



KEEPING CONTROL OF TERRORISTS WITHOUT  
LOSING CONTROL OF CONSTITUTIONALISM

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## INTRODUCTION: THE DYNAMICS OF COUNTER-TERRORISM POLICIES AND LAWS

More than five years since the cataclysmic events of September 11, 2001, two dynamics have affected patterns of terrorism and counter-terrorism. The first was identified from the outset and relates to the growing emphasis upon anticipatory risk. The second is the increasing threat of “neighbor” terrorism.

The anticipatory risk of mass terrorism casualties or even the nightmare of the use of weapons of mass destruction conduces towards interventions which

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are preemptive or preventative. The threat of terrorism to life and liberty cannot be addressed simply by ex post facto rectification for the sake of justice.<sup>1</sup> An inevitable consequence of this risk dynamic will be an intelligence-led approach, that is, governmental net-casting for information and for potential assailants on a wide and prescient scale.<sup>2</sup> An intelligence-led approach might be said to reflect “a new and urgent emphasis upon the need for security, the containment of danger, the identification and management of any kind of risk.”<sup>3</sup> The broad sweep of such an approach recognizes the pervasive nature of terrorism whilst at the same time seeking to refine intelligence data so as to narrow the range of risks that security agencies should address at any one time. This allows the government to target its resources. The careful buildup and analysis of data also signals the government’s assessment of the sophisticated, secretive, and dedicated nature of terrorist groups, features that distinguish them from “ordinary decent criminals.”<sup>4</sup>

The contrary argument is that the risk paradigm is less persuasive in the realms of terrorism policing; there, the orientation is said to be towards law and order, and measures are often taken or continued without proof of practical efficacy. An example of the latter concerns the policy and legislative accentuation of measures against the financing of terrorism, which impose pervasive burdens upon the financial sectors and their customers but have hampered few terrorists.<sup>5</sup> It is suggested in response that though policies are indeed often exaggerated in scope and intensity in response to the vivid threat of terrorism,<sup>6</sup> and though knowledge through intelligence is always less than perfect, the assessment of risk through an intelligence-led approach is a strong basis for action in the terrorism field and increasingly so. In fact, the intelligence cycle, including the discernment of and reaction to risk, provides a

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1. JOINT COMM. ON HUMAN RIGHTS, COUNTER-TERRORISM POLICY AND HUMAN RIGHTS: PROSECUTION AND PRE-CHARGE DETENTION, 2005-6, H.L. 240, H.C. 1576, at 10-11; see also ALAN DERSHOWITZ, *PREEMPTION: A KNIFE THAT CUTS BOTH WAYS* (2006); Robert M. Chesney, *The Sleeper Scenario: Terrorism-Support Laws and the Demands of Prevention*, 42 HARV. J. ON LEGIS. 1 (2005).

2. See FRANK KITSON, *LOW INTENSITY OPERATIONS: SUBVERSION, INSURGENCY, AND PEACEKEEPING* chs. 6-7 (1971); Clive Walker, *Intelligence and Anti-terrorism Laws in the United Kingdom*, 44 CRIME L. & SOC. CHANGE 387 (2005).

3. DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 12 (2001).

4. The term was coined by the REVIEW OF THE OPERATION OF THE NORTHERN IRELAND (EMERGENCY PROVISIONS) ACT 1978, 1984, Cmnd. 9222, at 41.

5. See Laura K. Donohue, *Anti-Terrorist Finance in the United Kingdom and United States*, 27 MICH. J. INT’L L. 303 (2006); Michael Levi & William Gilmore, *Terrorist Finance, Money Laundering and the Rise and Rise of Mutual Evaluation: A Mutual Evaluation for Crime Control?*, in *FINANCING TERRORISM* 87, 87-88 (Mark Pieth ed., 2002); Nikos Passas, *Fighting Terror with Error: The Counter-Productive Regulation of Informal Value Transfers*, 45 CRIME L. & SOC. CHANGE 315 (2006).

6. See Jonathan H. Marks, *9/11 + 3/11 + 7/7 = ? : What Counts in Counterterrorism*, 37 COLUM. HUM. RTS. L. REV. 559 (2006); cf. Eric A. Posner & Adrian Vermeule, *Emergencies and Democratic Failure*, 92 VA. L. REV. 1091 (2006).

“crucial”<sup>7</sup> key to anti-terrorism strategy and laws, and it is a feature that has been recurrent in counter-terrorism.

The second dynamic, termed here “neighbor” terrorism, reflects the gradual recognition after 9/11 that dangers are presented not only by al Qa’ida and its ilk, as often represented by the convenient figure of Osama bin Laden, the archetypal outlaw who is definitely not one of “us” (nor even one of “them,” if “them” is taken to mean the mainstreams of his own nationality or his own religion).<sup>8</sup> That convenient scapegoat has ceased to be the center-stage villain, now driven so far into the shadows by the invasion of Afghanistan in 2001 that even the CIA has reportedly closed its specialist search unit.<sup>9</sup> More ominously, in the contemporary phase of terrorism, the most threatening figures are our neighbors operating from within. Thus, the London bombings of July 7, 2005 were carried out by three second-generation British citizens, Hasib Hussein, Mohammad Sidique Khan, and Shehzad Tanweer, and one long-term British resident, Jermaine Lindsay.<sup>10</sup> These were Yorkshire folk whose mundane backgrounds set at naught many of the tactics of the security forces hunting for cells of crazed foreigners. The attempted bombings in London on July 21, 2005 likewise allegedly involved perpetrators with a mundane profile.<sup>11</sup> The 2005 and 2006 “neighbor” bombers were not an isolated aberration, and it is known that British citizens have engaged in terrorism not only on their own soil but on foreign soil. Examples include Richard Reid (convicted of attempting to set off a shoe bomb on a transatlantic flight in 2001),<sup>12</sup> Ahmad Omar Saeed Sheikh (sentenced to death in Hyderabad in 2002 for the murder of American journalist Daniel Pearl),<sup>13</sup> suicide bombings in Tel

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7. PAUL WILKINSON, *TERRORISM VERSUS DEMOCRACY* 105 (2000).

8. See generally ROHAN GUNARATNA, *INSIDE AL QAEDA: GLOBAL NETWORK OF TERROR* ch. 1 (2002).

9. Suzanne Goldenberg, *CIA Disbands Bin Laden Unit*, *GUARDIAN* (London), July 5, 2006, at 15.

10. See INTELLIGENCE & SEC. COMM., *REPORT INTO THE LONDON TERRORIST ATTACKS ON 7 JULY 2005*, 2006, Cm. 6785, at 2; *REPORT OF THE OFFICIAL ACCOUNT OF THE BOMBINGS IN LONDON ON 7TH JULY 2005*, 2006, H.C. 1087, at 13, 17.

11. Those awaiting trial for involvement in the bombings (several others are charged with withholding information or facilitating escape) include: Muktar Said Ibrahim (Eritrean-born but arrived in the United Kingdom as a child dependent of asylum seekers in 1990 and was granted residency in 1992); Ramzi Mohamed (a Somalian); Yassin Hassan Omar (Somalian-born but arrived in the United Kingdom as a child dependent of asylum seekers in 1992); Hussain Osman (Ethiopian-born but a naturalized British citizen); Manfo Kwaku Asiedu (a Ghanaian). They denied the charges. See Ian Cobain, *Five Men Deny Tube and Bus Bomb Plot*, *GUARDIAN* (London), Apr. 29, 2006, at 4. Adel Yahya (a naturalized Briton originally from Ethiopia) has also been charged with conspiracy. *Terror Suspect Is Charged*, *TIMES* (London), Dec. 23, 2005, at 4. For the overall picture of the police’s Operation Vivace, see Metropolitan Police, *Operation Vivace: Court Proceedings and Latest Updates* (Oct. 6, 2006), <http://www.met.police.uk/vivace/court.htm>.

12. See Pamela Ferdinand, *Would-Be Shoe Bomber Gets Life Term*, *WASH. POST*, Jan. 31, 2003, at A1.

13. See Rory McCarthy, *Case Closed?: Murky Underworld Where Terror and Security*

Aviv in May 2003 by Asif Mohammed Hanif and Omar Khan Sharif,<sup>14</sup> and the dozen or so British citizens or residents detained in Afghanistan or Guantánamo Bay.<sup>15</sup>

The same trend is evident in the United States, perhaps in part as a consequence of the detention and deportation of noncitizens after 9/11<sup>16</sup> and the tighter checks on visitors thereafter.<sup>17</sup> Examples include the arrests in March 2006 in Atlanta of a U.S. citizen and a U.S. resident for providing material support to a terrorist group by obtaining information on targets.<sup>18</sup> In

*Meet: Pearl Trial Ends But Doubts Exist on Military's Role*, GUARDIAN (London), July 16, 2002, at 10.

14. See Ohad Gozani et al., *British Bomber's Body Identified*, DAILY TELEGRAPH (London), May 20, 2003, at 2.

15. Five British citizens were released in 2004: Ruhul Ahmed, Tarek Dergoul, Asif Iqbal, Shafiq Rasul, and Jamal al-Harith. See Daniel McGrory & Stewart Tendler, *Camp X-Ray Briton Goes Free, Others Out by Friday*, TIMES (London), Mar. 10, 2004, at 1. The remaining four British citizens were released in 2005: Feroz Abbasi, Moazzam Begg, Richard Belmar, and Martin Mubanga. See Sean O'Neill et al., *Pentagon Agreed Deal to Monitor Freed Four*, TIMES (London), Jan. 28, 2005, at 26. British residents detained at Guantánamo have been said to include Shaker Abdur-Raheem Aamer, Ahmed Ben Bacha, Benjamin Mohammed Al Habashi, Bisher al-Rawi, Jamil el-Banna, Ahmed Errachidi, Jamal Abdullah Kiyemba, Omar Deghayes, and Abdunour Sameur. See James Slack, *Guantanamo Nine 'Have No Right to Return Here.'* DAILY MAIL (London), Oct. 4, 2006, at 8. Kiyemba was sent to Uganda on February 9, 2006 at the same time as an exclusion order was issued by the Home Office. See Richard Norton-Taylor, *Terrorism: Freed Guantanamo Man Refused Return to Britain*, GUARDIAN (London), Feb. 11, 2006, at 12. Several of the foregoing unsuccessfully sought judicial review to force the Foreign Secretary to take more active steps to secure their release, reflecting earlier actions by some of the citizens. See, e.g., R (Abassi) v. Sec'y of State for Foreign & Commonwealth Affairs, [2002] EWCA (Civ) 1598; R (Al Rawi) v. Sec'y of State for Foreign & Commonwealth Affairs, [2006] EWCA (Civ) 1279. It has been reported that the U.K. government has now refused to accept the return of most detainees (except Bisher al Rawi). See Ian Cobain & Vikram Dodd, *Britain to US: We Don't Want Guantanamo Nine Back*, GUARDIAN (London), Oct. 3, 2006, at 1. Similar actions have been brought by detainees held in Australia. See, e.g., R (B) v. Sec'y of State for Foreign & Commonwealth Affairs, [2004] EWCA (Civ) 1344, [2005] 2 W.L.R. 618 (dismissing suit seeking reversal of British consulate's decision to deny diplomatic asylum to escapees from Australian detention center).

16. See Susan M. Akram & Maritza Karmely, *Immigration and Constitutional Consequences of Post-9/11 Policies Involving Arabs and Muslims in the United States: Is Alienage a Distinction Without a Difference?*, 38 U.C. DAVIS L. REV. 609 (2005); Sameer M. Ashar, *Immigration Enforcement and Subordination: The Consequences of Racial Profiling After September 11*, 34 CONN. L. REV. 1185 (2002); Thomas M. McDonnell, *Targeting the Foreign Born by Race and Nationality: Counter-Productive in the "War on Terrorism"?*, 16 PACE INT'L L. REV. 19 (2004); Karen C. Tumlin, *Suspect First: How Terrorism Policy Is Reshaping Immigration Policy*, 92 CAL. L. REV. 1173 (2004).

17. See Susan Ginsburg, *National Security Efforts to Disrupt the Mobility of Terrorists*, 2 LOY. U. CHI. INT'L L. REV. 169 (2005); A. James Vazquez-Azpíri & Daniel C. Horne, *The Doorkeeper of Homeland Security: Proposals for the Visa Waiver Program*, 16 STAN. L. & POL'Y REV. 513 (2005).

18. Those who have been charged are Ehsanul Islam Sadequee, a U.S. citizen of Bangladeshi descent, and Syed Haris Ahmed, a naturalized U.S. citizen born in Pakistan. See Anthony M. DeStefano, *2 U.S. Citizens Met Extremists to Talk About Attacks, FBI Says*,

June 2006, members of what was described as “a homegrown terrorist cell” were arrested in Liberty City, near Miami, for allegedly plotting attacks on FBI buildings in Miami and on the Sears Tower in Chicago.<sup>19</sup> The members of the cell were all settled citizens or long-term residents.<sup>20</sup> These examples add to the existing list of cases involving U.S. citizens, such as Jose Padilla,<sup>21</sup> Yaser Hamdi<sup>22</sup> (who was allowed to travel to Saudi Arabia on the condition that he give up his U.S. citizenship in 2004),<sup>23</sup> and Ali Saleh Kahlah al-Marri.<sup>24</sup> There is also the Lackawanna case, in which six U.S. citizens of Yemeni origin pleaded guilty in Buffalo, New York to providing material support and resources to a terrorist group by training at a camp associated with al Qaeda in Afghanistan.<sup>25</sup> Several other U.S. citizens have been charged in connection with attempts to enter Afghanistan.<sup>26</sup> Perplexingly for those who maintain the paradigm image of the terrorist who is an alien in terms of nationality, race, and religion, not all of these “neighbor terrorists” even fit the description of “Arab” or Middle Eastern, a prime example being John Walker Lindh who was convicted for joining the Taliban in Afghanistan.<sup>27</sup>

“Know the enemy and know yourself” may still be the operative ideal,<sup>28</sup> but with globalized population movements and ideologies, discerning friend

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WASH. POST, Apr. 22, 2006, at A4.

19. See Peter Whoriskey & Dan Eggen, *Terror Suspects Had No Explosives and Few Contacts; Sears Tower Plan Never Finished, Authorities Say*, WASH. POST, June 24, 2006, at A3. Those with citizenship were Narseal Batiste, Burson Augustin, Rotschild Augustine, Naudimar Herrera, and Stanley Grant Phanor; also charged are Lyglenson Lemorin (a permanent resident from Haiti), and Patrick Abraham (an illegal resident from Haiti). *Id.*

20. See *id.*

21. See *Rumsfeld v. Padilla*, 542 U.S. 426 (2004).

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

23. Eric Lichtblau, *U.S. Captive Going to Saudi Arabia; Citizen Captured in Afghanistan Must Report Terrorist Activity*, INT'L HERALD TRIB., Sept. 24, 2004, at 4.

24. See *Al-Marri v. Rumsfeld*, 360 F.3d 707 (7th Cir. 2004), *cert. denied*, 543 U.S. 809 (2005).

25. See *United States v. Goba*, 220 F. Supp. 2d 182, 187 (W.D.N.Y. 2002) (discussing detention orders); David Staba, *Judge Questions Sentence in Al Qaeda Case*, N.Y. TIMES, Dec. 11, 2003, at A37 (discussing sentence imposed). Kamal Derwish, the alleged seventh member of the group, was killed in a U.S. air strike in Yemen in 2002. James Risen & Marc Santora, *Threats and Responses: The Terror Network; Man Believed Slain in Yemen Tied by U.S. to Buffalo Cell*, N.Y. TIMES, Nov. 10, 2002, § 1, at 17.

26. Ahmed Bilal, Muhammed Bilal, and four others (part of the “Portland Seven”) were convicted in 2003. See Blaine Harden & Dan Eggen, *Duo Pleads Guilty to Conspiracy Against U.S.; Last of the ‘Portland 7’ Face 18 Years in Prison*, WASH. POST, Oct. 17, 2003, at A3.

27. See *United States v. Lindh*, 212 F. Supp. 2d 541, 574-77 (E.D. Va. 2002); see also Karen Engle, *Constructing Good Aliens and Good Citizens: Legitimizing the War on Terror(ism)*, 75 U. COLO. L. REV. 59 (2004); Suzanne Kelly Babb, Note, *Fear and Loathing in America: Application of Treason Law in Times of National Crisis and the Case of John Walker Lindh*, 54 HASTINGS L.J. 1721 (2003).

28. SUN TZU, *THE ART OF WAR* 18 (Samuel B. Griffith trans., N.Y. & Oxford Univ. Press 1963) (515-512 BC).

from foe has become much more troublesome. Late modernity's boons of global movement of persons and ideas and networked communications<sup>29</sup> are, in line with the process of "reflexive modernization,"<sup>30</sup> equally adaptable to terrorist purposes by those who adhere to al Qa'ida's tenets. No longer can it be claimed that the enemy is "in a specially intense way, existentially something different and alien" or, as a fellow citizen, that he "intends to negate his opponent's way of life and therefore must be repulsed or fought in order to preserve one's own form of existence."<sup>31</sup> Unsure of the target of counter-terrorism, the tendency must again be towards net-widening and thereby treating the whole population as a risk.

Turning to appropriate legal responses, two main approaches to counter-terrorism are available. First, there is the strategy of criminalization: implementing legal measures that seek criminal justice outcomes. For example, the government could rely on extra policing powers to gather evidence, special processes to assist in trials, special offences, and enhanced penalties.<sup>32</sup> The second tactic is to prevent, disrupt, and counter, thereby engaging in "control." This is essentially executive-based risk management. Measures such as proscription, detention without trial, control orders, port controls, data-mining, and the seizure of assets evidently fall into this category. In addition, several powers such as arrest, interrogation, and stop and search could legitimately be included in either strategy. It also may prove difficult to disentangle intelligence-gathering from forensic interrogation.<sup>33</sup> But their tactical use tends towards the control strategy by mainly working through intelligence-gathering and disruption.

In the "control" mode, the objective relates to "future law enforcement . . . not necessarily directed to solving a crime that has already taken place."<sup>34</sup> This purpose is tied to the idea that the threat of terrorism demands an early police intervention at the preparatory stages of a terrorist act to detect<sup>35</sup> or disrupt that plot. It is too dangerous to allow the terrorists to move towards their objectives. Thus, "control" tends to predominate and reflects more general trends in the risk society<sup>36</sup> such as risk aversion, the precautionary principle, and

29. See generally 1 MANUEL CASTELLS, *THE RISE OF THE NETWORK SOCIETY* (2d ed. 2001).

30. ULRICH BECK, *RISK SOCIETY: TOWARDS A NEW MODERNITY* 87 (1992).

31. CARL SCHMITT, *THE CONCEPT OF THE POLITICAL* 27 (George Schwab trans., 1976).

32. For examples, see generally CLIVE WALKER, *BLACKSTONE'S GUIDE TO THE ANTI-TERRORISM LEGISLATION* (2002).

33. See J. J. ROWE, *REVIEW OF THE NORTHERN IRELAND (EMERGENCY PROVISIONS) ACT 1991, 1995, Cm. 2706*, ¶ 126.

34. SYBIL SHARPE, *SEARCH AND SURVEILLANCE* 199 (2000).

35. For examples of early intervention, see especially *Statements in Media Might Have Prejudiced Jury in Criminal Trial*, *TIMES* (London), May 1, 1990. See also Stewart Tendler & Sean O'Neill, *The Al-Qaeda Plot to Poison Britain*, *TIMES* (London), Apr. 14, 2005, at 1.

36. The "risk society" is "an epoch in which the dark sides of progress increasingly come to dominate social debate." ULRICH BECK, *ECOLOGICAL ENLIGHTENMENT: ESSAYS ON*

contingency planning.<sup>37</sup> Control is also the foremost strategy in the overarching counter-terrorism strategy, “CONTEST,”<sup>38</sup> set by the U.K. government. “Prevention” (such as deterrence and ideological responses), “preparation” (through, for example, risk identification) and “protection” (such as through contingency planning) are set alongside “pursuit” as strategic aims.<sup>39</sup> Even “pursuit,” which includes prosecution, is invoked in the context of “disrupting terrorist activity.”<sup>40</sup> No great store is placed in the prospect of punishment acting as a deterrent,<sup>41</sup> whether directly through the criminal justice system or indirectly through the impact of control measures. Because the jihadists are seen as harboring fanatical and non-negotiable objectives, punishment seems unlikely to deter them effectively.<sup>42</sup>

Both criminalization and control are controversial in their design and in their implementation. For example, the seemingly more straightforward approach of criminalization spawns the danger that special laws will undermine the legitimacy of the criminal justice system and generate “political” offenders.<sup>43</sup> This consequentialist argument probably reached its apogee in Northern Ireland with the hunger-striking prisoners of 1981.<sup>44</sup> Equally, the techniques of control are widely viewed as corrosive of constitutionalism. Individual rights may be diminished or eliminated without the public spectacle of an affirmation of the evidence against them, and without venerated rules such as proof beyond reasonable doubt. Almost certainly, the basis for control

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THE POLITICS OF THE RISK SOCIETY 2 (1995). It is further argued that “[t]he entry into risk society occurs at the moment when the hazards which are now decided and consequently produced by society *undermine and/or cancel the established safety systems of the provident state’s existing risk calculations.*” Ulrich Beck, *Risk Society and the Provident State*, in RISK, ENVIRONMENT AND MODERNITY: TOWARDS A NEW ECOLOGY 31 (Scott Lash et al. eds., 1996). For the application of these concepts to policing, see generally RICHARD V. ERICSON & KEVIN D. HAGGERTY, *POLICING THE RISK SOCIETY* (1997).

37. See generally CLIVE WALKER & JAMES BRODERICK, *THE CIVIL CONTINGENCIES ACT 2004: RISK, RESILIENCE AND THE LAW IN THE UNITED KINGDOM* (2006).

38. See U.K. HOME OFFICE, *COUNTERING INTERNATIONAL TERRORISM: THE UNITED KINGDOM’S STRATEGY*, 2006, Cm. 6888, at 1.

39. See *id.* at 1-2.

40. *Id.* at 2.

41. See *id.* at 1.

42. REPORT OF THE OFFICIAL ACCOUNT OF THE BOMBINGS IN LONDON ON 7TH JULY 2005, *supra* note 10, at 28.

43. See generally BARTON L. INGRAHAM, *POLITICAL CRIME IN EUROPE* (1979); JULIAN B. ROEBUCK & STANLEY C. WEEBER, *POLITICAL CRIME IN THE UNITED STATES: ANALYZING CRIME BY AND AGAINST GOVERNMENT* (1978); JEFFREY IAN ROSS, *THE DYNAMICS OF POLITICAL CRIME* (2002).

44. See DAVID BERESFORD, *TEN MEN DEAD: THE STORY OF THE 1981 IRISH HUNGER STRIKE* (1987); C. P. Walker, *Irish Republican Prisoners: Political Detainees, Prisoners of War or Common Criminals?*, 19 IRISH JURIST (New Series) 189 (1984); John Williams, *Hunger-Strikes: A Prisoner’s Right or a ‘Wicked Folly’?*, 40 HOWARD J. CRIM. JUST. 285 (2001).



measures will be intelligence rather than evidence, reflecting the dynamic of preemptive action against terrorism.

