture of the consequences of new provisions.

The second step is to develop a new protocol for responding to terrorist attacks by fostering a culture of restraint and to avoid the knee-jerk reaction that marks many of the past counterterrorist initiatives.²⁷⁰ The legislature can negotiate the relationship between representative democracy and the pressures of terrorism by resisting the introduction of new provisions using extraordinary procedures and, instead, following a terrorist attack by instituting an immediate inquiry into what went wrong. The determinations resulting from such an inquiry would allow the legislature to fix what is actually broken and to introduce new laws in a deliberative fashion. Emphasis on consequence management—and resilience—would help to assuage the demand that legislators act and be seen to act, even as an inquiry progresses. Rejecting sunset provisions and insisting in their place on obligatory reporting requirements and stringent oversight at the front end of a statute's term would further contribute to a culture of restraint.²⁷¹ And of considerable importance in developing a new counterterrorist protocol is maintaining a line between criminal law and counterterrorism—even within national security itself.²⁷²

The third step is to heed Professor Holmes's call for reinforcing transparency and accountability.²⁷³ Demanding a plausible reason for government action hardly undermines the ability of the executive to act. In the absence of plausible explanations, the government is wont to become less effective. To bolster transparency and accountability, the governments of the United States and the United Kingdom should seek to strengthen the free availability of information and carefully assess procedures used to classify information.

The fourth step is for the legislature to stop the executive from moving into the judicial realm or altering judicial rules.²⁷⁴ By so doing, the legislature can help to prevent further weakening of the courts.

In sum, the "security or freedom" framework distorts the dialogue and risks perverting the structure of the government. While the United States and the United Kingdom have thus far largely responded to conventional terrorism, the threats of biological and nuclear terrorism loom large. How, under the current framing, will both countries respond to such threats? It may, in the end, be desirable to adopt a different government structure. But if so, the political discourse needs to address that change directly. Backing into it by asking what

270. DONOHUE, *supra* note †, at 336-38.

271. *Id.* at 338.

272. *Id.* at 345-59.

273. Holmes, *supra* note 2, at 322, 324, 330-31, 333-34, 339; *see also* DONOHUE, *supra* note †, at 341-45.

274. DONOHUE, *supra* note †, at 353-59.

is required in the short term to counter a specific threat masks the long term impact of these provisions. Yet that is the approach both countries have thus far taken in the shadow of the “security or freedom” dialogue.