The inherent difficulties of intelligence as a basis for action cause problems for professional policing institutions at all stages of the intelligence cycle, from collection to dissemination and storage.<sup>45</sup> But an equally fundamental problem is that the deployment of intelligence as the trigger for official action is unpersuasive, as it is not court-cognizable as “evidence” or proven beyond reasonable doubt. These difficulties are compounded when ultimate decision-making is in the hands of less experienced and more politically motivated government ministers as opposed to detached judges. The Butler<sup>46</sup> and Hutton<sup>47</sup> inquiries laid out errors in the grand strategy of war, arising from the veracity of intelligence regarding Iraq’s possession of viable weapons of mass destruction and also the malleability of the presentation of that information for the given purpose of convincing the public of the rectitude of counter-measures against Iraq. Concerns regarding the veracity and malleability of intelligence surely apply to the smaller skirmishes over the repression of individuals. Aside from the evils (denial of due process and possible miscarriages of justice) that may be visited upon the individual suspect, there are wider concerns about delivering a sensible balance between personal and public liberty. Indeed, reassurance of security must come in ways that do not transform or disrupt legitimate activities, such as air travel, foreign currency transfers, or political dissent and association.

Several measures in U.K. law could be considered as test cases of counter-terrorism control measures. Probably the most appropriate are the eponymous control orders under the Prevention of Terrorism Act 2005. The system imposed by the Act encompasses both operative dynamics: the imperative to respond to anticipatory risk and the need to extend action to the “neighbor” terrorist. Foremost in the inquiry will be the following questions: what circumstances gave rise to the policy of control orders; what are the main elements of the policy and how is it implemented; is it possible to maintain constitutionalism when dealing with a non-criminal justice mechanism of this kind; and, what lessons can be derived for future policy? It is submitted that these are more pertinent questions than those that seek to establish some kind of “balance” between liberty and security, since such questions are based on the dubious assumption that the reduction of one produces the other.<sup>48</sup> The key

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45. See BICHARD INQUIRY, REPORT, 2004, H.C. 653, at 77-108, 127-55; U.K. HOME OFFICE, BICHARD INQUIRY RECOMMENDATIONS: PROGRESS REPORT (2004); BICHARD INQUIRY, FINAL REPORT (2005).

46. COMM. OF PRIVY COUNSELLORS, REVIEW OF INTELLIGENCE ON WEAPONS OF MASS DESTRUCTION, 2004, H.C. 898, ch. 5 (discussing British intelligence on Iraqi nuclear, biological, and chemical weapons programs).

47. LORD HUTTON, REPORT OF THE INQUIRY INTO THE CIRCUMSTANCES SURROUNDING THE DEATH OF DR. DAVID KELLY C.M.G., 2004, H.C. 247, at 319-24.

48. DAVID COLE & JAMES X. DEMPSEY, TERRORISM AND THE CONSTITUTION:

question is how the imposition of control measures can be used both to enhance security in the context of constitutional values rather than via measures which are antithetical to them<sup>49</sup> or seek to enfeeble them.<sup>50</sup> As stated by Roy Jenkins, the Home Secretary, in sponsoring the first British counter-terrorism bill of the contemporary era: “Few things would provide a more gratifying victory to the terrorist than for this country to undermine its traditional freedoms in the very process of countering the enemies of those freedoms.”<sup>51</sup>

## I. CONTROL ORDERS

### A. *Background to the Enactment of Control Orders*

The notion of imposing restraints on the liberty of the individual so as to avert a threat of terrorism is not new in U.K. law.<sup>52</sup> The most direct forerunner was the Prevention of Violence (Temporary Provisions) Act 1939, which reacted to an Irish Republican Army (IRA) campaign in Britain and contained measures of exclusion, prohibition, and registration.<sup>53</sup> Of greatest relevance were registration orders under section 1(3), which arose where the Secretary of State was “reasonably satisfied” that the targeted person was involved in the preparation or instigation of acts of violence or was harboring such a person.<sup>54</sup> The order required the subject to register with the police personal particulars, to be photographed and measured, and to report regularly.<sup>55</sup> Those orders were far less intrusive than the 2005 Act equivalents—the idea seems to have been to facilitate surveillance rather than to avert the need for it. In any event, the police seem to have preferred to opt for the latter by way of alternative orders for the exclusion and prohibition of Irish suspects.<sup>56</sup> Moreover, travel restrictions and identity requirements under wartime legislation, which began

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SACRIFICING CIVIL LIBERTIES IN THE NAME OF NATIONAL SECURITY 240 (3d ed. 2006).

49. See NAT'L COMM'N ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT 394-95 (2004).

50. As suggested by Hazel Blears in the House of Commons on February 23, 2005. 431 PARL. DEB., H.C. (6th ser.) (Feb. 23, 2005) 431.

51. 882 PARL. DEB., H.C. (5th ser.) (Nov. 29, 1974) 634 (Roy Jenkins).

52. The House of Lords Select Committee on the Constitution claimed, in ignorance in its report on The Prevention of Terrorism Bill, that there was no direct precedent. SELECT COMM. ON THE CONSTITUTION, THE PREVENTION OF TERRORISM BILL: REPORT, 2004-5, H.L. 66, at 5.

53. See Owen G. Lomas, *The Executive and the Anti-terrorist Legislation of 1939*, 1980 PUB. L. 16; see also CLIVE WALKER, *THE PREVENTION OF TERRORISM IN BRITISH LAW* 31-46 (2d ed. 1992).

54. Prevention of Violence (Temporary Provisions) Act, 1939, c. 50, § 1(3).

55. *Id.*

56. Exclusion reappeared under the Prevention of Terrorism (Temporary Provisions) Acts 1974-89. See generally Clive Walker, *Constitutional Governance and Special Powers Against Terrorism: Lessons from the United Kingdom's Prevention of Terrorism Acts*, 35 COLUM. J. TRANSNAT'L L. 1 (1997).

later the same year, made registration largely superfluous.<sup>57</sup> Thus, by the time the Act ended in 1954, there had been 190 expulsion orders and seventy-one prohibition orders but only twenty-nine registration orders.<sup>58</sup>

Further precedents, even more obscure to contemporary British legislators, were the some of the regulations issued under the Civil Authorities (Special Powers) Act 1922 (Northern Ireland). The relevant regulations permitted executive orders prohibiting residence in, or entry into, specified areas or imposing conditions as to reporting to the police.<sup>59</sup> These measures were resurrected in 1956<sup>60</sup> and were also reflected in many colonial emergency codes.<sup>61</sup>

These precedents had no apparent influence over the policies and designs which resulted in the Prevention of Terrorism Act 2005. At no point did the legislators invoke or discuss them. Instead, the history of control orders resides in the previous regime of detention without trial, which was erected, in the shadow of 9/11, by Part IV of the Anti-terrorism, Crime and Security Act 2001. The Act persisted until March 2005 and shall now be explained by way of background.<sup>62</sup>

The 2001 Act was shaped by the judgment of the European Court of Human Rights in *Chahal*,<sup>63</sup> wherein the United Kingdom was warned that it would contravene article 3 of the European Convention on Human Rights were it to expel a terrorist suspect to a jurisdiction where torture was a substantial possibility. Yet, if such fellows are “the worst of a very bad lot,” in the words of Vice President Dick Cheney in January 2002,<sup>64</sup> how can anyone remotely suspected of such a black heart be allowed to go free? Certainly, the idea that total liberty should be afforded to terrorist suspects just because they cannot be convicted under the conditions of full due process in a criminal trial was deemed unacceptable.<sup>65</sup>

57. See Defence (General) Regulation, 1939, Stat. R. & O. 927, ¶ 18 (U.K.).

58. 493 PARL. DEB., H.C. (5th ser.) (Nov. 15, 1951) 1209 (David Maxwell Fyfe).

59. Regs. 23A, 23B, 1922, Stat. R. & O. 36 (N. Ir.). For examples of use, see PATRICK BUCKLAND, *THE FACTORY OF GRIEVANCES* 211 (1979); NAT'L COUNCIL FOR CIVIL LIBERTIES, *REPORT OF A COMMISSION OF INQUIRY INTO CERTAIN DISTURBANCES AT THURLOE SQUARE, SOUTH KENSINGTON ON MARCH 22ND, 1936*, at 19 (1936).

60. 1956, Stat. R. & O. 12 (N. Ir.).

61. See generally A. W. BRIAN SIMPSON, *HUMAN RIGHTS AND THE END OF EMPIRE* (2001).

62. See Clive Walker, *Prisoners of “War All the Time,”* 2005 EUR. HUM. RTS. L. REV. 50.

63. *Chahal v. United Kingdom*, App. No. 22414/93, 23 Eur. H.R. Rep. 413 (Eur. Ct. H.R. 1997).

64. See Katharine Q. Seyle, *A Nation Challenged: Captives; Detainees Are Not P.O.W.'s, Cheney and Rumsfeld Declare*, N.Y. TIMES, Jan. 28, 2002, at A6.

65. U.K. HOME OFFICE, *COUNTER-TERRORISM POWERS: RECONCILING SECURITY AND LIBERTY IN AN OPEN SOCIETY*, 2004, Cm. 6147, at ii [hereinafter U.K. HOME OFFICE, *RECONCILING SECURITY AND LIBERTY*]. To detain indefinitely pending deportation would also breach article 5(1)(f). See *R v. Governor of Durham Prison*, [1984] 1 All E.R. 983

As a result, under section 21, detention orders can issue if the Home Secretary reasonably (a) believes that the person's presence in the United Kingdom is a risk to national security, and (b) suspects that the person is a terrorist.<sup>66</sup> The obstacles to a more legitimate form of disposal, such as a criminal trial, were the same as for exclusion and were expressed in the following terms by the Director-General of the Security Service, Dame Eliza Manningham-Buller:

This is one of the central dilemmas of countering this sort of terrorism. We may be confident that an individual or group is planning an attack but that confidence comes from the sort of intelligence I described earlier, patchy and fragmentary and uncertain, to be interpreted and assessed. All too often it falls short of evidence to support criminal charges to bring an individual before the courts, the best solution if achievable. Moreover, as I said earlier, we need to protect fragile sources of intelligence including human sources.<sup>67</sup>

It is evident that U.K. legislators sought to address the dynamic of anticipatory risk with this Act. However, the policy failed to cover "neighbor" terrorism, which was a fatal flaw as it turned out. Underlining this limitation, section 21(2) defined a "terrorist" by reference exclusively to "international terrorism."<sup>68</sup> Part IV was written as if based within the government's immigration powers and so could only apply to persons who were liable to deportation.

It followed that many of the procedures for legal challenge adopted in the 2005 Prevention of Terrorism Act were closely modeled on the Special Immigration Appeals Commission (SIAC) under the Special Immigration Appeals Commission Act 1997. An important procedural feature of the SIAC Act is the power to appoint a security-vetted "special advocate" to represent the appellant's interests<sup>69</sup> when the appellant and his legal representative are excluded from the proceedings (as may occur on grounds of national security under section 5).<sup>70</sup>

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(Q.B.); *Tan Te Lam v. Superintendent of Tai A Chau Detention Centre*, [1997] A.C. 97 (P.C.) (appeal taken from Court of Appeal of Hong Kong); *R (Saadi) v. Sec'y of State for the Home Dep't*, [2001] EWCA (Civ) 1512, [2001] 4 All E.R. 961. *But see* *R (Q) v. Sec'y of State for the Home Dep't*, [2006] EWHC (Admin) 2690; *Saadi v. United Kingdom*, App. No. 13229/03 (Eur. Ct. H.R. 2006) (both discussing permissible periods of detention). *See generally* U.K. HOME OFFICE, *SECURE BORDERS, SAFE HAVEN: INTEGRATION WITH DIVERSITY IN MODERN BRITAIN*, 2002, Cm. 5387, at 66-67.

66. Anti-terrorism, Crime and Security Act, 2001, c. 24, § 21(1).

67. Eliza Manningham-Buller, Dir.-Gen. of the U.K. Sec. Serv., *The International Terrorist Threat and the Dilemmas in Countering It*, Speech at the Ridderzaal Binnenhof, The Hague (Sept. 1, 2005) (transcript available at <http://www.mi5.gov.uk/output/Page387.html>).

68. Anti-terrorism, Crime and Security Act, 2001, c. 24, § 21(2).

69. Special Immigration Appeals Commission Act, 1997, c. 68, § 6.

70. *Id.* § 5; *see* CONSTITUTIONAL AFFAIRS COMM., *THE OPERATION OF THE SPECIAL IMMIGRATION APPEALS COMMISSION (SIAC) AND THE USE OF SPECIAL ADVOCATES*, 2004-5, H.C. 323-I, at 19-26; *see also* Eric Metcalfe, *Representative but Not Responsible: The Use of*

Just seventeen detention orders were ever issued under Part IV, over half of them originating in December 2001.<sup>71</sup> Nevertheless, the emergence of detention without trial and the accompanying derogation under article 15 of the European Convention on Human Rights<sup>72</sup> were politically unpalatable. Accordingly, opposition continued in Parliament and also through official reviews. As a result, Part IV was subjected to an unusual degree of scrutiny. In particular, section 122 of the same Act required the Home Secretary to appoint a committee of Privy Counsellors to conduct a review within two years.<sup>73</sup> Lord Newton chaired this team, which reported on December 18, 2003.<sup>74</sup> The Committee viewed the system of detention under Part IV as objectionable in principle because of the lack of safeguards against injustice and also because it provided no protection against British terrorists. It argued for either a more aggressive criminal prosecution stance or intrusive administrative restraints on movement and communications, including some measures not far short of the control orders eventually enacted. The Home Office paper in response<sup>75</sup> was rather more reflective than the initial negative reactions from the Home Secretary<sup>76</sup> but anticipated no urgent reform.

This insouciance was terminally shaken because of judicial intervention. In *A v. Secretary of State for the Home Department*,<sup>77</sup> the House of Lords concluded in a judgment issued on December 16, 2004, that, while a majority accepted that a public emergency sufficient to warrant a derogation notice under article 15 had been shown to exist,<sup>78</sup> the policy failed on the grounds of

*Special Advocates in English Law*, JUSTICE J., Dec. 2004, at 11. The system was commended by the House of Lords in *Sec'y of State for the Home Dep't v. Rehman*, [2001] UKHL 47, [2003] 1 A.C. 153, 159. For its role, see *Sec'y of State for the Home Dep't v. M*, [2004] EWCA (Civ) 324, [2004] 2 All E.R. 863. For the role of the Court of Appeal, see *G v. Sec'y of State for the Home Dep't*, [2004] EWCA (Civ) 265, [2005] 2 All E.R. 882.

71. For commentaries, see JOINT COMM. ON HUMAN RIGHTS, CONTINUANCE IN FORCE OF SECTIONS 21 TO 23 OF THE ANTI-TERRORISM, CRIME AND SECURITY ACT 2001, 2002-3, H.C. 462, H.L. 59; LORD CARLILE, ANTI-TERRORISM, CRIME AND SECURITY ACT 2001, Pt. IV SECTION 28: REVIEW 2004 (2005); JOINT COMM. ON HUMAN RIGHTS, ANTI-TERRORISM, CRIME AND SECURITY ACT 2001: STATUTORY REVIEW AND CONTINUANCE OF PART 4, 2003-4, H.L. 38, H.C. 381.

72. European Convention for the Protection of Human Rights and Fundamental Freedoms art. 15, *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 221, Europ. T.S. No. 5 [hereinafter European Convention on Human Rights]. For an explanation of article 15, see *infra* text accompanying note 132.

73. Anti-terrorism, Crime and Security Act, 2001, c. 24, § 122.

74. PRIVY COUNSELLOR REVIEW COMM., ANTI-TERRORISM, CRIME AND SECURITY ACT 2001 REVIEW, REPORT, 2003-4, H.C. 100.

75. U.K. HOME OFFICE, RECONCILING SECURITY AND LIBERTY, *supra* note 65.

76. See Richard Ford & Daniel McGrory, *Blunkett Fury as Privy Councillors Attack Terror Laws*, TIMES (London), Dec. 19, 2003, at 4.

77. [2004] UKHL 56, [2005] 2 A.C. 68.

78. This limit (reflecting the previous stance in *Secretary of State for the Home Department v. Rehman*, [2001] UKHL 47, [2003] 1 A.C. 153) belies the commentaries which heralded the judgment as a new chapter in judicial activism. Compare Walker, *supra*

disproportionality and discrimination. The question was whether detention without trial was, in the words of article 15, “strictly required by the exigencies of the (emergency) situation?” Unlike the reluctance to question the existence of an “emergency,” here the court made clear that it was not hidebound by “any doctrine of deference” and should apply a “greater intensity of review.”<sup>79</sup> There were two main features of Part IV which were out of keeping with the objective of public safety and were ultimately held to be disproportionate. One was that Part IV only applied to deportable aliens. While they represented the predominant threat, they were not the only problem—to ignore terrorism threatened by British citizens was wrong. The other was that the creation of a “prison with three walls”—the absent fourth wall allowing foreign terrorists to depart the jurisdiction and plot abroad—likewise made no sense.<sup>80</sup> The former feature additionally breached article 14 of the Convention.

Legislators and the Executive would have been foolish to ignore the issuance of a declaration of incompatibility under section 4 of the Human Rights Act 1998, the quashing of the 2001 order under the Human Rights Act, the prospect of future litigation under section 7(1)(a) of the Human Rights Act for an appropriate remedy (presumably compensation rather than release) under section 8, and the prospect of future litigation in the U.K. courts and before the Strasbourg European Court of Human Rights. Furthermore, while a majority of judges had upheld the declaration of a state of emergency, the persistence of such a declared state could become difficult to sustain over a long period of time. In any event, the conditions of detention without trial, increasingly substantial in time and with such bleak prospects of freedom, would eventually be questioned under article 3 standards because of their impact on mental health.<sup>81</sup> Finally, and most relevant to this Article, the strategy sought to distinguish sharply between neighbor and foreigner, denoting them naively as friend and foe. That denotation was unrealistic in 2001. It was condemned as discriminatory by the end of 2004, and the legal instability which resulted could not be permitted to persist.<sup>82</sup>

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note 62, with Adam Tomkins, *Readings of A v. Secretary of State for the Home Department*, 2005 PUB. L. 259.

79. A, [2004] UKHL [42], [44] (Lord Bingham).

80. *Id.* at [81] (Lord Nicholls); *id.* at [123] (Lord Hope); *id.* at [173]-[174] (Lord Rodger); *id.* at [212]-[215] (Lord Walker); *id.* at [230] (Baroness Hale).

81. See Robert Verkaik, *Belmarsh Detainees: Terror Suspects Are Mentally Ill After Torture, Warn Doctors*, INDEPENDENT (London), Oct. 14, 2004, at 4. But arguments along these lines as a basis for a complaint under article 3 were rejected by the European Court of Human Rights in *Léger v. France*, App. No. 19324/02 (Apr. 11, 2006).

82. 431 PARL. DEB., H.C. (6th ser.) (Feb. 23, 2005) 347 (Charles Clarke).

## B. *The Replacement System*

### 1. *Control orders—outline*

The Prevention of Terrorism Act 2005 replaced Part IV (which it largely repeals).<sup>83</sup> The Act came into force on March 11, 2005, just a couple of weeks after it was first introduced into Parliament.<sup>84</sup> It did not get off to a good start. The exceptionally rapid legislative process was the subject of highly rancorous debate which was said to have “demeaned” Parliament<sup>85</sup> as well as becoming the catalyst for the most severe bout of disagreement between Houses of Commons and Lords in modern history.<sup>86</sup> In the course of these debates, the opposition complained that the government had known since December 2004 that replacement legislation was essential, having been forewarned by both the Appellate Committee of the House of Lords and the Newton Committee.<sup>87</sup> The opposition also protested that there was no provision for ongoing Privy Counsellor review.<sup>88</sup> The disagreements were, however, subdued one year later, when only the Lords actually divided the House on a debate about the renewal order.<sup>89</sup>

The Prevention of Terrorism Act provides for “control orders” which differ from Part IV measures in a number of important respects. Most notably, they can apply to citizens as well as foreigners, and they do not for the most part rely upon a derogation notice.

As for the first difference, opposition claims that the extension was unnecessary and that there had been no change in the situation since the previous year were well-founded on that narrow argument,<sup>90</sup> but one might argue that the government had failed to recognize for some years the involvement of citizens as well as noncitizens in al Qaeda activity. The inclusion of citizens within the scheme meant that SIAC was no longer an

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83. Prevention of Terrorism Act, 2005, c. 2, § 16.

84. The First Reading was on February 22, 2005. 431 PARL. DEB., H.C. (6th ser.) (Feb. 22, 2005) 186.

85. 431 PARL. DEB., H.C. (6th ser.) (Feb. 28, 2005) 774 (Dominic Grieve). Most sections were not considered in the committee stage debate, and the Joint Committee on Human Rights produced two short reports. *See* JOINT COMM. ON HUMAN RIGHTS, PREVENTION OF TERRORISM BILL: PRELIMINARY REPORT, 2004-5, H.L. 61, H.C. 389; JOINT COMM. ON HUMAN RIGHTS, PREVENTION OF TERRORISM BILL, 2004-5, H.L. 68, H.C. 334.

86. The House of Lords sitting of March 10, 2005 actually lasted until 7:00 PM on March 11 and was claimed to be the longest ever recorded. 670 PARL. DEB., H.L. (5th ser.) (Mar. 10, 2005) 1059. The House of Lords relented in its objections after rejecting the Commons’ version on four occasions. *See id.* at 845, 999, 1019, 1032.

87. *See* 431 PARL. DEB., H.C. (6th ser.) (Feb. 23, 2005) 364 (David Davies).

88. *See, e.g.*, 431 PARL. DEB., H.C. (6th ser.) (Mar. 10, 2005) 1804 (Dominic Grieve).

89. 678 PARL. DEB., H.L. (5th ser.) (Feb. 15, 2006) 1213; 442 PARL. DEB., H.C. (6th ser.) (Feb. 15, 2006) 1499. The latter debate was at one point attended by just thirteen members. *See* 442 PARL. DEB., H.C. (6th ser.) (Feb. 15, 2006) 1516.

90. 431 PARL. DEB., H.C. (6th ser.) (Feb. 23, 2005) 364-65 (David Davis).

appropriate venue for the review of orders. Accordingly, jurisdiction was vested in the High Court or Court of Session (for Scotland) under section 15.<sup>91</sup> Nevertheless, the process by which this court review is undertaken very much resembles the SIAC model (delineated in the sole schedule to the Act).<sup>92</sup> During the debates on the bill, Lord Carlile questioned whether the High Court is the most suitable venue; he suggested that there should be some initial reliance upon the designated District Judges (Magistrates' Courts), Resident Magistrates (in Northern Ireland), or Scottish Sheriffs.<sup>93</sup> This idea is appealing—those judges have built up expertise in dealing with applications for extension of detention under section 41 of the Terrorism Act 2000, and their deployment could then avoid the High Court reviewing its own decisions. The government felt it better reflected the seriousness of the order to employ a High Court judge, however.<sup>94</sup> A more negative viewpoint was that involvement of the courts to any extent would bring them into disrepute.<sup>95</sup> Reflecting very much the dynamic of the need to respond to anticipatory risk, control orders were said to involve “a risk assessment” and “not a decision.”<sup>96</sup>

These views, apparently shared by some senior judges,<sup>97</sup> which embody the assumption that judges cannot or should not handle issues of anticipatory risk, should be rejected. It is a fundamental principle that the criminal and civil obligations imposed on the individual should be subject to judicial process (as recognized by article 6 of the European Convention on Human Rights).<sup>98</sup> In addition, the precedent of SIAC has been firmly established, and it is unrealistic to claim that it is distinguishable from the High Court since it involves an administrative process.<sup>99</sup> Indeed, it has been categorized as a “court of record” under the Anti-terrorism, Crime and Security Act 2001, section 35.<sup>100</sup> Finally, judges are involved every day in risk assessment when taking bail and sentencing decisions.

As for the second difference, control orders which derogate from rights to liberty (within the terms of article 5 of the European Convention) do require a

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91. Prevention of Terrorism Act, 2005, c. 2, § 15.

92. But note schedule 1, paragraph 4 of the Prevention of Terrorism Act 2005, which imposes a duty of full disclosure of relevant material to the court. *Id.* § 11. This affords the court an opportunity to make independent analysis, an opportunity that the SIAC does not have.

93. 670 PARL. DEB., H.L. (5th ser.) (Mar. 3, 2005) 372 (Lord Carlile).

94. 670 PARL. DEB., H.L. (5th ser.) (Mar. 8, 2005) 671 (Lord Falconer).

95. 431 PARL. DEB., H.C. (6th ser.) (Feb. 23, 2005) 419 (David Trimble).

96. 670 PARL. DEB., H.L. (5th ser.) (Mar. 1, 2005) 163 (Lord Lloyd).

97. 431 PARL. DEB., H.C. (6th ser.) (Mar. 9, 2005) 1576 (Charles Clarke).

98. European Convention on Human Rights, *supra* note 72, art. 6 (“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”).

99. 670 PARL. DEB., H.L. (5th ser.) (Mar. 1, 2005) 195 (Baroness Kennedy).

100. See WALKER, *supra* note 32, at 236-37.



derogation notice and can only be made by the courts (section 4) while non-derogating orders (expected to be the norm) must still be confirmed by the courts (section 3). This distinction must be understood in light of the jurisprudence of the European Court of Human Rights which does not treat every restriction on physical movement as a loss of “liberty” within article 5. For example, in *Guzzardi v Italy*, the Court declared that article 5:

[I]s not concerned with mere restrictions on liberty of movement; such restrictions are governed by Article 2 of Protocol No. 4 which has not been ratified by Italy. In order to determine whether someone has been “deprived of his liberty” within the meaning of Article 5, the starting point must be his concrete situation and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question.<sup>101</sup>

It follows that the detainees did not walk free from H.M. Prison Belmarsh. In fact, they were no longer in detention at all. On March 11, 2005, just before the 2005 Act came into force, Mr. Justice Ouseley in the SIAC decided not to confirm the order against one Part IV detainee, A, and released eight others, B, E, H, K, P, Q, plus Abu Qatada and Mahmoud Abu Rideh, on bail (one, G, was already on bail).<sup>102</sup> The result was that no one was left in physical detention under Part IV.<sup>103</sup> The detention policy had thus been decimated on the same day that control orders came into being. The bail conditions very much presaged the conditions that appeared in due time under control orders.

Following the July 2005 bombings in London, the government renewed its efforts to explore new possibilities of forced removal. In the expectation of a successful outcome, nine control orders issued against former detainees were revoked and they were detained in August 2005 pending deportation.<sup>104</sup> In total, the government served twenty-nine individuals with notices of intention to deport on national security grounds where assurances from the receiving

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101. *Guzzardi v. Italy*, Ser. A, No. 39, 3 Eur. H.R. Rep. 333, 362-63 (Eur. Ct. H.R. 1981); see also *Ciancimino v. Italy*, App. No. 12541/86, 70 Eur. Comm’n H.R. Dec. & R Rep. 103 (1991); *Raimondo v. Italy*, App. No. 12954/87, Ser. A, No. 281-A, 18 Eur. H.R. Rep. 237 (1994); *Mancini v. Italy*, App. No. 44955/98 (Eur. Ct. H.R. 2001); *Labita v. Italy*, App. No. 26772/95 (Eur. Ct. H.R. 2000); *Trijonis v. Lithuania*, App. No. 2333/02 (Eur. Ct. H.R. 2005); *Saadi v. United Kingdom*, App. No. 13229/03 (Eur. Ct. H.R. 2006); *R (Saadi) v. Sec’y of State for the Home Dep’t*, [2001] EWHC (Admin) 670, [24]; cf. *McDonald v. Dickson*, [2003] S.L.T. 467 (H.C.J.) (Scot.).

102. *G v. Sec’y of State for the Home Dep’t*, Special Immig. App. No. SC/2/2002 (May 20, 2004), available at <http://www.hmccourts-service.gov.uk/legalprof/judgments/siac/outcomes/scg10g.htm>.

103. See Richard Ford, *Terror Suspects Freed on Bail*, TIMES (London), Mar. 12, 2005, at 6. Detainee I was serving a prison sentence. Vikram Dodd, *Terror Bill: Everyday Life for the Gagged and Tagged: Conditions Bail Judge Expects Similar Limits in Control Orders: The 11 Detainees Likely to Be Freed*, GUARDIAN (London), Mar. 11, 2005, at 4.

104. Roger Blitz & Ben Hall, *Move to Deport Foreign Terror Suspects*, TIMES (London), Aug. 12, 2005, at 2. Seventeen control orders were issued in total. 440 PARL. DEB., H.C. (6th ser.) (Dec. 15, 2005) 169WS (Charles Clarke).

state are thought to be required.<sup>105</sup> Most remain in custody, though the government claims that agreements are “imminent,”<sup>106</sup> despite the fact that no agreement has been secured with the country of origin of the majority (Algeria) after some months if not years of contacts, and despite the fact that even where an agreement is in existence (for instance, with Jordan) the relevant nationals, such as Abu Qatada, have still not been removed.<sup>107</sup>

Consequently, Lord Carlile, the independent reviewer of terrorism legislation, has expressed concerns about whether control orders under the Terrorism Act 2005 would provide a sounder legal basis for the detainees’ state of limbo.<sup>108</sup> However, the Court of Appeal in *R (Q) v. Secretary of State for the Home Department* did hold that a detention period of one year, with the prospect of further detention until deportation to Algeria “in the near future,” was lawful.<sup>109</sup> One must qualify this precedent with the fact that Q, who had been detained under the 2001 Act and then subjected to a control order until his detention with a view to deportation, had constantly lied about his identity and was thus seen as contributing to his treatment.

## 2. Control orders—contents and issuance

The essence of the legislation is to permit the government to issue “control orders” which may regulate and restrict individuals suspected of being involved in terrorism. They fit the pattern of dealing with anticipatory risk, and so the basis for the orders is intelligence-led:

Much of the information is derived from intelligence. The sources and content of such intelligence in most instances demand careful protection in the public interest, given the current situation in which there is needed a concerted and strategic response to terrorism (and especially suicide bombings). The techniques of gathering intelligence, and the range of opportunities available, are wide and certainly in need of secrecy. Human resources place themselves at risk—not least by any means those who offer unsolicited information out of disapproval of conduct and events at which they may have been and could continue to be present.<sup>110</sup>

A control order is defined as “an order against an individual that imposes obligations on him for purposes connected with protecting members of the public from a risk of terrorism.”<sup>111</sup> It should be emphasized that any individual

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105. 440 PARL. DEB., H.C. (6th ser.) (Dec. 15, 2005) 168WS (Charles Clarke).

106. JOINT COMM. ON HUMAN RIGHTS, *supra* note 1, at 41.

107. See LORD CARLILE, FIRST REPORT OF THE INDEPENDENT REVIEWER PURSUANT TO SECTION 14(3) OF THE PREVENTION OF TERRORISM ACT 2005, at 7 (2006); see also Jason Bennetto, *Anti-terror Measures: Deportation Fight Looms as Police Arrest 10 Islamic Extremists*, INDEPENDENT (London), Aug. 12, 2005, at 4.

108. LORD CARLILE, *supra* note 107, at 8-9.

109. *R (Q) v. Sec’y of State for the Home Dep’t*, [2006] EWHC (Admin) 2690, [23].

110. LORD CARLILE, *supra* note 107, at 12.

111. Prevention of Terrorism Act, 2005, c. 2, § 1(1). Under section 15(1), “terrorism”

can be subject to these orders—“neighbor” or visitor. The obligations imposed must be considered “necessary for purposes connected with preventing or restricting involvement by that individual in terrorism-related activity.”<sup>112</sup> Subsection 9 defines “involvement in terrorism-related activity” (which may relate to specific acts or to terrorism in general) as comprising: (a) the commission, preparation or instigation of acts of terrorism; (b) conduct which facilitates or is intended to facilitate the commission, preparation or instigation of such acts; (c) conduct which gives encouragement or is intended to give encouragement to the commission, preparation or instigation of such acts; or (d) conduct which gives support or assistance to those known or believed to be involved in terrorism-related activity.<sup>113</sup> The final leg (d) differs from the others in that it contains an element of mens rea as to outcomes. The government resisted an amendment to insert “knowingly” in (a) to (c), suggesting that the need to protect the public would only be triggered by those who are more than unwitting in their behavior.<sup>114</sup>

Subsection (4) sets out a very lengthy and nonexclusive list of obligations that may be imposed pursuant to a control order. It includes: (a) a prohibition or restriction on the subject’s possession or use of specified articles or substances (such as a computer); (b) a prohibition or restriction on the subject’s use of specified services or specified facilities, or on his carrying on specified activities (banking facilities or a telephone may be in mind here); (c) a restriction with respect to the subject’s work or other occupation, or in respect of his business; (d) a restriction on the subject’s association or communications with specified persons or with other persons generally; (e) a restriction in respect of the subject’s place of residence or on the persons to whom he gives access to his place of residence; (f) a prohibition on the subject’s being at specified places or within a specified area at specified times or on specified days; (g) a prohibition or restriction on the subject’s movements to, from or within the United Kingdom, a specified part of the United Kingdom or a specified place or area within the United Kingdom; (h) a requirement that the subject comply with such other prohibitions or restrictions on his movements as may be imposed, for a period not exceeding twenty-four hours, by directions given to him in the specified manner, by a specified person and for the purpose of securing compliance with other obligations imposed by or under the order (even a curfew might be imposed); (i) a requirement that the subject surrender his passport, or anything in his possession to which a prohibition or restriction imposed by the order relates, to a specified person for a period not exceeding the period for which the order remains in force; (j) a requirement that the

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has the same meaning as in section 1 of the Terrorism Act 2000. For an analysis of this wide-ranging definition, see Clive Walker, *The Legal Definition of “Terrorism” in United Kingdom Law and Beyond*, 2007 PUB. L. 331.

112. Prevention of Terrorism Act, 2005, c. 2, § 1(3).

113. *Id.* § 1(9).

114. 670 PARL. DEB., H.L. (5th ser.) (Mar. 3, 2005) 459-60 (Lord Falconer).

subject give access to specified persons to his place of residence or to other premises to which he has power to grant access; (k) a requirement that the subject allow specified persons to search that place or any such premises for the purpose of ascertaining whether obligations imposed by or under the order have been, are being or are about to be contravened; (l) a requirement that the subject allow specified persons, either for that purpose or for the purpose of securing that the order is complied with, to remove anything found in that place or on any such premises and to subject it to tests or to retain it for a period not exceeding the period for which the order remains in force; (m) a requirement that the subject allow himself to be photographed; (n) a requirement that the subject cooperate with specified arrangements for enabling his movements, communications or other activities to be monitored by electronic or other means; (o) a requirement that the subject comply with a demand made in the specified manner to provide information to a specified person in accordance with the demand; (p) a requirement that the subject report to a specified person at specified times and places.<sup>115</sup>

Subsection (5) emphasizes that a control order may restrict a person's movements by, for example, requiring him to stay in a particular place at particular times or generally. This allows the government to impose restrictions such as curfews or exclusion zones. Complementary to these possible obligations are the facilitative requirement clauses: controlled persons may be required to cooperate with practical arrangements for monitoring control orders, such as wearing and maintaining apparatus as directed.<sup>116</sup> The controlled person may also be required to provide information under a control order, including advance information about his proposed movements or other activities.<sup>117</sup> Similarly, an obligation imposed by an order may be worded so that it can be waived by the authorities provided prior approval is sought.<sup>118</sup>

Given the depth and breadth of the list in section 1(4), opposition party and other legislators attempted during the bill's passage to remove any further discretion.<sup>119</sup> A variety of specific exclusions were also proposed, including obligations which would prevent the taking of legal advice, participation in elections, or being required to provide information or answer questions such as might self-incriminate or reveal confidential information. The government rejected the need for such restraints, relying instead on the general requirements of proportionality and referring to the grounds for limitation of rights to privacy, speech, and association under articles 8 to 11 of the European Convention on Human Rights.<sup>120</sup> It was, however, accepted that imposing an

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115. Prevention of Terrorism Act, 2005, c. 2, § 1(4).

116. *Id.* § 1(6).

117. *Id.* § 1(7).

118. *Id.* § 1(8).

119. *See, e.g.*, 670 PARL. DEB., H.L. (5th ser.) (Mar. 3, 2005) 425 (Lord Thomas); *id.* at 634-35 (Lord Kingsland).

120. *Id.* at 444 (Lord Falconer).

obligation to leave the United Kingdom would be an improper usurpation of deportation powers and that legal privilege could only be taken away by express words.<sup>121</sup> The legislators also posited a distinction between the improper asking for information for the purposes of securing a conviction and legitimately asking for information in the spirit of the Act to prevent terrorism.<sup>122</sup> This distinction is not wholly convincing. If a person refuses to answer the question, “Where is the bomb?,” then he might commit an offense under section 9(1) of the Prevention of Terrorism Act for contravening an obligation under section 1(4)(o) to provide information. But equally he could be prosecuted under section 19 of the Terrorism Act 2000 for the offence of withholding information about terrorism. A more successful distinction here might be based on the procedures under which the questioning takes place. If the general safeguards which pertain to police interrogations in England and Wales under the Police and Criminal Evidence Act 1984<sup>123</sup> are in place, including cautions, tape recording, access to lawyers, and so on, then the police can rightly collect information or evidence and seek the appropriate sanctions.<sup>124</sup> If those safeguards are not in place, then there will be difficulties in using the information to prosecute the suspect. Finally, it might be argued that if obligations are imposed outside the express headings of section 1(4), then they will not be “prescribed by law” for the purposes of articles 8 to 11 of the European Convention.<sup>125</sup>

Whilst control may be a step down from detention without trial on international human rights scales, its impact should not be dismissed lightly. Just as Part IV detention was damaging to mental health and to family life and personal privacy, as well as directly infringing political rights, so control orders can produce the same damage. The state of restriction and uncertainty, heightened by the ever-present threat of deportation or prosecution, has been damaging to the mental state of several subjects.<sup>126</sup> In addition, control orders can affect family members more directly than detention, since it is impossible to isolate the subject when imposing restrictions on that individual’s communications and visitors.<sup>127</sup>

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121. *Id.* at 444-50.

122. *Id.*

123. Police and Criminal Evidence Act, 1984, c. 60.

124. For details regarding these rules, see ANDREW SANDERS & RICHARD YOUNG, CRIMINAL JUSTICE chs. 3-5 (3d ed. 2007).

125. See JOINT COMM. ON HUMAN RIGHTS, PREVENTION OF TERRORISM BILL: PRELIMINARY REPORT, *supra* note 85, at 5.

126. See LIBERTY (NAT’L COUNCIL FOR CIVIL LIBERTIES), RENEWING THE PREVENTION OF TERRORISM ACT 2005 annex 2, ¶¶ 6-11 (2006) (redacted witness statement by Gareth Peirce, solicitor, for a number of the men subject to control orders).

127. See *id.* annex 3, ¶¶ 15-16 (redacted witness statement by Gareth Peirce explaining how, in practice, control orders have affected her clients and other wives and families in similar positions).

There are two ways to secure a control order under section 1(2). The institution of a “non-derogating” control order is by the Home Secretary,<sup>128</sup> but if an order involves obligations that are incompatible with the right to liberty under article 5 of the European Convention on Human Rights (or any other right), it can be made only by the court on an application by the Secretary of State.<sup>129</sup> If incompatible with article 5, the obligation will be a “derogating obligation.”<sup>130</sup> Such an order must be justified by reference to a designation order (an order under section 14(1) of the Human Rights Act 1998 by which a derogation under article 15 is designated).<sup>131</sup> By way of explanation of this distinction, article 15 is the key provision in the European Convention which contemplates “emergency measures” such as against terrorism which will “derogate” from the rights which normally must be observed under the Convention, most of the terms of which have been incorporated into U.K. domestic law by way of the Human Rights Act 1998.<sup>132</sup> By article 15(1), “[i]n time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.”<sup>133</sup> The derogation can be challenged in both domestic courts<sup>134</sup> and the European Court of Human Rights.<sup>135</sup> The derogation can relate to rights to liberty under article 5 and privacy under article 8, and to freedoms of religion, expression, and association under articles 9 to 11, but not to rights against torture under article 3 which are expressed as absolute under article 15(2).<sup>136</sup>

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128. See Prevention of Terrorism Act, 2005, c. 2, §§ 2-3.

129. See *id.* § 4.

130. *Id.* § 1(10).

131. *Id.*

132. See Human Rights Act, 1998, c. 42, § 14. For the legislative background and impact of the Human Rights Act 1998, see generally RICHARD CLAYTON & HUGH TOMLINSON, *THE LAW OF HUMAN RIGHTS* (2000); DAVID FELDMAN, *CIVIL LIBERTIES AND HUMAN RIGHTS IN ENGLAND AND WALES* (2d ed. 2002); HUMAN RIGHTS LAW AND PRACTICE (Anthony Lester & David Pannick eds., 2d ed. 2004); Clive Walker & Russell L. Weaver, *The United Kingdom Bill of Rights 1998: The Modernisation of Rights in the Old World*, 33 U. MICH. J.L. REFORM 497 (2000).

133. European Convention on Human Rights, *supra* note 72, art. 15.

134. See, e.g., *A v. Sec’y of State for the Home Dep’t*, [2004] UKHL 56, [2005] 2 A.C. 68.

135. See *Ireland v. United Kingdom*, App. No. 5310/71, Ser. A, No. 25, 2 Eur. H.R. Rep. 25 (Eur. Ct. H.R. 1978) (challenging U.K. derogation); *Brannigan v. United Kingdom*, App. Nos. 14553-14554/89, Ser. A, No. 258-B, 17 Eur. H.R. Rep. 539 (Eur. Ct. H.R. 1993) (same); *Marshall v. United Kingdom*, App. No. 41571/98 (Eur. Ct. H.R. 2001); *Kerr v. United Kingdom*, App. No. 40451/98 (Eur. Ct. H.R. 2001).

136. “No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.” European Convention on Human Rights, *supra* note 72, art. 15.

### 3. *Non-derogating control orders*

Section 15 provides the unhelpful definition that “‘non-derogating control order’ means a control order made by the Secretary of State.”<sup>137</sup> This formulation made sense in the initial drafts of the Act (wherein there was no court involvement). In contrast, under section 15, a derogating control order is defined as “a control order imposing obligations that are or include derogating obligations” (which are defined by section 1(10)).<sup>138</sup> One might define a non-derogating control order simply as an order which does not contain derogating obligations.

The Home Secretary may make a non-derogating control order under section 2(1) if he:

- (a) has reasonable grounds for suspecting that the individual is or has been involved in terrorism-related activity; and
- (b) considers that it is necessary, for purposes connected with protecting members of the public from a risk of terrorism, to make a control order imposing obligations on that individual.<sup>139</sup>

The procedures under section 2(2) allow the Secretary of State to impose a control order on an individual already subject to a control order imposed by the court in very limited circumstances. In fact, the Secretary only may do so if the court has decided to revoke its control order (under section 3 below) but has postponed that revocation in order to allow the Secretary of State to decide whether to impose a new order.<sup>140</sup> This provision is presumably included to clarify that two control orders, one by the court and one by the Secretary of State, may be issued in relation to the same person at the same time, at least in the circumstances specified in section 2(2). Otherwise the court’s order will be exclusive. There would appear to be nothing in the Act to stop a new order from being issued after a previous order has simply expired or has been quashed without postponement by the courts. The question will then arise as to whether that order is necessary and proportionate.

The two tests in section 2(1) are designed to elicit the factual bases for the issuance of a control order, and their strength will be later tested in court. Examining in further detail the meanings of the two tests in section 2(1), as set out above, the first test is expressly objective, though the proof threshold is set at a low level, consistent with the dynamic of anticipatory risk. In fact, the threshold is lower, for example, than that required for the issuance of a civil injunction.<sup>141</sup> The second test is apparently subjective and has no specific standard set, though the modern practice is to set an objective standard.<sup>142</sup> In

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137. Prevention of Terrorism Act, 2005, c. 2, § 15(1).

138. *Id.*

139. *Id.* § 2(1).

140. *Id.* § 2(2).

141. See 670 PARL. DEB., H.L. (5th ser.) (Mar. 3, 2005) 371 (Lord Carlile).

142. See, e.g., *Youssef v. Home Office*, [2004] EWHC 1884, [62] (Q.B.) (holding that

assessing the actual level of proof, consideration may be given to the statement of Lord Hoffman in *Secretary of State for the Home Department v. Rehman* (a deportation case arising before the provenance of control orders), in which he stated that:

In a criminal or civil trial in which the issue is whether a given event happened, it is sensible to say that one is sure that it did, or that one thinks it more likely than not that it did. But the question in the present case is not whether a given event happened but the extent of future risk. This depends upon an evaluation of the evidence of the appellant's conduct against a broad range of facts with which they may interact. The question of whether the risk to national security is sufficient to justify the appellant's deportation cannot be answered by taking each allegation seriatim and deciding whether it has been established to some standard of proof. It is a question of evaluation and judgment, in which it is necessary to take into account not only the degree of probability of prejudice to national security but also the importance of the security interest at stake and the serious consequences of deportation for the deportee.<sup>143</sup>

This position was echoed in cases decided under Part IV. In *Secretary of State for the Home Department v. M*, Lord Woolf stated:

SIAC is required to come to its decision as to whether or not reasonable grounds exist for the Secretary of State's belief or suspicion. Use of the word "reasonable" means that SIAC has to come to an objective judgment. The objective judgment has however to be reached against all the circumstances in which the judgment is made. There has to be taken into account the danger to the public which can result from a person who should be detained not being detained. There are also to be taken into account the consequences to the person who has been detained. To be detained without being charged or tried or even knowing the evidence against you is a grave intrusion on an individual's rights. Although, therefore, the test is an objective one, it is also one which involves a value judgment as to what is properly to be considered reasonable in those circumstances.<sup>144</sup>

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the reasonableness of the Home Secretary's view that there was a real prospect of being able to remove Youssef, as a suspected terrorist, to Egypt in compliance with article 3 of the Convention was to be judged by the court as the primary decisionmaker, just as it was to be the court as primary decisionmaker that judges the reasonableness of the length of the detention); *R v. Ministry of Defence*, [1996] 1 Q.B. 517, 538 (holding in the case of administrative discharges from military service on the grounds of homosexuality, where fundamental human rights are being restricted, that the minister on judicial review will need to show that there is an important competing public interest which he could reasonably judge sufficient to justify the restriction, and he must expect his reasons to be closely scrutinized under a more intensive review process and a greater readiness to intervene than would ordinarily characterize a judicial review challenge); *Sec'y of State for Educ. & Sci. v. Tameside Metro. Borough Council*, [1977] A.C. 1014, 1047-52 (H.L.) (finding that the Secretary of State, in a dispute about changes to schooling provision, had had a sufficient objective factual basis for believing that the change proposed by the local authority would lead to educational chaos or undue disruption before blocking their plans, even though the wording of the statutory power simply required the Minister to be "satisfied" of the facts).

143. [2001] UKHL 47 [56], [2003] 1 A.C. 153, 194 (H.L.).

144. [2004] EWCA (Civ) 324 [16], [2004] 2 All E.R. 863.



The Court of Appeal relied on these passages in *A v. Secretary of State for the Home Department (No. 2)* (a sequel to the December 2004 case dealing principally with the admissibility of evidence of torture).<sup>145</sup> However, the Court did regard as “unfortunate” a statement by SIAC that the formula was “not a demanding standard.”<sup>146</sup> Nevertheless, Lord Justice Laws concluded that:

The nature of the subject-matter is such that it will as I have indicated very often, usually, be impossible to prove the past facts which make the case that A is a terrorist. Accordingly a requirement of proof will frustrate the policy and objects of the Act. Now, it will at once be obvious that the derogation issue and the scrutiny issue run together here. In dealing with the former I have already said that the legislature’s choice of belief and suspicion as the test for certification and thus detention tends to support the view that the target of the Act’s policy includes those who belong to loose, amorphous, unorganised groups. So it does; the choice is apt to strike the target. Proof would not be.<sup>147</sup>

Likewise, Neuberger concluded that a court “need not, as I have sought to explain, be concerned about satisfying itself that on the balance of probabilities, the belief for suspicion is justified, or that it shares the belief or suspicion. It is merely concerned with deciding whether there are reasonable grounds for such belief or suspicion.”<sup>148</sup>

Whatever the judges might say, the government clearly intended to operate at a relatively low level of proof. In response to demands that the legislature adopt a balance-of-probabilities test, the Home Secretary made clear that to accede would mean that “potentially dangerous individuals could simply slip away.”<sup>149</sup>

A non-derogating control order expires after twelve months, but it may be renewed.<sup>150</sup> The date must be specified,<sup>151</sup> but it appears that there is no power to vary the period from twelve months. On renewal (the commencement and expiration of which is covered by subsections (7) and (8)), the Secretary of State must make two findings. First, the Secretary must find that the order, by continuing in force, would protect members of the public from a risk of terrorism.<sup>152</sup> Second, the Secretary must deem necessary any obligations

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145. [2004] EWCA (Civ) 1123, [34], [46], [2005] 1 W.L.R. 414, 433, 435. The appeal is principally confined to the admissibility of evidence tainted by torture. *A v. Sec’y of State for the Home Dep’t*, [2005] UKHL 71, [2006] 2 A.C. 221; *see also* JOINT COMM. ON HUMAN RIGHTS, COUNTER-TERRORISM POLICY AND HUMAN RIGHTS: TERRORISM BILL AND RELATED MATTERS, 2005-6, H.C. 561-I, H.L. 75-I, at 48.

146. [2004] EWCA (Civ) 1123 [49], [2005] 1 W.L.R. 414, 436 (Pill, L.J.).

147. *Id.* at [231].

148. *Id.* at [370] (Neuberger, L.J., dissenting).

149. 431 PARL. DEB., H.C. (6th ser.) (Mar. 9, 2005) 1588 (Charles Clarke).

150. Prevention of Terrorism Act, 2005, c. 2, § 2(4).

151. *Id.* § 2(5).

152. *Id.* § 2(6)(a).

imposed by the renewed order.<sup>153</sup> These grounds are different to those pertaining to the original imposition of the order under section 2(1), in that section 2(1)(b) corresponds with 2(6)(a), but there is no need on renewal specifically to review the evidence for the original suspicion that the individual is or has been involved in terrorism-related activity. However, section 2(6)(b) does require the Secretary to consider whether the obligations to be imposed are necessary to prevent the suspect's involvement in proscribed activity.<sup>154</sup> In this way, the case for renewal may differ entirely from the case for imposition.

In the original draft of the bill, non-derogating control orders could be instituted by the Secretary of State without any involvement of the courts. This feature was one of the major bones of contention in Parliament, as voiced by the shadow Secretary of State:

There are good reasons why the Home Secretary should not take such decisions. Imagine the pressures on any politician, and on the Home Secretary in particular, after a terrorist outrage. Imagine the temptation to be better safe than sorry and to put away everybody, which are precisely the circumstances in which a miscarriage of justice will occur.<sup>155</sup>

Opponents also pointed to the inconsistency between the treatment of non-derogating and derogating orders where, as shall be described, the court issues the order. On the latter, the government line was that there was an important distinction: derogating orders impinge upon article 5 liberty whereas non-derogating orders affect rights under articles 8 to 11 (at least), but not liberty within article 5.<sup>156</sup> However, search warrants likewise involve rights under article 8 and yet are issued by the judiciary.<sup>157</sup> Another dubious argument made by those who oppose judicial involvement was that judge-made orders would diminish accountability to Parliament.<sup>158</sup> Yet, this point is wholly spurious in practice, since the Home Secretary will always refuse to discuss individual cases. Home Office silence serves to rival the same lack of accountability that some saw in judges.

Additionally, critics of judicial involvement offered the "eccentric"<sup>159</sup> argument that a government minister rather than a judge is more adept at evaluating the case:

Those preventive orders require an assessment of the overall security situation, of the risks posed by particular individuals and of what measures are

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153. *Id.* § 2(6)(b).

154. *Id.*

155. 431 PARL. DEB., H.C. (6th ser.) (Feb. 23, 2005) 359 (David Davis).

156. 431 PARL. DEB., H.C. (6th ser.) (Feb. 28, 2005) 693 (Charles Clarke).

157. *See* 670 PARL. DEB., H.L. (5th ser.) (Mar. 7, 2005) 493 (Lord Lester).

158. 431 PARL. DEB., H.C. (6th ser.) (Feb. 22, 2005) 160 (Charles Clarke).

159. JOINT COMM. ON HUMAN RIGHTS, PREVENTION OF TERRORISM BILL: PRELIMINARY REPORT, *supra* note 85, at 5. As the committee points out, the Home Secretary undoubtedly has policy responsibility within the executive for criminal justice issues but does not claim a jurisdiction in individual cases. *Id.*

necessary and appropriate to meet those risks. It must be carried out on the basis of a wide range of complex intelligence and other material, and it involves making inferences and evaluations about matters affecting national security. I maintain that the Secretary of State is in a better position to carry out those judgments than the courts.<sup>160</sup>

This contention is implausible given that judges regularly have to assess materials (and occasionally must assess claims) relating to national security in other contexts, for example in applications regarding damaging publications.<sup>161</sup> Moreover, judges have actually been appointed as reviewers in security matters.<sup>162</sup> Finally, an argument was made that judges should not sully their reputations by involvement in security orders.<sup>163</sup> However, the idea that judges cannot handle sensitive intelligence data and cannot operate “judicially” unless there is full disclosure to the accused is belied by their deployment as judges in security cases before SIAC, as reviewers in other intelligence matters, and by the compromises made everyday in the regular courts under the doctrine of public interest immunity.

After much jousting on the issue,<sup>164</sup> a compromise was eventually reached that there should be an early judicial check by way of an *ex parte* application for leave to make the order.<sup>165</sup> This means that the Home Secretary, and not the court, remains the author of the order but only if he has been granted permission to do so by the court.<sup>166</sup> There are, however, two exceptional procedures. By section 3(1)(b), there is the possibility that the Secretary of State has made, and included in the control order, a statement saying that the urgency of the case requires him to make the control order without permission from the court.<sup>167</sup> Alternatively, it is possible under section 3(1)(c) for an order to be made on the Secretary of State’s authority alone where the order is made before March 14, 2005 against a detainee under Part IV of the Anti-terrorism, Crime and Security Act 2001.<sup>168</sup> The argument here is that if detention was

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160. 431 PARL. DEB., H.C. (6th ser.) (Feb. 29, 2005) 695 (Charles Clarke); *see also id.* at 1575.

161. *See, e.g.*, Attorney General v. Blake, [2001] 1 A.C. 268 (H.L.); Attorney General v. Observer Ltd., [1990] 1 A.C. 109 (H.L.); Sec’y of State for Defence v. Guardian Newspapers, [1985] 1 A.C. 339 (H.L.).

162. *See* Security Service Act, 1989, c. 5, § 4; Intelligence Services Act, 1994, c. 13, § 8; Police Act, 1997, c. 50, § 91; Regulation of Investigatory Powers Act, 2000, c. 23, §§ 57, 59, 62.

163. *See, e.g.*, 670 PARL. DEB., H.L. (5th ser.) (Mar. 1, 2005) 163 (Lord Lloyd).

164. *See, e.g.*, 670 PARL. DEB., H.L. (5th ser.) (Mar. 7, 2005) 482 (Lord Carlile); 670 PARL. DEB., H.L. (5th ser.) (Mar. 8, 2005) 627 (Lord Thompson); *id.* at 645 (Lord Thomas); 670 PARL. DEB., H.L. (5th ser.) (Mar. 10, 2005) 856 (Lord Falconer). *See also* the call for prior judicial authorization in JOINT COMM. ON HUMAN RIGHTS, PREVENTION OF TERRORISM BILL: PRELIMINARY REPORT, *supra* note 85, at 6.

165. 431 PARL. DEB., H.C. (6th ser.) (Mar. 9, 2005) 1579 (Charles Clarke).

166. Prevention of Terrorism Act, 2005, c. 2, § 3(1)(a).

167. *Id.* § 3(1)(b).

168. *Id.* § 3(1)(c).

justifiable, then there was reduced urgency to check whether the lesser intrusion of a non-derogating control order was needed. For the exceptional cases under (b) or (c) above, the Secretary of State must refer the control order to the court immediately, and the court must begin considering such a reference not later than seven days after the day on which the control order was made.<sup>169</sup>

On application under (a), if the court concludes that the relevant decisions are not “obviously flawed,” directions will then be given for a full hearing to take place to consider the order as soon as reasonably practicable.<sup>170</sup> The same rule applies under section 3(3) and (6) after a referral under (b) and (c), but there are two added possibilities for court intervention (again on the “obviously flawed” standard) in those situations.

First, section 3(6)(b) allows (in relation to orders issued under subsections (3)(1)(b) and (3)(1)(c)) the court to quash a particular obligation within the order, whereas an order under (a) is on an all or nothing basis—section 3(2)(a) mentions review only of the grounds of the order and not its obligations.<sup>171</sup> However, it is possible that the same review power applies to an order under (a) pursuant to section 2(9). This section states that “[i]t shall be immaterial, for the purposes of determining what obligations may be imposed by a control order made by the Secretary of State, whether the involvement in terrorism-related activity to be prevented or restricted . . . is connected with matters to which the Secretary of State’s grounds for suspicion relate.”<sup>172</sup> This provision surely does not relate to the power in the Secretary of State’s hands to impose obligations, since to impose obligations going beyond his suspicions could hardly be necessary under section 2(1). But if treated as a proviso guiding action at the later stage of court hearings, it makes sense that obligations can then be imposed as the court considers necessary to prevent the subject’s involvement in any terrorism-related activity and not just the activity which originally gave rise to the grounds for the Secretary of State’s suspicion.

Second, in relation to (b) only, the court may quash the “certificate” of urgency.<sup>173</sup> The wording here betrays the haste with which the legislation was drafted, for a “certificate” is relevant to a referral under (c) and not under (b).<sup>174</sup> While the “certificate” can be quashed if flawed, the order itself is not expressly quashed as a result, and the phrase “certificate contained in the order” suggests a severance of the issues. However, if there was no power under section 3(1)(b) to issue the order in the first place, then the provisions of (a)

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169. *Id.* § 3(3)-(4).

170. *Id.* § 3(2).

171. Compare *id.* § 3(6)(b), with *id.* § 3(2)(a).

172. *Id.* § 2(9).

173. *Id.* § 3(8).

174. A mistaken certification of someone under (c) would be remediable by “normal” judicial review under the Civil Procedure Rules, 1998, S.I. 1998/3132 (as amended principally by the Civil Procedure (Amendment No. 4) Rules, 2000, S.I. 2092), sched. pt. 54, and the special procedures in the 2005 Act would not then apply.

should have been followed. Thus, in that case, without a court's permission, there can be no valid order. The resulting position would then be that the Secretary of State must immediately apply to the court for a decision under section 3(2).

By contrast, it would appear that a case under (a) entails more court discretion in one aspect. Section 3(2)(b) states that the court "may" grant permission for an order which is not obviously flawed<sup>175</sup>—"may" suggests some kind of residual discretion, though the basis for its exercise is not clear. Perhaps if the court believes that the order would be an abuse of process or in some way unjust, then it could exercise its discretion. Under section 3(6)(c), the court "must" confirm the order if it is not obviously flawed.<sup>176</sup>

The sensitive nature of these intelligence-led procedures in court is exemplified by section 3(5). The initial hearings in connection with non-derogating control orders, in which the court will decide whether to grant permission for the order to be made under procedure (a) or will consider the Secretary of State's decision to impose the order without the court's permission under procedure (b) or (c) may be made in the absence of, without the knowledge of, and without representation for the subject of the order.<sup>177</sup> However, the court must ensure that the controlled person is notified of its decision on a reference under subsection (3)(a).<sup>178</sup> Furthermore, as a result of a parliamentary amendment, when the court orders that a full hearing in connection with a non-derogating control order must take place, the court must make arrangements for the individual in question to be given an opportunity to make representations *inter partes* about the directions already given or the making of further directions.<sup>179</sup> This must occur within seven days of the court's decision.<sup>180</sup> The time limit of seven days is said to have caused some problems in practice, and a more leisurely timetable might be helpful. In response, however, the independent reviewer, Lord Carlile, preferred to retain the limit out of respect for liberty, and the government has agreed.<sup>181</sup>

Assuming there is a full hearing on a non-derogating control order,<sup>182</sup> the court will determine under section 3(10) whether the decisions of the Secretary of State were "flawed" in terms of the grounds for the order or in terms of the necessity for every obligation in the order. Though the term "flawed" rather than "obviously flawed" is used here, there is no legal difference: section 3(11) defines both by reference to "the principles applicable on an application for

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175. Prevention of Terrorism Act, 2005, c. 2, § 3(2)(b).

176. *Id.* § 3(6)(c).

177. *Id.* § 3(5).

178. *Id.* § 3(9).

179. *Id.* § 3(7); 431 PARL. DEB., H.C. (6th ser.) (Mar. 10, 2005) 1796 (Hazel Blears).

180. Prevention of Terrorism Act, 2005, c. 2, § 3(7).

181. LORD CARLILE, *supra* note 107, at 15.

182. The controlled person may ask for the procedures to be stopped under section 3(14). Prevention of Terrorism Act, 2005, c. 2, § 3(14).

judicial review.”<sup>183</sup> It must thereby be understood by the court that the full hearing is not a *de novo* consideration of the evidence. While the courts have been willing to exercise a higher standard of scrutiny when basic rights are at stake,<sup>184</sup> in these cases, they must stick to the recognized grounds for review—irrationality, illegality, procedural error,<sup>185</sup> and proportionality.<sup>186</sup> The courts may not substitute their own judgment on the merits for that of the minister.<sup>187</sup> Past experiences of emergency laws suggests that Lord Pearce stated the crux of this matter accurately in *Conway v. Rimmer* when he argued that “the flame of individual right and justice must burn more palely when it is ringed by the more dramatic light of bombed buildings.”<sup>188</sup> Thus, the “‘Reading Presumption of Executive Innocence’ . . . which has continued to embody the attitude of the judiciary to executive power in such cases”<sup>189</sup> has, for now, prevailed.

As well as highlighting the limits in the grounds for review under the 2005 Act, one should also bear in mind that the decision being reviewed only requires a “reasonable suspicion” for the process to be set in motion. There were many challenges in the parliamentary debates to this lowly level of proof,<sup>190</sup> which is no more than for an arrest for a breach of the peace. Attempts to equate the position to that for derogating orders—ultimately, on the balance-of-probabilities test—was repeatedly rejected, as was the demand for the criminal standard of proof,<sup>191</sup> which is applied even to mere antisocial behavior orders.<sup>192</sup>

If, despite the hobbled nature of the inquiry, the court decides in a full hearing on a non-derogating control order that a decision of the Secretary of State was flawed, it must under section 3(12): (a) quash the control order; (b) quash one or more of the obligations contained in the control order; (c) give directions to the Secretary of State for him to revoke or modify the order; or, under section 3(13), it must uphold the order.<sup>193</sup> There is no residual discretion left to the court here. The quashing of an order may be stayed pending

183. *Id.* § 3(11).

184. *See* R v. Ministry of Defence, [1996] 1 Q.B. 517.

185. *See* Council for Civil Serv. Unions v. Minister for the Civil Serv., [1985] A.C. 374 (H.L.).

186. R v. Intervention Bd. for Agric. Produce, [1986] 2 All E.R. 115 (Q.B.); R v. Sec’y of State for the Home Dep’t, [1991] 1 A.C. 696 (H.L.).

187. Sec’y of State for the Home Dep’t v. MB, [2006] EWHC (Admin) 1000 [79]; *see also* R (Daly) v. Sec’y of State for the Home Dep’t, [2001] UKHL 26 [28], [2001] 2 A.C. 532, 548.

188. [1968] A.C. 910, 982 (H.L.).

189. A. W. BRIAN SIMPSON, IN THE HIGHEST DEGREE ODIUS: DETENTION WITHOUT TRIAL IN WARTIME BRITAIN 29-30 (1992).

190. *See, e.g.*, 670 PARL. DEB., H.L. (5th ser.) (Mar. 1, 2005) 152 (Lord Ackner).

191. 670 PARL. DEB., H.L. (5th ser.) (Mar. 7, 2005) 482 (Lord Carlile).

192. R (McCann) v. Manchester Crown Court, [2002] UKHL 39, [2003] 1 A.C. 787. In part, however, this standard was applied for the pragmatic reason of avoiding confusion in the minds of magistrates who normally apply the criminal standard. *Id.* at [37] (Lord Steyn).

193. Prevention of Terrorism Act, 2005, c. 2, § 3(12)-(13).

appeal;<sup>194</sup> alternatively, the Secretary of State may proceed to make a new order.<sup>195</sup> With the benefit of the sometimes unhappy experience of the application of these provisions,<sup>196</sup> Lord Carlile has suggested that the courts should be granted a power to amend orders which are obviously flawed so as to avoid the drastic step of quashing the order and creating for the administration the complications of making and serving a new order.<sup>197</sup>

#### 4. *Derogating control orders*

Reflecting the fact that “the right to liberty is in play,”<sup>198</sup> the courts are more heavily involved in the issuance of derogating control orders. However, it should be emphasized that the standard of proof and procedures adopted are still consistent with the need to deal with anticipatory risk and they diverge significantly from the norms for a criminal trial.

The bill as originally drafted allowed the Secretary of State to make the order, but Parliament insisted upon court oversight and issuance.<sup>199</sup> Further differences from non-derogating orders concern the automatic subsequent referral to the court and the adoption of the civil standard of proof (in other words, on the balance of probabilities). However, the government managed to resist calls to incorporate the criminal standard (beyond reasonable doubt).<sup>200</sup> The next difference is that, as their name suggests, the issuance of these orders must be predicated upon the lawful issuance of a notice of derogation under article 15 of the European Convention on Human Rights<sup>201</sup> and a designation order under section 14(1)(b) of the Human Rights Act 1998.<sup>202</sup>

As mentioned above, under section 4(1), the order must be made by the court.<sup>203</sup> The court must hold an immediate preliminary hearing on an application from the Secretary of State to decide whether to make a derogating control order against an individual.<sup>204</sup> No time limit is specified for what is to count as “immediate.” If the court decides to make the order, it then must give directions for a full hearing to take place to determine whether to confirm the

194. *Id.* § 15(2).

195. *Id.* sched., ¶ 8.

196. *See, e.g., infra* note 286 and accompanying text.

197. LORD CARLILE, SPECIAL REPORT OF THE INDEPENDENT REVIEWER IN RELATION TO QUARTERLY REPORTS UNDER SECTION 14(1) OF THE PREVENTION OF TERRORISM ACT 2005 ¶ 24 (2006), available at <http://security.homeoffice.gov.uk/news-publications/publication-search/independent-reviews/pta-review2-06.pdf>.

198. 670 PARL. DEB., H.L. (5th ser.) (Mar. 1, 2005) 121 (Lord Falconer).

199. 670 PARL. DEB., H.L. (5th ser.) (Mar. 3, 2005) 363.

200. 670 PARL. DEB., H.L. (5th ser.) (Mar. 1, 2005) 152 (Lord Ackner).

201. European Convention on Human Rights, *supra* note 72, art. 15.

202. Human Rights Act, 1998, c. 42, § 14(1)(b).

203. Prevention of Terrorism Act, 2005, c. 2, § 4(1).

204. *Id.* § 4(1)(a).

order.<sup>205</sup> Once again this preliminary hearing may occur in the absence of, without the knowledge of, and without representation for, the subject of the order.<sup>206</sup> At the preliminary hearing, the court may make the order if, by section 4(3), it appears:

- (a) that there is material which (if not disproved) is capable of being relied on by the court as establishing that the individual is or has been involved in terrorism-related activity;
- (b) that there are reasonable grounds for believing that the imposition of obligations on that individual is necessary for purposes connected with protecting members of the public from a risk of terrorism;
- (c) that the risk arises out of, or is associated with, a public emergency in respect of which there is a designated derogation from the whole or a part of Article 5 of the Human Rights Convention; and
- (d) that the obligations that there are reasonable grounds for believing should be imposed on the individual are or include derogating obligations of a description set out for the purposes of the designated derogation in the designation order.<sup>207</sup>

As with section 3(2)(b), there is some suggestion of residual discretion, and here it makes more sense in the context of a court-based decision rather than a court-based review. The test in (a) is suggestive of a *prima facie* case, rather more searching than for a non-derogating order and intentionally so. Even the test in (b) requires the court positively to satisfy itself rather than asking in the negative whether the Secretary of State is obviously wrong. Pending a full hearing, the court may impose interim obligations under section 4(4) when it has reasonable grounds for believing that measures are necessary to prevent or restrict the controlled person's involvement in terrorism-related activity.<sup>208</sup> In this way, the court can be the author of a control order in the same way as the Home Office in non-derogating cases. No doubt, the latter will make suggestions as to the contents of the order.

At the full hearing, the court may confirm or revoke the control order.<sup>209</sup> If it revokes the order, it may direct that the order be treated as having been quashed under the terms of the Act.<sup>210</sup> If, on the other hand, it confirms the order, the court may modify the interim obligations and direct that any which are removed are to be treated as having been quashed under the terms of this Act.<sup>211</sup> Under section 4(13), the obligations which may be imposed may vary from those initially imposed, as under section 2(9).<sup>212</sup>

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205. *Id.* § 4(1)(b).

206. *Id.* § 4(2).

207. *Id.* § 4(3).

208. *Id.* § 4(4).

209. *Id.* § 4(5).

210. *Id.*

211. *Id.*

212. *Id.* § 4(13).



The tests to be applied by the court are much more searching than the “flawed” test under section 3 and do move towards a more substantive scrutiny. Thus, under subsection (7), the court may confirm the order only if:

- (a) it is satisfied, on the balance of probabilities, that the controlled person is an individual who is or has been involved in terrorism-related activity;
- (b) it considers that the imposition of obligations on the controlled person is necessary for purposes connected with protecting members of the public from a risk of terrorism;
- (c) it appears to the court that the risk is one arising out of, or is associated with, a public emergency in respect of which there is a designated derogation from the whole or a part of Article 5 of the Human Rights Convention; and
- (d) the obligations to be imposed by the order or (as the case may be) by the order as modified are or include derogating obligations of a description set out for the purposes of the designated derogation in the designation order.<sup>213</sup>

There may be two limitations within the court’s scrutiny at this point. The first is that there is no explicit basis on which to review the necessity for the derogation order itself, in contrast with the position regarding detention orders. In *A v. Secretary of State for the Home Department*, some judges were of the view that review of derogation was only possible because of the express grounds for review in section 30 of the Anti-terrorism, Crime and Security Act 2001.<sup>214</sup>

The second limitation concerns the standard of proof. While the standard of proof has risen to the “balance of probabilities,” it does not reach the standard of a criminal court nor does it import the rules of evidence of a criminal court. Accordingly, the intelligence-led approach remains viable. Nevertheless, the courts adapt the civil standard of proof to the circumstances, and, where the allegations are serious, the standard of proof rises:

Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation.

Although the result is much the same, this does not mean that where a serious allegation is in issue the standard of proof required is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established. . . .

This approach also provides a means by which the balance of probability standard can accommodate one’s instinctive feeling that even in civil proceedings a court should be more sure before finding serious allegations proved than when deciding less serious or trivial matters.<sup>215</sup>

Indeed, if full account is taken of the seriousness of the matters to be proved and the implications of proving them, some courts have contended that the civil

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213. *Id.* § 4(7).

214. [2004] UKHL 56, [164], [2005] 2 A.C. 68, 151 (Lord Rodger).

215. *Re H*, [1996] A.C. 563, 586-87 (Lord Nicholls).

standard of proof will for all practical purposes be indistinguishable from the criminal standard.<sup>216</sup> This line of precedent was cited with approval by the Lord Chancellor, Lord Falconer, in debates on the 2005 Act.<sup>217</sup>

The mechanics of a derogating control order include that it will last for a set period of just six months, unless it ceases to have effect either because it is revoked or because it would otherwise continue beyond the period provided for in section 6.<sup>218</sup> Section 6(1) provides that a derogating control order is in effect at a time only if the relevant derogation notice is also still in force and that time is not more than twelve months after the making of the order designating the derogation, or after the Secretary of State declares that it remains necessary for him to have the power to impose derogating obligations under the original derogation.<sup>219</sup> Subsections (2) to (7) set out the procedure for the Secretary of State to make the declaration of necessity to continue imposing derogating obligations.<sup>220</sup> To put this another way, a control order will cease if the derogation notice ceases or if Parliament does not approve an order within the relevant period confirming that the general power to impose derogating obligations should continue.

A derogating control order can continue for more than six months (plus any temporary extension pending the decision in the renewal hearing under section 4(11) and (12)) if the court renews it under section 4(10) on the basis that:

- (a) the court considers that it is necessary, for purposes connected with protecting members of the public from a risk of terrorism, for a derogating control order to continue in force against the controlled person;
- (b) it appears to the court that the risk is one arising out of, or is associated with, a public emergency in respect of which there is a designated derogation from the whole or a part of Article 5 of the Human Rights Convention;
- (c) the derogating obligations that the court considers should continue in force are of a description that continues to be set out for the purposes of the designated derogation in the designation order; and
- (d) the court considers that the obligations to be imposed by the renewed order are necessary for purposes connected with preventing or restricting involvement by that person in terrorism-related activity.<sup>221</sup>

Once again, the wording which governs renewal subtly differs from the criteria for the original order. The balance-of-probabilities standard is not repeated; instead, a test of necessity is mandated. It is likely, however, that courts will apply the same standard of proof as before.

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216. *B v. Chief Constable of Avon & Somerset Constabulary*, [2001] 1 W.L.R. 340, 354, [31] (Lord Bingham); *Gough v. Chief Constable of the Derbyshire Constabulary*, [2002] EWCA (Civ) 351, [90], [2002] Q.B. 1213, 1242-43 (Lord Phillips); *R (McCann) v. Manchester Crown Court*, [2002] UKHL 39, [83], [2003] 1 A.C. 787, 826 (Lord Steyn).

217. 670 PARL. DEB., H.L. (5th ser.) (Mar. 7, 2005) 507.

218. Prevention of Terrorism Act, 2005, c. 2, § 4(8).

219. *Id.* § 6(1).

220. *Id.* § 6(2)-(7).

221. *Id.* § 4(10).

The government made it clear from the outset that derogating orders were an embellishment to the legislation which would typically be kept in the trophy cabinet. The political and legal reasons for this reticence are based on the added forensic risks of proving an emergency, especially if apparently based on the threat from just one individual at a time, and the political bad publicity and rancor in Parliament which would flow from having to derogate explicitly from rights. From subsequent practice, one might also add the further factor that, as there is no clear demarcation between derogating and non-derogating conditions, the Executive could always take a chance and push the boundaries of non-derogating orders.

Nevertheless, the government took the stance that as a matter of principle the “threat that we currently face” allowed for a derogation.<sup>222</sup> This view is based on the “qualitatively different” features of jihadist terrorism since 9/11, including the al Qa’ida’s “nihilistic” ideology, cataclysmic lack of restraint, use of suicide operations, capabilities and resources, and global reach.<sup>223</sup> But the government accepted, on advice from the security authorities, that non-derogating orders would presently be sufficient to meet the threat. The assertion of a “back-pocket” emergency was not accepted on all sides.<sup>224</sup> However, it could be argued that the London bombings in July 2005 have strengthened the government’s case since they illustrate that catastrophic-suicide terrorism is more than a fanciful danger in the United Kingdom, whether because of its close alliance with the United States or otherwise.<sup>225</sup> It is also submitted that it is better to set out the legislative contours of a derogating order before there is an urgent need for their use. The Joint Committee on Human Rights’s contention that it is a breach of human rights law to sponsor a provision dependent upon a derogation when no derogation is in force<sup>226</sup> is mistaken in principle. This contention is based on no legal precedent and is in practice, contrary to the legislative dispositions, including states of siege, of most European countries.<sup>227</sup>

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222. 431 PARL. DEB., H.C. (6th ser.) (Feb. 22, 2005) 153 (Charles Clarke).

223. *See id.* at 333-34.

224. *See, e.g.*, 670 PARL. DEB., H.L. (5th ser.) (Mar. 1, 2005) 161-62 (Lord Lloyd).

225. This was prominent amongst the reasons given for the derogation notice in 2001. JOINT COMM. ON HUMAN RIGHTS, SECOND REPORT ON THE ANTI-TERRORISM, CRIME AND SECURITY BILL, 2001-2, H.L. 37, H.C. 372, Minutes of Evidence, ¶ 7, *available at* <http://www.publications.parliament.uk/pa/jt200102/jtselect/jtrights/037/1111402.htm> (“We are adjudged internationally to be more at risk than the Danes or other smaller European countries, we know that we are, and the steps we have taken since 11 September, in terms of civil contingencies and security protection, have reflected that heightened concern. Our position internationally and our support for the United States have increased that danger. Also, as the Germans and French are often pointing out, we have a larger host community of those who the Germans and French allege are organising for international terror.” (David Blunkett)).

226. JOINT COMM. ON HUMAN RIGHTS, PREVENTION OF TERRORISM BILL: PRELIMINARY REPORT, *supra* note 85, at 4-5.

227. *See* SUBRATA ROY CHOWDHURY, RULE OF LAW IN A STATE OF EMERGENCY: THE

### 5. Criminal prosecution

Despite the dynamic of anticipatory risk and the difficulties for criminal trials which it implies, the government claimed from the outset that prosecution is “our preferred approach.”<sup>228</sup> Parliament deemed the bill inadequate to reflect this aspiration. Therefore, section 8 was inserted.<sup>229</sup> This section applies where it appears to the Secretary of State that (a) an individual’s suspected involvement in terrorism-related activity may have involved the commission of an offense relating to terrorism, and (b) that the commission of that offense is being or would fall to be investigated by a police force.<sup>230</sup> The latter prong presumably rules out criminal consideration where a foreign offense is alleged which is of a nature alien to the English legal system (such as slandering the state or insulting officials) or where the foreign offense would not fall within any extra-jurisdictional provision (such as section 17 of the Terrorism Act 2006) and so cannot be prosecuted in English law. Subsection (2) requires the Secretary of State to consult with the chief police officer of that police force (as defined in section 8(7)) about the evidence relating to the individual before he makes a control order to consider whether there is evidence available that could realistically be used for the purposes of a prosecution of the individual for an offence relating to terrorism.<sup>231</sup> If a control order is then made, subsection (3) requires the Secretary of State to inform that chief police officer, and, thereafter, subsection (4) requires the chief police officer to keep the investigation of the individual’s conduct under review throughout the duration of the control order to see if prosecution for a terrorism-related offense becomes feasible.<sup>232</sup>

The Act’s reliance on the police (and not the Crown Prosecution Service) as the agency empowered to make judgments about prosecution seems obtuse. There seems to be muddle here between the possibilities of investigation and the collection of more evidence (a police affair) and decisions about the weight of that evidence and the public interest (a prosecution affair).<sup>233</sup> Admittedly, subsection (5) requires the chief police officer to consult the relevant prosecuting authority about the carrying out of his functions under the section, but only when a control order has been made, and only to the extent that he

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PARIS MINIMUM STANDARDS OF HUMAN RIGHTS NORMS IN A STATE OF EMERGENCY 12 (1989); JOHN E. FINN, CONSTITUTIONS IN CRISIS: POLITICAL VIOLENCE AND THE RULE OF LAW ch. 5 (1991); *cf.* Civil Contingencies Act, 2004, c. 36, pt. II.

228. 431 PARL. DEB., H.C. (6th ser.) (Feb. 23, 2005) 339 (Charles Clarke).

229. *See* 670 PARL. DEB., H.L. (5th ser.) (Mar. 7, 2005) 536-38 (Baroness Scotland); *see also* JOINT COMM. ON HUMAN RIGHTS, *supra* note 1, at 14.

230. Prevention of Terrorism Act, 2005, c. 2, § 8(1).

231. *See* 431 PARL. DEB., H.C. (6th ser.) (Mar. 9, 2005) 1584 (Charles Clarke).

232. Prevention of Terrorism Act, 2005, c. 2, § 8(3)-(4).

233. With the advent of the charging scheme under the Criminal Justice Act, 2003, c. 2, sched. 2, whereby decisions as to charge are shifted from police custody office to Crown Prosecutors, the emphasis in section 8 on the chief police officer appears even more bizarre.

considers it appropriate to do so.<sup>234</sup> Subsection (6) also provides that the chief police officer's duty to consult the relevant prosecuting authority may have been satisfied by a consultation that took place before the Act was passed,<sup>235</sup> another indication that a rather perfunctory degree of consultation is sufficient. The government sought to justify the invisibility of the prosecution branch by reference to some of the foregoing features as to consultation and also by reference to the need to maintain the independence of the prosecution.<sup>236</sup> Why the prosecution should be more deserving than the constabulary of symbolic independence from what might be inferred to be the rather sordid business of control orders is not apparent. On the one hand, there remains a doctrine of constabulary independence from politicians,<sup>237</sup> so why are the police the fall guys in this process? On the other hand, it is equally illogical to view prosecutors as lacking independence because their professional judgment is reported to the Home Secretary rather than a court.

Other ideas for the facilitation of prosecution were not adopted. Prominent amongst these has been the proposal that evidence from the interception of communications should be available in court, thereby amending the current exclusionary rule in section 17 of the Regulation of Investigatory Powers Act 2000.<sup>238</sup> The inadmissibility of information arising from a Part I intercept of communications by the public postal service or, more likely in the data age, a public telecommunication system is in contrast to the treatment of information arising from Part II surveillance such as by the chance overhearing of telephone conversations or indeed from Part I-type intercepts conducted abroad. There also remains open the possibility of gathering evidence through the planting of electronic bugs under Part III of the Police Act 1997.<sup>239</sup> The effect is to denote Part I intercept data as intelligence rather than evidence. This classification is counterintuitive, because the recording of a communication is itself a record of information without value added through analysis or otherwise. Thus, it is evidence rather than intelligence. Whether it is used in a trial or not should therefore depend, as ever, on relevance and reliability rather than on an *ab*

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234. Prevention of Terrorism Act, 2005, c. 2, § 8(5).

235. *Id.* § 8(6).

236. See 670 PARL. DEB., H.L. (5th ser.) (Mar. 3, 2005) 442, 539 (Baroness Scotland).

237. For explanations and applications of the doctrine, see *Fisher v. Oldham Corp.*, [1930] 2 K.B. 364; *Attorney-General for New South Wales v. Perpetual Trustee Co.*, [1955] A.C. 457; *R v. Police Commissioner of the Metropolis*, [1968] 2 Q.B. 118; *R. v. Oxford*, (1987) 151 L.G. Rev. 371 (C.A. Civ); *R v. Chief Constable of Sussex*, [1999] 2 A.C. 418; and *R (Mondelly) v. Commissioner of Police for the Metropolis*, [2006] EWHC (Admin) 2370.

238. Regulation of Investigatory Powers Act, 2000, c. 23, § 17; see Peter Mirfield, *Regulation of Investigatory Powers Act 2000(2): Part 2: Evidential Aspects*, 2001 CRIM. L. REV. 91, 97; David Ormerod & Simon McKay, *Telephone Intercepts and Their Admissibility*, 2004 CRIM. L. REV. 15; see also JOINT COMM. ON HUMAN RIGHTS, *supra* note 1, at 30; JUSTICE, INTERCEPT EVIDENCE: LIFTING THE BAN 18 (2006).

239. Police Act, 1997, c.50, §§ 91-108.

*initio* classification. Of course, what really comes into play in these cases is public policy—the public policy favoring the absolute secrecy of techniques and modes of cooperation (especially between the police and security services). There may also be the argument that the disclosure of techniques would alter criminal behavior and make detection more difficult. However, the most recent review commissioned by the Home Office, reported in 2004, found precious little evidence of such sophistication in comparable foreign jurisdictions like Australia and the United States, which freely admit intercept evidence.<sup>240</sup>

The Steering Group's policy-driven attempt to provide for different paths under a "triple warrant" scheme for intelligence only, non-evidential, and evidential intercepts<sup>241</sup> is likewise confusing in principle and difficult to operate in practice. In principle, it is wrong for the state's police and security agencies to determine the categorization of evidence for their purposes and without regard to fairness to the suspect. This task, if it arises at all, should be assigned to a judge under a public-interest immunity hearing. In practice, how do the policing and security agencies know which to choose and will it always be the case, as seems to be implied, that what starts as intelligence can later be developed into evidence? What if the decisive remarks are at the start of an exchange and not at the end? The Newton Committee favored intercept evidence as one solution to reliance upon detention without trial;<sup>242</sup> the same surely applies to control orders.

The Home Office line on the subject remains dismissive: "The reality is that intercept [evidence] is only a part—often a small part—of the intelligence picture in such cases."<sup>243</sup> It is even claimed that there is no evidence that intercept evidence has been successful in bringing terrorists to trial in any country in the world,<sup>244</sup> a claim belied in both Australia<sup>245</sup> and the United States.<sup>246</sup> It is also interesting to note that this line of argument has now

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240. See 430 PARL. DEB., H.C. (6th ser.) (Jan. 26, 2005) 18WS (Charles Clarke) (referring to a report written by the Steering Group on Warranted Interception, which has not been made public).

241. See *id.*

242. PRIVY COUNSELLOR REVIEW COMM., *supra* note 74, at 57.

243. 431 PARL. DEB., H.C. (6th ser.) (Feb. 22, 2005) 151 (Charles Clarke).

244. *Id.* at 337. The Home Secretary may have had in mind the convictions in Spain of seventeen defendants linked to al Qaeda; the intercept evidence proffered in that trial was rejected as untrustworthy, in that it was based on misunderstandings of the Arabic conversations. See generally SAN (Sala de lo Penal), Sept. 26, 2005 (Sentence No. 36/2005, p. 17-18), available at <http://estaticos.elmundo.es/documentos/2005/09/26/sentencia.pdf>.

245. Several modes of electronic intercept evidence will be prominent in the pending trials of eleven persons following "Operation Pendennis," which is alleged to have revealed a plot by jihadists. Katie Laphorne, *Terror Trials Ordered; 11 Suspects to Face Jury*, HERALD SUN (Austl.), Sept. 2, 2006, at 9.

246. A summary of terrorist cases in which interceptions have been used appears in the amicus brief of Janet Reno and others in *Rumsfeld v. Padilla*. Brief of Janet Reno et al., Amici Curiae In Support of Respondents at 22-24, *Rumsfeld v. Padilla*, 542 U.S. 426 (2004) (No. 03-1027), 2004 WL 782374.

switched from the sensitivity of the evidence-gathering methodologies to the value of their product.<sup>247</sup> This is a much weaker line of argument—it is up to prosecutors and the courts to make judgments on value and strength.

As a footnote to this debate, it may be noted that paragraph 9 to the schedule of the 2005 Act amends section 18 of the Regulation of Investigatory Powers Act 2000 so as to allow for the admission of intercept evidence in control order proceedings or any proceedings arising from such proceedings.<sup>248</sup> No doubt, the government would argue that the highly circumscribed nature of those proceedings (as described below) makes it safer to disclose the intercept evidence there than in ordinary Crown Court hearings.

An array of other ideas for encouraging prosecution was examined by the Joint Committee on Human Rights in its report, *Counter-terrorism Policy and Human Rights: Prosecution and Pre-Charge Detention*.<sup>249</sup> They include: inter-agency protocols for the sharing of information, firmer judicial pretrial management, and incentives for witnesses.<sup>250</sup>

Further assurance to the security authorities should be taken from the fact that the encouragement of prosecution does not preclude them from resorting to control orders. For example, Rauf Abdullah Mohammad, a mini-cab driver of Iraqi origin, was charged under the Terrorism Act 2000, section 57, with making a video which might be useful to terrorists.<sup>251</sup> He claimed that his discussion about the killing of U.K. and U.S. political leaders, the background noise of religious chants and explosives were not to be taken seriously. The jury returned a not-guilty verdict, but he was immediately subjected to a control order or “conviction lite,” according to one commentator.<sup>252</sup> This isolated case notwithstanding, the more common position seems to be that prosecution is not in practice the preferred option and has not been attempted against most subjects of control orders. As emerges in later cases, some have not even been interviewed by the police.<sup>253</sup> It would thus appear that criminal prosecution is not strongly prioritized since the dynamic of anticipatory risk makes control orders appear much more feasible and appropriate.

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247. There was an afterthought based on the protection of sophisticated intercept methods not known to terrorists. See 431 PARL. DEB., H.C. (6th ser.) (Feb. 23, 2005) 432 (Hazel Blears).

248. Prevention of Terrorism Act, 2005, c. 2, sched., ¶ 9.

249. JOINT COMM. ON HUMAN RIGHTS, COUNTER-TERRORISM POLICY, AND HUMAN RIGHTS: PROSECUTION AND PRE-CHARGE DETENTION, 2005-6, H.C. 1576, H.L. 240, at 14-32.

250. *Id.* at 27, 31.

251. See Dominic Kennedy, *Film of High-Profile Targets Was Made as a Joke, Trial Told*, TIMES (London), Aug. 23, 2006, at 23.

252. See Dominic Kennedy et al., *Restriction Order on Cab Driver Cleared in Terror Case*, TIMES (London), Aug. 30, 2006, at 4 (quoting Gareth Crossman, policy director of the human rights group Liberty).

253. See Sec’y of State for the Home Dep’t v. E, [2007] EWHC (Admin) 233, [124]; see also *infra* note 392 and accompanying text for a description of the case.

### 6. *Ancillary issues*

Section 5(1) allows for arrest and detention pending the issuance of a derogating control order where the Secretary of State has applied to the court for a derogating control order to be made and the constable tasked with enforcement considers that the individual's arrest and detention are necessary to ensure the individual is available to receive notice of the order if and when it is made.<sup>254</sup> This power was inserted after the publication of the bill and became necessary when the government conceded that the court and not the Home Secretary would initiate a derogating control order.<sup>255</sup> Detention is needed where there is concern that the suspect will disappear in the interim. Under section 5(2), the constable must take the arrested individual to an appropriate "designated place"; this is defined under section 5(10) in the same terms as in schedule 8 to the Terrorism Act 2000 and is likely to be a police station such as Paddington Green in London. The person is otherwise deemed to be in "police detention" under the Police and Criminal Evidence Act 1984,<sup>256</sup> as modified by the Terrorism Act 2000.<sup>257</sup>

Some aspects of normal arrest procedures are more difficult to transcribe to this type of arrest. In particular, there is no requirement for reasons to be given to the suspect on par with section 28 of the Police and Criminal Evidence Act. There is also no requirement in section 5 that the detaining officer even recite the legal grounds for detention—though the minister felt that suspects should be offered an explanation along the lines of "You are being detained because the Home Secretary is at this very moment applying for an order in relation to the control orders pursuant to the Prevention of Terrorism Act."<sup>258</sup> There is a danger of a breach of article 5(2) of the European Convention if reasons (which, contrary to the minister's fond belief, means more than grounds)<sup>259</sup> are not given, and the hasty drafting of the Act is apparent here as elsewhere. Another difference from normal police arrest powers, this time more favorable to the suspect, is that the initial detention period under section 5(3) is forty-eight hours, but "the court" (which means the High Court or Court of Session under section 15) may extend the period for a further forty-eight hours if it considers an extension necessary to ensure that the individual is available to be served with any notice.<sup>260</sup> The power of detention will cease once a person becomes bound by a derogating control order or where the court dismisses the

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254. Prevention of Terrorism Act, 2005, c. 2, § 5(1).

255. See 670 PARL. DEB., H.L. (5th ser.) (Mar. 7, 2005) 520.

256. The regime is set out in the Police and Criminal Evidence Act, 1984, c. 60, pt. IV.

257. Terrorism Act, 2000, c. 11, sched. 8.

258. 670 PARL. DEB., H.L. (5th ser.) (Mar. 7, 2005) 529 (Baroness Scotland).

259. See *Fox v. United Kingdom*, App. Nos. 12244, 12245, 12383/86, Ser. A. 182, 13 Eur. H.R. Rep. 157, 169-71 (Eur. Ct. H.R. 1991).

260. Prevention of Terrorism Act, 2005, c. 2, § 5(4).



application for an order.<sup>261</sup> The purpose of the detention under section 5 departs from the standard in article 5(1)(c) of “the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence.”<sup>262</sup> Thus, section 5(9) states that the detention may be incompatible with the right to liberty under article 5 provided there is a designated derogation in connection with the 2005 Act powers which arises from the same public emergency as the derogation in connection with derogating control orders. It may be that the detention could alternatively be justified by reference to article 5(1)(b), as “the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfillment of any obligation prescribed by law.”<sup>263</sup> However, if the government is being put to the trouble of a derogation notice for the sake of the substantive restrictions in the control order itself, it may as well obtain full value from the notice by extending it to the pre-order detention and thereby clear up any speculation.

There is no specific power to arrest and detain in connection with non-derogating control orders. The prime explanation is that a control order may be made as a matter of urgency on the authority of the Home Secretary under section 3(1)(b). Thus, it can come into force without any further ado.

In many cases, the intended subject of a control order will already have been detained under other measures—such as under section 41 of the Terrorism Act 2000 on the basis of suspicion of involvement in terrorism.<sup>264</sup> Given that the period of detention under section 41 can be prolonged (up to fourteen days when the 2005 Act was passed and currently twenty-eight days),<sup>265</sup> one might wonder whether there was really any need for section 5. The difficulty with applying section 41 instead is that while an initial arrest for breach of a control order may be lawful under section 41, detention for purposes of determining whether a control order should be made is not specified as a ground for extended detention pursuant to schedule 8 of the Terrorism Act 2000. Quite why it could not be added to the list of purposes in schedule 8 of the Terrorism Act 2000 (alongside, for example, “pending a decision whether to apply to the Secretary of State for a deportation notice to be served on the detained person”<sup>266</sup>) is not clear. Perhaps this is yet another emanation of hasty drafting; but one beneficial effect of this anomaly is that the time limit is tighter under section 5 than under section 41.

Once a non-derogating order is in force, ancillary matters such as its modification, notification, and proof of existence are dealt with by section 7.

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261. *Id.* § 5(5).

262. European Convention on Human Rights, *supra* note 72, art. 5(1)(c).

263. *Id.* art. 5(1)(b); *cf.* *McVeigh v. United Kingdom*, App. Nos. 8022, 8025, 8027/77, 5 Eur. H.R. Rep. 71 (Eur. Comm’n on H.R. 1983).

264. Terrorism Act, 2000, c. 11, § 41.

265. *See* Criminal Justice Act, 2003, c. 44, § 306; Terrorism Act, 2006, c. 11, § 23.

266. Terrorism Act, 2000, c. 11, sched. 8, § 23(1)(c).

Pursuant to section 7(1), a controlled person can apply to the Secretary of State for revocation or modification on the basis that there has been “a change of circumstances” affecting the order; the Secretary of State has a duty to consider the application, without limiting the number or frequency of such applications<sup>267</sup>—a provision which may vex the minister. In addition, the Secretary of State may take the initiative, without application by the subject, to modify or revoke the order, or “relax” or remove an obligation imposed by the order.<sup>268</sup> “Relax” implies a lessening of restraint on rights rather than a strengthening, but the subsection goes on to grant the power to make any modifications to the order’s obligations that he considers necessary to prevent or restrict the controlled person’s involvement in terrorism-related activity. A third way also exists: modifications may be made by mutual consent.<sup>269</sup> Section 7(3) provides that the Secretary of State may not, however, make any modifications which turn a non-derogating control order into one which imposes a derogating obligation.<sup>270</sup> If desired, a new order would have to be sought under section 4.

As for modifications to derogating orders, the Secretary of State or the controlled person must apply to the court for the revocation or modification of a derogating control order,<sup>271</sup> and the court has modification powers under section 7(5) which correspond to those under section 7(2).<sup>272</sup> But the court has more power than granted to the Secretary of State under section 7(3); pursuant to section 7(6), the court may impose further derogating obligations if it considers modifications necessary to protect members of the public from a risk of terrorism, and if it appears that the risk arises out of, or is associated with, the public emergency with respect to which a designated derogation has effect.<sup>273</sup> If the court at any time determines that a derogating control order needs to be modified so that it no longer imposes derogating obligations, it must revoke the order,<sup>274</sup> and section 2 would come into play.

Applying to both varieties of control orders, section 7(8) requires notice of the imposition, renewal, or modification of a control order (other than a relaxation or modification with consent) to be given to the controlled person in person.<sup>275</sup> A constable or other person authorized by the Secretary of State may enter any premises where he has reasonable grounds to believe the subject of a control order may be, and to search those premises, in order to serve notice

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267. Prevention of Terrorism Act, 2005, c. 2, § 7(1).

268. *Id.* § 7(2).

269. *Id.* § 7(2)(c).

270. *Id.* § 7(3).

271. *Id.* § 7(4).

272. *Id.* § 7(5).

273. *Id.* § 7(6).

274. *Id.* § 7(7).

275. *Id.* § 7(8).

upon the individual.<sup>276</sup> There is no further power of arrest—however, if the control order persists, then the person would almost certainly commit a breach by leaving the specified premises when the police come calling or by failing to comply with police instructions. Section 7(10) requires the Secretary of State, if he revokes or modifies a control order under section 7(2)(b) or (c), to give notice to the controlled person of the revocation or modification and of the date from which the revocation or modification takes effect.<sup>277</sup>

For the sake of other legal proceedings, a control order, or the renewal, revocation, or modification of an order, may be proved by the production of a document purporting to be certified by the Secretary of State or the court as a true copy of the order or instrument.<sup>278</sup>

The next ancillary issue deals with breaches of orders under section 9. Offenses include breaching, without reasonable excuse, an obligation imposed by a control order,<sup>279</sup> failing, without reasonable excuse, to report to a specified person when first returning to the United Kingdom as required by the terms of a control order, when the order has ceased to have effect,<sup>280</sup> and intentionally obstructing a person delivering a notice setting out the terms of the control order in accordance with section 7(9).<sup>281</sup> The offenses under 9(1) and 9(2) are indictable but 9(3) is summary only.<sup>282</sup> At first, some indulgence was shown in the application of section 9, for while some relatively minor infractions occurred, none were prosecuted.<sup>283</sup> However, a conviction (prompting a sentence of five months in prison) was recorded in December 2006, and another prosecution is pending.<sup>284</sup> The identity of the convicted person is unclear but it was reported that Abu Rideh, a Palestinian who is suspected of fundraising for terrorists, refused to wear a tag and was charged and remanded in custody in April 2005.<sup>285</sup> Other prosecutions may soon be initiated. An Iraqi suspect is reportedly to be prosecuted for the removal of a tag and failure to report to the police. The person is “on the run,” thereby avoiding the service of

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276. *Id.* § 7(9).

277. *Id.* § 7(10).

278. *Id.* § 7(11).

279. *Id.* § 9(1).

280. *Id.* § 9(2).

281. *Id.* § 9(3).

282. *See id.* § 7(4)-(7). By section 9(9), the arrest powers in relation to section 9(3) fall within schedule 1A of the Police and Criminal Evidence Act 1984. For other offenses in section 9, see Police and Criminal Evidence Act, 1984, c. 60, § 24 (as amended by the Serious Organised Crime and Police Act, 2005, c.15, § 110).

283. LORD CARLILE, *supra* note 107, at 20.

284. 688 PARL. DEB., H.L. (5th ser.) (Jan. 16, 2007) 33WS.

285. Owen Bowcott, *Tagged Terror Suspect Sent Back to Jail*, GUARDIAN (London), Apr. 29, 2005, at 9. There is no record of conviction, and he is next reported as having made a controversial visit to the Houses of Parliament. Daniel McGrory, *Terror Suspect Sat in Commons*, TIMES (London), Mar. 18, 2006, at 41.

the amended control order after his initial order was quashed by court order.<sup>286</sup> It is doubtful that a target could breach an order which has been declared to be an unlawful nullity (as described later).<sup>287</sup> Another person had left a mental health institute in September and is sought also for the service of an order.<sup>288</sup> Another case concerns a British person who was to be served with a control order in Manchester; he escaped after sheltering in a mosque.<sup>289</sup>

Appeals relating to non-derogating control orders are covered by section 10. A controlled person may appeal under section 10(1) against renewal or any modification without consent (in which case there may be objection to all or just some of the modifications).<sup>290</sup> Where a person applies to the Secretary of State for the modification or revocation of a non-derogating control order, the person may appeal against any decision by the Secretary of State on the application.<sup>291</sup> As with the original orders, the court decides whether any decision of the Secretary of State was “flawed.”<sup>292</sup> Where the court upholds an appeal against a decision of the Secretary of State, it may under section 10(7) quash the control order or one or more of the obligations imposed in the control order, or give directions to the Secretary of State to revoke the control order or to modify the obligations it imposes.<sup>293</sup> The latter allows for some discretion either in time or in the format of the eventual order.

Sections 12(4) to (7) make it clear that an appeal may be brought notwithstanding the fact that an earlier appeal may already have been brought. The sections also set out other matters in relation to such an appeal.<sup>294</sup> By section 15(3), the Secretary of State or the court has the power to state when any revocation or modification of a control order which he or it has decided to make will take effect. It also allows the court to postpone the effect of any revocation of a derogating control order either pending an appeal or to allow the Secretary of State time to consider whether to make a non-derogating control order against the same person.<sup>295</sup>

Where a control order is quashed in control order proceedings or on appeal from such proceedings, section 12 allows a person convicted of an offense under section 9(1) or (2) to appeal against their conviction. The court must

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286. Stewart Tandler, *Terror Suspect on Run After Breaking Out of Mental Unit*, TIMES (London), Oct. 17, 2006, at 2.

287. *Boddington v. British Transport Police*, [1999] 2 A.C. 143, 155; *see also* Attorney General’s Reference (No. 2 of 2001), [2003] UKHL 68, [124].

288. Tandler, *supra* note 286.

289. Alan Travis & Alex Kumi, *Manhunt as Terror Suspect Escapes Control Order: Man Absconds Four Days After Restrictions Imposed: British Citizen Wanted to Go Abroad ‘For Terrorism,’* GUARDIAN (London), Jan. 17, 2007, at 6.

290. Prevention of Terrorism Act, 2005, c. 2, § 10(2).

291. *Id.* § 10(3).

292. *Id.* § 10(4)-(6).

293. *Id.* § 10(7).

294. *Id.* § 12(4)-(7).

295. *Id.* § 15(3).

allow the appeal and quash the conviction.<sup>296</sup> This result ties in with paragraph 8(1) of the schedule which states that where an order, its renewal, or an obligation under the order is quashed, it shall be treated as never having been made. In consequence, section 12(8) amends section 133 of the Criminal Justice Act 1988 to permit compensation to be awarded on an application under that section.<sup>297</sup> This would allow an individual to claim compensation if, for example, he had been convicted for breaching the conditions of an order but the relevant control order had subsequently been quashed.

A further proviso regarding appeals is included in paragraph 8(2) to the schedule. A decision by the court or on appeal from the court (a) to quash a control order, the renewal of a control order, or an obligation imposed by such an order, or (b) to give directions to the Secretary of State in relation to such an order, does not prevent the Secretary of State from exercising any power of his to make a new control order to the same or similar effect or from relying, in whole or in part, on the same matters for the purpose of making that new order.<sup>298</sup>

The jurisdiction in relation to control orders is firmly placed within the Queen's Bench Division of the High Court (in England and Wales or in Northern Ireland) or the Outer House of the Court of Session in Scotland.<sup>299</sup> This contrasts with the employment of the Special Immigration Appeals Commission for detention without trial and is a logical distinction because control orders are not part of immigration law and, so as to avoid any charges of discrimination, may affect citizens and noncitizens alike. Yet, the issues of intelligence and the sensitivity of handling such material again arise, and the Act seeks to carve out a process within the High Court which is equivalent to that pertaining to SIAC. Accordingly, section 11(1) provides that control order decisions and derogation matters are not to be questioned in any legal proceedings other than proceedings in the court or on appeal from such proceedings.<sup>300</sup> At the same time, there is the assurance under section 11(2) that the relevant court will be able to consider human rights issues with respect to control order procedures;<sup>301</sup> of course, the specified courts already had this power (and duty) under sections 3 and 6 of the Human Rights Act 1998.<sup>302</sup> But the scope of appeals otherwise is reduced by virtue of section 11(3), which states that appeals from any determination of the court in control order proceedings can only be on a question of law.<sup>303</sup> A further restriction is set out in section 11(4), whereby only the Secretary of State can appeal against the

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296. *Id.* § 12(3).

297. *Id.* § 12(8).

298. *Id.* sched., ¶ 8(2).

299. *See id.* sched., ¶ 10.

300. *Id.* § 11(1).

301. *Id.* § 11(2).

302. Human Rights Act, 1998, c. 42, §§ 3, 6.

303. Prevention of Terrorism Act, 2005, c. 2, § 11(3).

judgment of the court on an application under section 3(1)(a) (giving permission to impose a non-derogating control order) or on a reference under section 3(3)(a) (confirming a non-derogating control order made without court permission).<sup>304</sup> In these cases, the controlled person is still able to challenge the decision in the full hearing that automatically takes place following directions.

Additional procedural issues are addressed in the schedule to the Act. There are two general concerns set out in paragraph 2 of the schedule. The first is a general duty on persons exercising the relevant powers to have regard to the need to secure proper review of control orders.<sup>305</sup> At the same time, and emphasizing once again the presence of sensitive intelligence, there is also a duty to have regard to the need to ensure that disclosures of information are not made where they would be contrary to the public interest.<sup>306</sup> Thereafter, the schedule mainly deals with the nuts and bolts of control order procedure. An attempt to demand as an explicit statutory guiding principle for judicial and prosecutorial officers' compliance with the requirements of article 6 of the European Convention was deemed superfluous in view of the Human Rights Act 1998.<sup>307</sup>

The court rules can be provided by the normal channels (the Civil Procedure Rule Committee in England and Wales and the Northern Ireland Supreme Court Rules Committee or the Lord President of the Court of Session in Scotland). In addition, by paragraph 3, outside of Scotland, the first set of rules could be (and was) made by the Lord Chancellor. This measure was passed in order to ensure the swift production of the rules as well as allowing for parliamentary oversight.<sup>308</sup> It was a controversial power, so safeguards in the form of requirements of consultation with the Lord Chief Justice and approval by affirmative procedure in Parliament were added on the recommendation of the House of Lords Delegated Powers and Regulatory Reform Committee.<sup>309</sup>

By paragraph 4(2), the rules may provide, for example, that proceedings may be conducted in the absence of the controlled person or his legal representative (though there may be provided a summary of the evidence taken in closed proceedings) and that proceedings may be concluded without full particulars of the reasons for decisions.<sup>310</sup> At the same time, under paragraph

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304. *Id.* § 11(4).

305. *Id.* sched., ¶ 2.

306. *Id.*

307. See 670 PARL. DEB., H.L. (5th ser.) (Mar. 8, 2005) 686 (Lord Falconer).

308. See DELEGATED POWERS AND REGULATORY REFORM COMM., TWELFTH REPORT, 2004-5, H.L. 63, at 3; see also 670 PARL. DEB., H.L. (5th ser.) (Mar. 7, 2005) 550 (Lord Falconer); *id.* at 595; *id.* at 673.

309. 670 PARL. DEB., H.L. (5th ser.) (Mar. 8, 2005) 701; see also SELECT COMM. ON DELEGATED POWERS AND REGULATORY REFORM COMMITTEE, THIRTEENTH REPORT, 2004-5, H.L. 80, annex 4.

310. Prevention of Terrorism Act, 2005, c. 2, § 4(2).

4(3), all “relevant material” (as defined in sub-paragraph (5)) must be disclosed,<sup>311</sup> though application may be made (always in the absence of the controlled person (or any other relevant party) and his legal representative) for “closed” evidence which is disclosed only to the court and to a person appointed under paragraph 7 of the schedule (the special advocate). If the Secretary of State elects not to disclose relevant material, or provide a summary, the court may prevent the Secretary of State from relying on that material, or matters that the court required to be summarized. The court may also require the Secretary of State to withdraw any allegation or argument to which that material (or matters required to be summarized) relates.

Paragraph 5 deals with an application by the controlled person or the Secretary of State for an order mandating the anonymity of the controlled person.<sup>312</sup> The application may be made even before the relevant court proceedings have commenced, such as following an arrest under section 5. The stigma of being labeled a terrorist is a serious burden to carry when it has neither been proven before a jury nor is intended to be so proven. To that extent, the departure from the principle of open justice<sup>313</sup> may be condoned, although it would be desirable to publish details of cases so that public policy can be discerned and debated.<sup>314</sup>

Paragraph 6 allows for the court to call for assistance from lay advisers, appointed for this purpose by the Lord Chancellor. These advisers are likely to be experts in security and terrorism. They are appointed by the Lord Chancellor rather than the court so as to allow for payment to be handled.<sup>315</sup>

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311. This formulation is a significant improvement on the bill which stated that “the Secretary of State is not required for the purposes of any control order proceedings or relevant appeal proceedings to disclose anything to the relevant court, or to any other person, where he does not propose to rely on it in those proceedings.” 670 PARL. DEB., H.L. (5th ser.) (Mar. 7, 2005) 607 (Lord Falconer). After pressure in Parliament, it is now clear that exculpatory material must be disclosed even if the Home Office does not wish to rely on it. *Compare id.*, with 670 PARL. DEB., H.L. (5th ser.) (Mar. 8, 2005) 692, and 670 PARL. DEB., H.L. (5th ser.) (Mar. 10, 2005) 912.

312. Paragraph 5 was added at the behest of the government on report stage. 670 PARL. DEB., H.L. (5th ser.) (Mar. 8, 2005) 697-700 (Lord Falconer). The government has since applied for anonymity in several cases, a practice which has become controversial in the case of absconders. *See* Richard Ford & Daniel McGrory, *Reid Wins Battle for Anonymity of Terror Suspects*, TIMES (London), Oct. 27, 2006, at 4; Daniel McGrory & Richard Ford, *Terrorist Suspect Flees Police in Mosque*, TIMES (London), Jan. 17, 2007, at 1. However, it is defended by Lord Carlile on the grounds that: it is fair to the subject who is not accused of crimes; it averts local hostility and so reduces the need for police protection; it avoids prejudicing future legal proceedings; and it assists the police when investigating other suspects. *See* LORD CARLILE, *supra* note 197, ¶¶ 10-11. His support for anonymity extends to absconders. *Id.* ¶ 22.

313. *Scott v. Scott*, [1913] A.C. 417, 434.

314. There is an anonymized list in the report by Lord Carlile, but it does not convey details beyond the formal dates of issuance and review, plus nationality. LORD CARLILE, *supra* note 107, at 5.

315. 670 PARL. DEB., H.L. (5th ser.) (Mar. 8, 2005) 702 (Lord Falconer).

A key safeguard for the controlled person is contained in paragraph 7, which allows the appointment of qualified lawyers as “special advocates.” Their role is “to represent the interests” of a relevant party in control order proceedings where that party and his legal representative are excluded from the proceedings. The special advocate is not, however, “responsible” to the party whom he represents.<sup>316</sup> This means that the advocate is not obliged to follow instructions from the person, and it is doubtful whether the advocate would be legally liable to the controlled person.

The special rules are contained in Part 76 of the Civil Procedure Rules.<sup>317</sup> Rule 76.2 requires the court to give effect to the overriding objective in paragraph 2 of the schedule to “ensure that information is not disclosed contrary to the public interest.” The public interest, as defined by Rule 76.1(4), includes “the interests of national security, the international relations of the United Kingdom, the detection and prevention of crime, or . . . any other circumstances where disclosure is likely to harm the public interest.”<sup>318</sup> Rule 76.22 enables the court to conduct hearings in private and to exclude the controlled person and his representatives from all or part of the hearing. Rule 76.24 describes the functions of the special advocate. Rule 76.26 modifies the general rules of evidence and enables the court to “receive evidence that would not, but for this rule, be admissible in a court of law.”<sup>319</sup> One controversy arising here was whether the rules should exclude evidence arising from torture.<sup>320</sup> The Lord Chancellor gave his understanding that it is was not the intention to rely upon such evidence where there is knowledge or belief of the application of torture, though he did not give the same understanding to article 3 behavior as a whole.<sup>321</sup> In the subsequent case of *A v. Secretary of State for the Home Department (No. 2)*,<sup>322</sup> the House of Lords directed that when the SIAC considered detention orders, it could not receive evidence obtained by the use of torture because evidence obtained by torture was inadmissible in judicial proceedings.<sup>323</sup> In terms of the burden and standard of proof for the exclusionary rule to apply, the majority of their lordships held that the appellant should raise a plausible reason as to why evidence adduced might have been procured by torture.<sup>324</sup> At that point, the burden passed to the SIAC to consider the suspicion, investigate it, and determine whether the evidence

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316. Prevention of Terrorism Act, 2005, c. 2, sched., ¶ 7(5).

317. Civil Procedure (Amendment No. 2) Rules, 2005, S.I. 2005/656, pt. 76.

318. *Id.* pt. 76.1(4).

319. *Id.* pt. 76.26(4).

320. 670 PARL. DEB., H.L. (5th ser.) (Mar. 7, 2005) 597 (Lord Falconer).

321. *Id.* at 610.

322. *A v. Sec’y of State for the Home Dep’t*, [2005] UKHL 71, [2006] 2 A.C. 221.

323. *Id.* at [52]. But note that the court refused to apply the same exclusionary rule to inhuman and degrading treatment or even to the use of information derived from torture in operational decisions. *Id.* at [53], [70].

324. *Id.* at [56].



should be admitted.<sup>325</sup> The majority felt that the standard to meet at that point was whether, in the view of the SIAC, it was established on a balance of probabilities, that the information being adduced was obtained by torture.<sup>326</sup> A significant minority (Lord Bingham of Cornhill, Lord Nicholls of Birkenhead, and Lord Hoffmann dissented) would have preferred that it be established before the SIAC that the statement was not made under torture. The majority nevertheless felt their approach better complied with article 15 of the U.N. Convention Against Torture.<sup>327</sup> The same rules can be expected to apply to control orders.

By Rules 76.28 and 76.29, the Secretary of State must apply to the court for permission to withhold closed material from the controlled person or their legal representatives and file a statement explaining the reasons for withholding that material. The material is then scrutinized by the Special Advocate who may challenge the need to withhold all or any of the closed material. If so, the court must arrange the hearing to determine the issue, unless the Secretary of State and Special Advocate agree that the court may decide the issue without a hearing. If the court finds in favor of the Secretary of State, it must next consider whether to direct the Secretary of State to serve a summary of that material on the relevant party or his legal representative.

Though a control order is likely to cause financial loss or damage to an individual (by, for example, preventing employment or engagement in business), there is no special scheme for compensation. The Lord Chancellor suggested that the person could be compensated by reference to section 8 of the Human Rights Act 1998.<sup>328</sup> But if it were possible to show a breach of article 5 or articles 8 to 11, then this would call into question the validity of the order itself. Accordingly, the adverse side effects of an order are not compensated. It might be argued that this treatment is unfair and that those who bear a disproportionate share of the cost of collective security should be compensated in the absence of proof of criminal fault, but one can understand the political unattractiveness of paying suspected terrorists because of their suspect status. There are also no special rules about social support, but welfare payments may be available under normal rules.<sup>329</sup>

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325. *Id.*

326. *Id.*

327. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 15, Dec. 10, 1984, S. TREATY DOC. NO. 100-20 (1988), 1465 U.N.T.S. 113.

328. 670 PARL. DEB., H.L. (5th ser.) (Mar. 7, 2005) 546 (Lord Falconer).

329. 670 PARL. DEB., H.L. (5th ser.) (Mar. 8, 2005) 641 (Baroness Scotland).

### 7. Review by Parliament and the Executive

So as to ensure future parliamentary review, section 13 provides that sections 1 to 9 expire after twelve months (from March 11, 2005).<sup>330</sup> They may then be renewed for a period not exceeding one year at a time by order made by statutory instrument, subject to the Secretary of State consulting with the independent reviewer appointed under section 14,<sup>331</sup> the Intelligence Services Commissioner,<sup>332</sup> and the Director-General of the Security Service.<sup>333</sup> Only the views of the independent reviewer (Lord Carlile) are revealed in public.<sup>334</sup> The statutory instrument is subject to the affirmative procedure, save for cases of urgency. These provisions were the subject of fierce debate in Parliament. The opponents asked for a sunset provision to be imposed at the end of November 2005, as well as a review by a committee of Privy Counsellors, so that the government would be forced to table new legislation, which would allow line-by-line debate.<sup>335</sup> The government resisted these demands as wholly unrealistic and even offered the disquieting interpretation that sunset clauses, rather than representing an affirmation of confidence in parliamentary democracy in the face of the provocation of political violence, would in fact “send the message to terrorists . . . that we are uncertain.”<sup>336</sup> Overall, the Home Office position was that a renewal order process after twelve months,<sup>337</sup> plus the reports by the Secretary of State and independent reviewers were sufficient safeguards.

The eventual resolution was in terms of the promise that new anti-terrorism legislation would be forthcoming in the following parliamentary session and that the opposition could then table changes to the 2005 Act, including the possibility of advocating the Act’s entire repeal.<sup>338</sup> In fact, when that new legislation appeared, in the shape of what became the Terrorism Act 2006, no changes whatever were made to the 2005 Act, and a whole new range of controversies hogged the limelight in Parliament and the media. The 2006 renewal-order debates did include complaints that the government had reneged

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330. The original review was of sections 1 through 6. 431 PARL. DEB., H.C. (6th ser.) (Mar. 10, 2005) 1765 (Charles Clarke).

331. *See id.* at 1799 (Hazel Blears).

332. *Id.* at 1827 (Charles Clarke) (“My amendment would require the Secretary of State to consult the director general of the Security Service before making the annual renewal order.”).

333. *Id.* at 1856.

334. An application under the Freedom of Information Act, 2000, c. 36, for the materials supplied by the other correspondents under section 13 was refused by the Home Office on grounds of national security in 2007. Letter from J. Fanshawe, U.K. Home Office, to Clive Walker, Professor, University of Leeds (Apr. 2007) (on file with the author) (denying Freedom of Information request reference number T9046/7).

335. *See, e.g.*, 670 PARL. DEB., H.L. (5th ser.) (Mar. 7, 2005) 573 (Lord Kingsmead); *id.* at 582 (Lord Kingsmead); *id.* at 649 (Mar. 8, 2005).

336. 431 PARL. DEB., H.C. (6th ser.) (Mar. 9, 2005) 1626 (Hazel Blears).

337. *See id.* at 1592 (Charles Clarke).

338. 670 PARL. DEB., H.L. (5th ser.) (Mar. 10, 2005) 1058 (Lord Falconer).

on its promise to table again the legislation for full scrutiny. The government responded by saying it had been overtaken by the events of July 2005, that a full cycle of review would provide valuable data, and that there would be a form of renewal in spring 2007.<sup>339</sup>

So as to assist further parliamentary scrutiny, section 14 provides that the Secretary of State must report to Parliament on a tri-monthly basis regarding the exercise of his control order powers during that period. A copy of each report must be laid before Parliament. In practice, the Secretary has produced a ministerial written answer, thereby foreclosing debate.<sup>340</sup>

As mentioned under section 13, the Secretary of State must appoint an independent person to review the operation of the Act (including the use of urgent non-derogating orders)<sup>341</sup> and to report back to the Secretary of State after nine months<sup>342</sup> and every twelve months thereafter. These reports must then be laid before Parliament. The opponents of the Act had wanted to emulate the device of a full Privy Counsellor review as under Part IV of the Anti-terrorism, Crime and Security Act 2001, but no such major exercise is currently on the horizon.

Lord Carlile, the independent reviewer, accepted that the control orders were properly made,<sup>343</sup> but raised a number of important concerns in his first report. It was revealed that by the end of 2005, eighteen control orders were made and nine subsisted (just one relating to a British citizen).<sup>344</sup> The position as of September 10, 2006 was that there are fifteen orders, six of which are against British citizens.<sup>345</sup> By January 16, 2007, eighteen control orders were currently in force, with another issued but not served.<sup>346</sup> On the basis of these statistics, it is clear that the dynamic of “neighbor terrorism” is having a significant role in the continued deployment of control orders. Indeed, as their usage against “neighbors” increases, their issuance against visitors is decreasing. As mentioned above, nine of the initial eighteen controlled persons (all formerly detainees under the 2001 Act) were served on August 11, 2005 with notice of the government’s intention to deport them, and their control orders were revoked on August 31, 2005 following their detention for deportation purposes. Of those nine, four were bailed by the Special

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339. *Id.* at 1213 (Lord Bassam) (Feb. 15, 2006); *id.* at 1235; 442 PARL. DEB., H.C. (6th ser.) (Feb. 15, 2005) 1499 (Hazel Blears).

340. Lord Carlile has made various suggestions to improve the detail given in the reports, *see* LORD CARLILE, *supra* note 197, ¶ 27, and these points have been accepted by the Secretary of State, *see* 454 PARL. DEB., H.C. (6th ser.) (Dec. 11, 2006) 40WS (John Reid).

341. *See* 431 PARL. DEB., H.C. (6th ser.) (Mar. 10, 2005) 1799 (Hazel Blears).

342. *Id.* at 1827 (Charles Clarke).

343. LORD CARLILE, *supra* note 107, at 12.

344. *Id.* at 4-5.

345. 685 PARL. DEB., H.L. (5th ser.) (Oct. 9, 2006) 26WS (Baroness Scotland).

346. 688 PARL. DEB., H.L. (5th ser.) (Jan. 16, 2007) 33WS (Baroness Scotland). The nationality of those affected is not disclosed.

Immigration Appeals Commission. Two of the former detainees remain subject to control orders since they have not been served with deportation notices. As for those held in detention under deportation procedures, Lord Carlile has observed, as already noted,<sup>347</sup> that the control order system could offer a preferable response within article 5.<sup>348</sup> This is because deportation negotiations are very difficult: U.K. authorities must secure memoranda of understanding regarding the treatment of transferees from the states where detainees will be transferred so as to avoid the prospect of mistreatment on their return.<sup>349</sup>

Lord Carlile's next point criticized the contents of the control orders actually issued. He remarked at the outset that "24/7 house arrest would involve derogation."<sup>350</sup> He then revealed and assessed the *pro forma* of the Schedule of Obligations imposed on most controlled persons, including:

[A]n eighteen hour curfew, limitation of visitors and meetings to those persons approved by the Home Office, submission to searches, no cellular communications or internet, and a geographical restriction on travel. They fall not very far short of house arrest, and certainly inhibit normal life considerably.<sup>351</sup>

Lord Carlile thus strongly hinted that the orders go too far to qualify as non-derogating orders. The Home Office did not take the hint, but the courts (as described below) have certainly done so. Moreover, Lord Carlile called for the establishment of a Home Office-led procedure whereby officials and representatives of the control authorities meet regularly to monitor each case.<sup>352</sup> There were also early reports of practical difficulties in the implementation of Lord Carlile's conditions,<sup>353</sup> but these seem to have been overcome in time.

As regards section 8, Lord Carlile argued that the formula may exclude cases where on public interest grounds it had been predetermined that there should be no investigation with a view to prosecution.<sup>354</sup> He also revealed that

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347. LORD CARLILE, *supra* note 107, at 4-5.

348. *Id.* at 8-9.

349. For a description of the memoranda of understandings, see Clive Walker, *Foreign Terror Suspects*, 70 MOD. L. REV. 428 (2007).

350. LORD CARLILE, *supra* note 107, at 10. The view is shared by Alvaro Gil-Robles, Commissioner for Human Rights for the Council of Europe. See Council of Europe, Office of the Comm'r for Human Rights, *Report by Mr. Alvaro Gil-Robles, Commissioner for Human Rights, on his visit to the United Kingdom, 4th-12th November 2004*, at 6, CommDH (2005)6 (June 8, 2005).

351. LORD CARLILE, *supra* note 107, at 13.

352. *Id.* at 14.

353. Sophie Goodchild et al., *Police: We Can't Guarantee Safety of Belmarsh Suspects*, INDEP. ON SUNDAY (London), Mar. 13, 2005, at 1; Sophie Goodchild et al., *How Chaos in the Commons Descended into a Dangerous Farce: Inside Story: Britain's New Terror Laws*, INDEP. ON SUNDAY (London), Mar. 13, 2005, at 6. The service is run by Serco (formerly Premier Custodial Group) and Group4Securicor. Interview with Claire Sims, Group4Securicor, at the Electronic Monitoring Conference in Kegworth, U.K. (Nov. 2006).

354. LORD CARLILE, *supra* note 107, at 18.

letters from chief officers of police in relation to each controlled person are woefully thin on reasons preventing prosecution. Accordingly, he asked for more detail and also suggested that the letters be disclosed to the suspects.<sup>355</sup>

The response of the Home Secretary took the form of a letter to Lord Carlile.<sup>356</sup> The government accepted the need for continuous review of control orders and has established a Home Office Review Group, including law enforcement and intelligence representatives (but there is again no mention of prosecutors) to conduct a quarterly review of extant orders. It also agreed with the need for reform under section 8 and that there should be more information given in the police assessments.

The second annual report from Lord Carlile, appearing in February 2007, pointed to some progress.<sup>357</sup> He recorded that the obligations imposed under orders had become more tailored and less formulaic and that the Control Order Review Group was meeting regularly to consider the justification for extant orders, though he felt it should give more attention to proactive measures to achieve exit from the regime.<sup>358</sup> However, he remained critical of the detail disclosed in police letters about the possibility of prosecution and sought a better audit trail of police, prosecution, and security agency meetings.<sup>359</sup>

This review process has been very thorough but also relatively conservative. It concentrated on the fine detail but did not press hard on some of the more radical issues. These include the availability of intercept evidence for the purposes of prosecution (briefly mentioned but not explored or applied in relation to the cases actually scrutinized). There was also the issue of whether the process could be made more judicial and whether the Secretary of State should act as judge at the initial stage for non-derogation orders. There was also little consideration of whether the Act actually meets the standards of the European Convention, aside from the major hint that the actual orders were wrongly categorized as non-derogating.

The subsequent review of the Joint Committee on Human Rights was more policy oriented.<sup>360</sup> It covered compliance with article 5<sup>361</sup> and article 6 of the

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355. *Id.* at 19.

356. Letter from Charles Clark, Sec'y of State for the Home Dep't, to Lord Carlile of Berriew Q.C., House of Lords, Home Secretary's Response to Lord Carlile of Berriew's First Annual Review of the Operation of the Prevention of Terrorism Act 2005 (Apr. 26, 2005), *available at* [http://security.homeoffice.gov.uk/news-publications/publication-search/legislation-publications/hs-annual\\_review.pdf](http://security.homeoffice.gov.uk/news-publications/publication-search/legislation-publications/hs-annual_review.pdf).

357. LORD CARLILE, SECOND REPORT OF THE INDEPENDENT REVIEWER PURSUANT TO SECTION 14(3) OF THE PREVENTION OF TERRORISM ACT 2005 (2007), *available at* <http://security.homeoffice.gov.uk/news-publications/publication-search/independent-reviews/lord-carlile-ann-report.pdf>.

358. *Id.* at 4, 15-16.

359. *Id.* at 15-16, 25.

360. JOINT COMM. ON HUMAN RIGHTS, COUNTER-TERRORISM POLICY AND HUMAN RIGHTS: DRAFT PREVENTION OF TERRORISM ACT 2005 (CONTINUANCE IN FORCE OF SECTIONS 1 TO 9) ORDER 2006, 2005-6, H.L. 122, H.C. 915.

European Convention on Human Rights.<sup>362</sup> It also called for greater judicial involvement<sup>363</sup> and for a higher standard of proof.<sup>364</sup>

### C. Judicial Review

Several judges have forthrightly condemned fundamental aspects of the legislative provisions and the execution of the Act in a series of cases brought by persons subject to control orders. The judicial concerns have focused upon the extent of the conditions imposed pursuant to control orders and the fairness of the processes by which they may be tested. It was asked at the outset of this paper whether it is possible to maintain constitutionalism when dealing with a non-criminal justice mechanism such as control orders. The judges have demonstrated that it is possible, but not without substantial effort, which in several instances has demanded more careful consideration than afforded by the executive authorities.

In the first case, *Re MB*,<sup>365</sup> a hearing took place pursuant section 3(10) of the Prevention of Terrorism Act 2005 regarding a non-derogating control order which was made in September 2005 against a British citizen on the grounds that he intended to go to Iraq to fight against coalition forces. The material delivered to the court included an open statement and supporting documents dated August 2005, a closed statement and supporting documents, and an application for permission to withhold that closed material supplemented by an outline summary of the reasons why the Secretary of State contended that the closed material should be withheld. The open statement referred to specific allegations as follows:

MB is an Islamist extremist who, as recently as March 2005, attempted to travel to Syria and then Yemen. . . . MB attempted to travel to Syria on 1 March 2005 but was prevented from doing so by police officers at Manchester airport. . . . The Security Service assessment is that MB was intending to travel from Syria onwards to Iraq. . . . On 2 March 2005, MB was stopped before boarding his flight to the Yemen by the Metropolitan Police at Heathrow airport. . . . The Security Service is confident that prior to the authorities preventing his travel, MB intended to go to Iraq to fight against coalition forces. Despite having been stopped from travelling once, MB showed no inclination to cancel his plans. . . . However, given that SHAREB is an experienced facilitator with the ability to acquire false documentation, the Security Service assesses that his lack of passport will not prevent MB from travelling indefinitely.<sup>366</sup>

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361. *Id.* at 15.

362. *Id.* at 23.

363. *Id.* at 15.

364. *Id.* at 21.

365. Sec'y of State for the Home Dep't v. MB, [2006] EWHC (Admin) 1000.

366. *Id.* at [20].

These allegations were admitted to be “relatively thin.”<sup>367</sup> Neither the closed evidence nor a summary of it was served on the respondent.

In this case, the principal adverse finding of the High Court was based upon the restricted grounds for challenge, which amounted to a breach of the requirements of a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law under article 6(1) of the European Convention.<sup>368</sup> Mr. Justice Sullivan classified the hearings as “civil” and not “criminal,” which reduced the applicable human rights standards.<sup>369</sup> Nevertheless, according to the court, it remained vital that where the initial decision determining the individual’s civil rights and obligations is taken by an administrator who is not independent (in the present case, the Secretary of State), there is a subsequent appeal or review which has independence and has full jurisdiction over the earlier decision.<sup>370</sup> Having considered matters such as the subject matter of the decision appealed against, the manner in which that decision was arrived at, and the content of the dispute, the court found that the supervisory role at the section 3(2) stage is “very limited indeed,” that “[t]he standard of proof to be applied by the decision taker in making the decision subject to review is very low,”<sup>371</sup> and that there is substantial reliance on closed material which the appointment of a special advocate does not make much less unfair.<sup>372</sup> In response to those drawbacks, the court recognized its “inability to reach a decision upon the whole of the evidence available as at the date of the hearing.”<sup>373</sup> As a result, “nothing short of an ability to re-examine and reach its own conclusions on the merits of the case (applying the higher civil standard of proof . . .) would be sufficient to give the court ‘full jurisdiction’ for the purposes of determining the respondent’s rights under Article 8 in compliance with Article 6.1 of the Convention.”<sup>374</sup> In short:

To say that the Act does not give the respondent in this case, against whom a non-derogating control order has been made by the Secretary of State, a fair hearing in the determination of his rights under Article 8 of the Convention would be an understatement. The court would be failing in its duty under the

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367. *Id.* at [66].

368. *Id.* at [104].

369. *Id.* at [30]-[41]; *see also* *S v. S*, [2002] UKHL 10, [70]-[71] (Lord Nicholls); *R (McCann) v. Manchester Crown Court*, [2002] UKHL 39, [112], [2003] 1 A.C. 787; JOINT COMM. ON HUMAN RIGHTS, *supra* note 360, at 17-18; Council of Europe, *supra* note 350, ¶¶ 18-22.

370. *See also* *Bryan v. United Kingdom*, App. No. 19178/91, Ser. A, No. 335-A, 21 Eur. H.R. Rep. 342, 342 (Eur. Ct. H.R. 1996); *Runa Begum v. Tower Hamlets London Borough Council*, [2003] UKHL 5, [11], [2003] 2 A.C. 430 (Lord Bingham).

371. *Sec’y of State for the Home Dep’t v. MB*, [2006] EWHC (Admin) 1000, [51]-[52].

372. *Id.* at [70]; *see also* *R (Roberts) v. Parole Board*, [2005] UKHL 45, [19], [2005] 2 A.C. 738, 754-55 (Lord Bingham).

373. *MB*, [2006] EWHC (Admin) 1000, [80].

374. *Id.* at [87]. The same limitations meant that sections 7 and 10 also did not provide sufficient remedy.

1998 Act, a duty imposed upon the court by Parliament, if it did not say, loud and clear, that the procedure under the Act whereby the court merely reviews the lawfulness of the Secretary of State's decision to make the order upon the basis of the material available to him at that earlier stage are conspicuously unfair. The thin veneer of legality which is sought to be applied by section 3 of the Act cannot disguise the reality. That controlees' rights under the Convention are being determined not by an independent court in compliance with Article 6.1, but by executive decision-making, untrammelled by any prospect of effective judicial supervision.<sup>375</sup>

Thus, the court issued a declaration of incompatibility under section 4 of the Human Rights Act 1998.

Thereafter, the Court of Appeal reversed the High Court on several points. First, the Court of Appeal viewed the legislation as allowing for a much more rigorous standard of review than indicated by Mr. Justice Sullivan.<sup>376</sup> Given that control orders affect basic rights and that section 11(2) envisages that the reviewing court can apply the standards of the Human Rights Act 1998, section 3(10) had to be "read down"<sup>377</sup> so as to allow the court to consider whether the decision was flawed at the time of the court hearing and not just at the time of the making of the order.<sup>378</sup> Next, the court distinguished the standard of review embodied within the two elements in the decision of the Secretary of State, namely reasonable grounds for suspecting involvement in terrorism and the necessity for the order. On the first ground, the court asserted that it would have to satisfy itself that the evidence met the standard but, if the first leg could be established, that greater deference would be shown on the second necessity question but it would still be subjected to intense scrutiny.<sup>379</sup> Though the result was less than a full merits review, the Court of Appeal considered that it went far enough to satisfy article 6 by allowing and requiring the court to form its own view on whether the facts relied upon by the Secretary of State amounted to reasonable grounds for suspecting and whether the order was necessary.<sup>380</sup>

Second, as regards the standard of proof, the Court of Appeal also felt that that there had been confusion between substance and procedure.<sup>381</sup> Third, the

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375. *Id.* at [103]. This conclusion was predicted by the Joint Committee on Human Rights in its preliminary report on the Prevention of Terrorism Bill. JOINT COMM. ON HUMAN RIGHTS, PREVENTION OF TERRORISM BILL: PRELIMINARY REPORT, *supra* note 85, at 6.

376. *Sec'y of State for the Home Dep't v. MB*, [2006] EWCA (Civ) 1140, [47]-[48].

377. *Id.* at [46]. "Reading down" is a canon of constitutional interpretation by which more general words can be narrowed in meaning so as to comply with constitutional requirements. Such use of section 3 of the Human Rights Act 1998 is, and should be, a relatively rare occurrence. *See Re S(FC)* [2002] UKHL 10, [39] (Lord Nicholls); DEP'T FOR CONSTITUTIONAL AFFAIRS, REVIEW OF THE IMPLEMENTATION OF THE HUMAN RIGHTS ACT 29-34 (2006).

378. *MB*, [2006] EWCA (Civ) 1140, [46]; *see also Sec'y of State for the Home Dep't v. E*, [2007] EWHC (Admin) 233, [32].

379. *MB*, [2006] EWCA (Civ) 1140, [60], [64], [65].

380. *Id.* at [48], [60].

381. *Id.* at [67].



court held that the fact that statutory procedures allowed closed hearings did not breach article 6.<sup>382</sup> Both Strasbourg and British courts have accepted that a breach of article 6 does not necessarily arise because material evidence has not been openly disclosed.<sup>383</sup> There does remain the possibility that the courts will find in a given case that so much of the case has remained secret that it is impossible to give or take effective instructions to the special advocate or, as a result, for the latter to provide effective advocacy. But the instant case apparently did not cross that threshold.

In the second case to have considered control orders, *Re JJ*,<sup>384</sup> the Court of Appeal sustained a breach of the Human Rights Act. In this case, the non-derogating control orders were made against asylum-seekers who had previously been detained without trial. The obligations imposed included, inter alia, that the controlled persons be confined for eighteen hours per day in designated domestic residences and be electronically tagged; that the residences be subject to random searches at any time; that all visitors must provide their name, address, and photo identification; that their sole means of contact with the outside world from that residence is confined to a single telephone connection; and finally that, outside of the periods of confinement, they may only meet persons by prior arrangement and must not attend any meetings or gatherings, apart from at a mosque chosen with the approval of the Home Office.<sup>385</sup> Mr. Justice Sullivan, again the presiding judge at first instance, concluded that the cumulative impact of the obligations had been to deprive the defendants of their “liberty” in breach of article 5(1) of the Convention.<sup>386</sup> The Court of Appeal agreed.<sup>387</sup> It understood that article 5 “liberty” is not the same as “freedom to do as one wishes,”<sup>388</sup> but the totality of these orders was much more repressive than the “overnight curfew” mentioned by the Lord Chancellor.<sup>389</sup> As a result, the Secretary of State had made, in substance, derogating control orders, which he had no power to make under section 2 and the orders must therefore be quashed.<sup>390</sup>

A significant crisis arose through the nullity of the orders in *Re JJ*. The High Court had stayed its order pending appeal, but the Court of Appeal had followed its own logic and granted no further stay. One might have suggested that the authorities should have seen it coming. But since they did not, it was

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382. *Id.* at [86].

383. *Id.* at [80]; *see also* Tinnelly v. United Kingdom, App. Nos. 20390/92, 21322/93, 27 Eur. H.R. Rep. 249, 250 (Eur. Ct. H.R. 1999); *R v. H*, [2004] UKHL 3, [2004] 2 A.C. 134; *R (Roberts) v. Parole Bd.* [2005] UKHL 45, [2005] 2 A.C. 738.

384. *Sec’y of State for the Home Dep’t v. JJ*, [2006] EWHC (Admin) 1623.

385. *Id.* at [18].

386. *Id.* at [80].

387. *Sec’y of State for the Home Dep’t v. JJ*, [2006] EWCA (Civ) 1141.

388. *Id.* at [12].

389. 670 PARL. DEB., H.L. (5th ser.) (Mar. 3, 2005) 415 (Lord Falconer).

390. *JJ*, [2006] EWCA (Civ) 1141, [28].

later revealed, at some embarrassment to the Home Office, that one suspect had been able to evade the re-imposition of an order and was “on the run,” thereby avoiding the service of the amended control order.<sup>391</sup>

A further case which successfully attacked in the High Court the impact of control order obligations was the *Secretary of State for the Home Department v. E*.<sup>392</sup> E had been detained under the 2001 Act and then subjected to a control order in March 2005. The orders of eight of the ten were revoked in August 2005, pending deportation, but the (non-derogating) orders against E, a Tunisian national, and Abu Rideh, a Palestinian, remained in place, and both mounted legal challenges.<sup>393</sup> The obligations imposed upon E comprised electronic tagging; residence at a specified address and a requirement to remain within it for a period of twelve hours between seven p.m. and seven a.m.; reporting to the monitoring company by telephone on any trip away from the residence; restrictions on visitors to the residence except with the prior agreement of the Home Office and restrictions on prearranged meetings outside the residence; submission to police searches; submission to temporary prohibitions and restrictions on movement; restrictions on communications equipment, including any access to the Internet or a mobile phone; a requirement to notify the Home Office regarding any intended departure from the United Kingdom; restrictions on banking facilities and on the transfer of money, documents or goods.<sup>394</sup>

The focus of the challenges in this case was not only on the impact on the personal liberty of the controlled person (article 5 of the European Convention on Human Rights) but also on the impossibility of conducting a normal family life in those circumstances (article 8), an issue which was also taken up by his wife and children as third parties to the litigation.<sup>395</sup> Article 6 issues were again raised, as were the questions whether the interferences with any of the foregoing rights were sufficiently certain as to meet the standards required by the European Convention and whether the Secretary of State’s decision to issue an order was “flawed” under sections 3 and 10.<sup>396</sup> A further point not canvassed in the previous cases was whether the impact of the control orders on the family of E, especially on the mental health of his children, was inhuman and degrading contrary to article 3 of the Convention.<sup>397</sup>

In considering whether the Secretary of State’s decision to issue and to renew the order was “flawed,” the gist of the reasonable suspicion against E

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391. See Tendler, *supra* note 286.

392. Sec’y of State for the Home Dep’t v. E, [2007] EWHC (Admin) 233.

393. See Clare Dyer, *Terror Suspects’ Control Orders Face New Court Challenge*, GUARDIAN (London), Jan. 8, 2007, at 10.

394. E, [2007] EWHC (Admin) 233, [49].

395. *Id.* at [3]. The restrictions on computers and telephones could also raise issues under article 10 (freedom of expression), but this was not pursued. *Id.* at [13].

396. *Id.* at [10]-[11].

397. *Id.* at [13].

was that he had provided support to the leadership of the Tunisian Fighting Group involved in terrorist-related activity, such as sending recruits to Afghanistan, though it was not a proscribed organization and there was no evidence that E had directly engaged in violence.<sup>398</sup> The Court of Appeal received in evidence on behalf of the Home Office judgments of the County Court of Brussels, dated September 30, 2003, and of the Court of Appeal of Brussels, dated February 21, 2005, relating to cases in which associates of E were successfully prosecuted, and in which there are references to their association with E and to his activities.<sup>399</sup> This evidence was sufficient to convince the court that there were substantial grounds for suspecting E of terrorist involvement; as for necessity, even the fact that he had been subject to detention, control, and therefore close surveillance, did not remove all danger.<sup>400</sup> So, on the one hand, the original order was validly issued. The court also accepted that the renewal of the order was not flawed in that there had been sufficient consultation with the police for the purposes of section 8(2) of the Act before the renewal had been made.<sup>401</sup> On the other hand, the duty under section 8(4) to keep under review the possibility of prosecution had not been sufficiently observed because the impact of the Belgian judgments and the material referred to in them on the prospects of prosecuting E were not adequately considered when they became available after the order had been made in March 2005. That material had later been considered for the purposes of the litigation,<sup>402</sup> but no serious inquiry seems to have been made as to whether it could trigger a prosecution, and E had not been interviewed at any stage by the police. This defect on the part of the police tainted the Secretary of State's decision to maintain the order.<sup>403</sup>

Next, the contention was rejected<sup>404</sup> that the obligations lacked certainty and amounted to limits on rights which were not "in accordance with the law" under articles 8 to 11<sup>405</sup> or were not "prescribed by law" for the purposes of article 5. E's argument was that the activity targeted is very wide and ill-defined, that the obligations that may be imposed are, on their face, unlimited, and that the legal safeguards against abuse are nonexistent. The court

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398. *Id.* at [60], [63], [64].

399. *Id.* at [52].

400. *Id.* at [82], [96]. The court also rejected the plea that individual obligations were not necessary. *Id.* at [296].

401. *Id.* at [266], [284].

402. *Id.* at [124].

403. *Id.* at [284], [293].

404. *Id.* at [182], [184].

405. The European Court of Human Rights has specified that "the law" includes both formal and informal rulemaking and that the effect must allow the shaping of conduct. *See* *Malone v. United Kingdom*, App. No. 8691/79, Ser. A, No. 82, 7 Eur. H.R. Rep. 14, 14-15 (Eur. Ct. H.R. 1985). But it has also accepted that legal provisions must allow for a broad range of circumstances. *Kuijper v. Netherlands*, App. No. 64848/01, 41 Eur. H.R. Rep. SE16 (Eur. Ct. H.R. 2005).

interpreted the European Convention's precept of certainty as allowing for "broad terms" and rejected, especially in the light of the two previous review cases, that there were no legal safeguards against abuse.<sup>406</sup>

The more specific allegation that article 5 rights to liberty had been breached by the cumulative obligations of the order, the argument which proved successful in *Re JJ*, equally prevailed in this case.<sup>407</sup> It was concluded that the impact must be judged objectively, so that subjects who were especially vulnerable or weak-minded would not be treated more lightly than those who can suffer adversity with fortitude; nevertheless, some limited account had to be taken of mental condition in judging the social isolation created by the restrictions.<sup>408</sup> Influential factors in the estimation of the court were the likely indefinite duration of the order and the vetting of visitors, conditions which were harsher than in comparable cases before the European Court of Human Rights.<sup>409</sup>

As regards the fairness of process under article 6, the question was whether E had been afforded an opportunity to make representations after the decision to issue the control order had been taken. The practice of the Home Office in 2005 was to serve control orders with covering letters which did not invite representations about the obligations nor indicate that "Control Order Contact Officers" could be contacted. Such officers were only appointed in 2006, and so the first express invitation to E to make representation was by a letter dated December 12, 2006.<sup>410</sup> Whilst the Home Office had a dialogue with his legal advisers, who took the initiative to contact the Home Office, Mr. Justice Beatson concluded that "[o]penness to representations made is, however, not the same as affording an opportunity to make representations."<sup>411</sup> He left open whether this defect meant that the order was flawed, partly because it had been condemned on other grounds and partly in recognition that representations had in fact been made without this express invitation.<sup>412</sup>

In considering the articles 3 and 8 points, the court paid close attention to the psychological impact, which caused depression as regards E himself and stress for his children.<sup>413</sup> There was also information about the difficulties caused in relation to religious observances and child care arrangements and, more generally, the isolation and stresses caused by the orders which meant there was an ever present threat of police intrusion and that friends and contacts were deterred by the need to seek clearance.<sup>414</sup> Yet, the national security

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406. *E*, [2007] EWHC (Admin) 233, [186], [190].

407. *Id.* at [226].

408. *Id.* at [229], [230].

409. *Id.* at [233], [242].

410. *Id.* at [302], [303].

411. *Id.* at [305].

412. *Id.* at [306].

413. *Id.* at [54], [56], [57], [130], [155], [156], [177], [179].

414. *Id.* at [155].

interests and the nature of the risk E is assessed to pose, “particularly weighty” factors, were held to justify the serious interference with the rights of E’s innocent wife and children under article 8.<sup>415</sup> As for article 3, the control order restrictions were held not to pose a risk of such significant impact on the children’s mental health that they were “humiliating and debasing them and possibly breaking their moral resistance” so as to breach article 3.<sup>416</sup> No specific conclusion was reached about E himself as the argument was not pursued.

In summary, the Home Office lost the case because of an excess of obligations and because of the flawed process by which the alternative of prosecution had not been kept sufficiently alive or by which representations had not been positively sought. At least the consequences of the defeat in the earlier cases were avoided because the High Court decided to stay for seven days its decision to quash the orders.<sup>417</sup>

Assuming that resorting to derogation remains unattractive, the government must seek to apply with much greater care and precision the processes in the 2005 Act, having regard to the need to invite representations and to keep prosecution under more active review. The meticulous scrutiny of the judges should keep the executive authorities on their toes, though the level of care demanded does not pose an impossible barrier to the persistence of control orders. Perhaps more troubling is that the Home Office must also observe greater restraint over the obligations which may permissibly flow from a non-derogating order. The problem the government then faces is whether the level of control will be too weak to protect public security. The Home Secretary, John Reid, has reportedly bemoaned that control orders “have got holes all through them.”<sup>418</sup> It is submitted that the solution to that concern must lie in terms of bolstering prosecution and also applying more effective resources to the monitoring of the handful of suspects subject to control orders. Subject to these points, the cases have shown that a form of control orders can be consistent with constitutionalism as interpreted within the European Convention on Human Rights and in the context of what is accepted to be the real scourge of terrorism.<sup>419</sup>

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415. *Id.* at [280].

416. *Id.* at [309].

417. *Id.* at [311]. A replacement control order has been issued, after full consideration of the Belgian judgment, and appeals are pending in the cases of JJ and E. *See* 457 PARL. DEB., H.C. (6th ser.) (Feb. 22, 2007) 437 (Tony McNulty).

418. Richard Ford, *Terror Controls Full of Holes, Says Reid*, *TIMES* (London), Jan. 25, 2007, at 2.

419. The courts afford an added degree of deference to the Executive in recognition of the dangers of terrorism. *See, e.g.*, *Klass v. Federal Republic of Germany*, App. No. 5029/71, Ser. A, No. 28, 2 Eur. H.R. Rep. 214, 216 (Eur. Ct. H.R. 1978); *Brogan v. United Kingdom*, App. Nos. 11209, 11234, 11266/84, 11386/85, Ser. A., No. 145-B, 11 Eur. H.R. Rep. 117, 129 (Eur. Ct. H.R. 1988); *Fox v. United Kingdom*, App. Nos. 12244, 12245, 12383/86, Ser. A, No. 182, 13 Eur. H.R. Rep. 157, 171 (Eur. Ct. H.R. 1990).

## II. MAINTAINING CONSTITUTIONALISM IN THE CONTROL ORDER REGIME

Further to the foregoing analysis, there appear to be no fundamental objections to the melding of intelligence into the evidence-based legal process—it is not anathema to the legal system in the same way that one might suggest that evidence obtained through torture is intrinsically tainted.<sup>420</sup> Intelligence is information with value-added analysis and no more. But there are two observations that arise from this initial finding.

First, intelligence must be properly tested if it is to be the foundation for legal process, just as we expect evidence to be tested. So, decisionmakers should be able to see the original data; otherwise, there could be legitimate complaints about the nondisclosure of material information and the possibility that executive decisions would simply be rubber-stamped.

Second, there are degrees of relevance and reliability of intelligence that must be weighed in the overall context of any infringement of liberty, just as if “evidence” was being taken into account. But the idea that decisions should only be made on the basis of “pure” evidence is belied by trenchant domestic changes to the rules of admissibility in criminal proceedings brought about by Part XI of the Criminal Justice Act 2003.<sup>421</sup> This issue must also be viewed in light of the laissez-faire attitude of the European Court of Human Rights, which, while accepting that pretrial and evidential rules can in general be relevant to fair process under article 6,<sup>422</sup> has continually emphasized that the admissibility of evidence is therefore primarily a matter for regulation under national law.<sup>423</sup>

Having asserted that intelligence is a proper basis for action, the experience of control orders (and detention without trial beforehand) suggests that, at least in the context of executive orders based on intelligence, further regulation is

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420. For the position of the English courts, see *A v. Sec’y of State for the Home Department*, [2005] UKHL 71, [2006] 2 A.C. 221. For the American position, see the Detainee Treatment Act of 2005, Pub. L. No. 109-148, §§ 1001-1006, the limitations of which are exposed in Arsalan M. Suleman, Recent Development, *Detainee Treatment Act of 2005*, 19 HARV. HUM. RTS. J. 257 (2006).

421. Criminal Justice Act, 2003, c. 44, pt. 9; see also LAW COMM’N, EVIDENCE IN CRIMINAL PROCEEDINGS: HEARSAY AND RELATED TOPICS (1997); LAW COMM’N, EVIDENCE OF BAD CHARACTER IN CRIMINAL PROCEEDINGS, 2001, Cm. 5257; ROBIN AULD, REVIEW OF THE CRIMINAL COURTS OF ENGLAND AND WALES (2001), available at <http://www.criminal-courts-review.org.uk/index.htm>.

422. *Murray v. United Kingdom*, App. No. 14310/88, Ser. A, No. 300-A, 19 Eur. H.R. Rep. 193, 193 (Eur. Ct. H.R. 1994); *Shannon v. United Kingdom*, App. No. 6563/03, 42 Eur. H.R. Rep. 31, 32 (Eur. Ct. H.R. 2005).

423. See *Schenk v. Switzerland*, App. No. 10862/84, Ser. A, No. 140, 13 Eur. H.R. Rep. 242, 242 (1988); see also BEN EMMERSON & ANDREW ASHWORTH, HUMAN RIGHTS AND CRIMINAL JUSTICE 418 (2001); John D. Jackson, *The Effect of Human Rights on Criminal Evidentiary Processes: Towards Convergence, Divergence or Realignment?*, 68 MOD. L. REV. 737 (2005); David Ormerod & Nick Taylor, *Mind the Gaps: Safety, Fairness and Moral Legitimacy*, 2004 CRIM. L. REV. 266.

both desirable and possible. It is said that law has intruded into the world of intelligence during the recent decades. That is a fair observation in the light of legislation such as the Interception of Communications Act 1985, the Security Service Act 1989, the Intelligence Services Act 1994, the Police Act 1997 (Part III), and the Regulation of Investigatory Powers Act 2000. The trend towards legalism in the intelligence field is desirable: law is a necessary condition for constitutionalism. Yet it is not a sufficient condition, because the achievement of true constitutionalism depends on the substance of law and not just the presence of law. So the question arises, what sort of regulation of intelligence should the law provide where it is the basis for legal process?

First, there should be legal guidance about targeting, given its importance to successful intelligence work and given the known dangers of skewing the objects of investigative attention through police cultures.<sup>424</sup> The risk of “rounding up the usual suspects” has precipitated corresponding attempts to rein in the discretion exercised under stop and search powers, albeit with limited success.<sup>425</sup>

Second, what is counted as “intelligence” in the first place or “valid” intelligence in the second place, or “quality” intelligence in the third place is not sufficiently structured under current law. To take each in turn, arguments about what is “intelligence” surely raise similar issues to those pertaining to forensic evidence. In other words, if this information is to be considered, the decisionmaker should be able to understand: what are the qualifications of the person who generated the intelligence; and were the methods used to generate analysis acceptable to a wider community? The forensic science world is rightly wary of “junk science.”<sup>426</sup> The intelligence world should likewise be vetted for the sake of its reputation. Next, what constitutes “valid” intelligence begins to raise normative issues. Is it acceptable, for instance, to use intelligence where the data has been obtained by torture or even obtained by illegal means such as an unlawful search<sup>427</sup> or unlawful capture into

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424. See PETER GILL, *ROUNDING UP THE USUAL SUSPECTS?: DEVELOPMENTS IN CONTEMPORARY LAW ENFORCEMENT INTELLIGENCE* 130, 249 (2000).

425. See U.K. HOME OFFICE, *POLICE AND CRIMINAL EVIDENCE ACT 1984, CODE A: CODE OF PRACTICE FOR THE EXERCISE BY: POLICE OFFICERS OF STATUTORY POWERS OF STOP AND SEARCH* ¶¶ 1.1, 2.2-2.6 (2005), available at [http://police.homeoffice.gov.uk/news-and-publications/publication/operational-policing/PACE\\_Chapter\\_A.pdf](http://police.homeoffice.gov.uk/news-and-publications/publication/operational-policing/PACE_Chapter_A.pdf); U.K. HOME OFFICE, *HOME OFFICE CIRCULAR 038/2004: AUTHORISATIONS OF STOP AND SEARCH POWERS UNDER SECTION 44 OF THE TERRORISM ACT (2004)*.

426. See R.K. FOSTER, & PETER W. HUBER, *JUDGING SCIENCE* (1997); PETER W. HUBER, *GALILEO'S REVENGE: JUNK SCIENCE IN THE COURTROOM* (1991); Gary Edmond & David Mercer, *Trashing "Junk Science,"* 1998 *STAN. TECH. L. REV.* 3; Paul C. Giannelli, *The Abuse of Scientific Evidence in Criminal Cases: The Need for Independent Crime Laboratories*, 4 *VA. J. SOC. POL'Y & L.* 439 (1997); Mike Redmayne, *Expert Evidence and Scientific Disagreement*, 30 *U.C. DAVIS L. REV.* 1027 (1997).

427. See (MCDONALD) *COMMISSION OF INQUIRY CONCERNING CERTAIN ACTIVITIES OF THE RCMP, SECOND REPORT: FREEDOM AND SECURITY* 513-14 (1981) [hereinafter (MCDONALD) *COMMISSION*].

jurisdiction, such as by kidnap?<sup>428</sup> As for quality in intelligence, what standards should be applied? The U.K. police force use a 5x5x5 reliability test.<sup>429</sup> Similarly, the Bichard Inquiry Report has recommended a new Code of Practice covering record creation, retention, and deletion, which should take account of the nature of the allegations, seriousness and circumstances, the reliability of the allegations, and the age of the allegations.<sup>430</sup> The Code of Practice on the Management of Police Information<sup>431</sup> made under sections 39 and 39A of the Police Act 1996 and sections 28, 28A, 73 and 73A of the Police Act 1997 have duly appeared, but at just thirteen pages long, it does little more than scratch the surface and fails even to mention the Data Protection Principles.<sup>432</sup> The Home Office guidelines on the disclosure of criminal records under Part V of the Police Act 1997 talk more vaguely about information being credible and clear and reasonably current.<sup>433</sup> No codes or other documents have appeared to regulate intelligence in control order cases.

Processes must next be considered. There should be a safeguard of internal oversight by way of pre-authorization where feasible. The level of authorization should be based on the intrusiveness rather than the sensitivity.<sup>434</sup> The hierarchy of authorizations should include, towards the upper end, persons with legal training. Some say that the judges should not be involved as it will sully their reputations to become involved in the murky world of intelligence, but these concerns have already been addressed. In addition to the qualifications of the decisionmaker, consideration must also be given to other procedural features such as the standard of proof, legal representation, disclosure, and so on.

Outcomes must next be delimited. The general principle should be one of proportionality to the threat.<sup>435</sup> This test might be broken down into

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428. See *R v. Horseferry Rd. Magistrates' Court*, [1994] 1 A.C. 42; *R v. Mullen*, [2000] Q.B. 520.

429. This refers to the 5x5x5 data grading scheme for the evaluation of the source, intelligence, and handling. Evaluation of the source (the person providing it) ranges from reliable and tested to unreliable and unknown (A to E). The information itself is also graded on a five-point scale (one to five). One is assigned where the information is known to be true and five where information is considered false or malicious. A handling code, ranging from one to five, is also assigned. This determines the level to which the information may be spread across the Force and partner agencies. For further details, see NAT'L CENTRE FOR POLICING EXCELLENCE, GUIDANCE ON THE NATIONAL INTELLIGENCE MODEL (2005), available at <http://www.acpo.police.uk/asp/policies/Data/nim2005.pdf>.

430. BICHARD INQUIRY, *supra* note 45, at 135-38.

431. See NAT'L CENTRE FOR POLICING EXCELLENCE, CODE OF PRACTICE ON THE MANAGEMENT OF POLICE INFORMATION (2005), available at <http://police.homeoffice.gov.uk/news-and-publications/publication/operational-policing/CodeofPracticeFinal12073.pdf>.

432. Data Protection Act, 1998, c. 29, sched. 1.

433. See BICHARD INQUIRY, *supra* note 45, at 153.

434. See (MCDONALD) COMMISSION, *supra* note 427, at 513-14.

435. *Id.*



components such as seriousness, temporality, and certainty.<sup>436</sup> Without a high standard of proof and full, open testing, which is common in the executive measures, there should be time limits on the persistence of orders which are built upon intelligence (whether to exclude, detain, control, or otherwise). For example, it might be specified that an executive order should persist for no more than twelve months, without the possibility of renewal on the same grounds. The same conclusion is reached by the Council of Europe Commissioner for Human Rights, as stated by Alvaro Gil-Robles:

The indefinitely renewable nature of control orders, however, risks elevating the exceptional to the permanent by obviating the need ever to prove suspicions the restrictions are supposed to counter. Failure to find sufficient evidence to bring charges within the generous 12-month period allowed for control orders ought in my view to constitute grounds for lifting the restrictions imposed.<sup>437</sup>

A time limit could transform the situation.<sup>438</sup> It would turn a control order into either a provisional-charge detention or a provisional-deportation detention—either way, the Home Office would know that it must act decisively and not rely on control orders for what one minister called (with inimitable logic), “an identifiable, limited period” reviewed “on a continuous basis.”<sup>439</sup> That gives sufficient time for the collection of evidence, and those who are still suspect but whose control orders have lapsed can then be selected for intense surveillance that will either prove or dispel the state’s suspicions. This recommendation is proffered in the knowledge that only eighteen or so orders have ever been issued and that the budgets of the security services have doubled since 2001.

Finally there is a need for continuing legislative and executive oversight. A specialist standing committee which reports to Parliament and not just the Home Secretary would fulfill this need.

Rather than seeking further limitations upon control orders for constitutional reasons or assessing their effectiveness to date, the opposite trend has emerged. Thus, the Home Office issued, in July 2006, a command paper, *New Powers Against Organised and Financial Crime*,<sup>440</sup> which includes the proposal in chapter 3 for a new “Serious Crime Prevention Order.” These orders would follow in the footsteps of new categories of civil orders against individuals for harm or crime prevention purposes, addressing areas like

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436. Anthony E. Bottoms & Roger Brownsword, *Dangerousness and Rights, in DANGEROUSNESS: PROBLEMS OF ASSESSMENT AND PREDICTION* 9 (John W. Hinton ed., 1983).

437. Council of Europe, *supra* note 350, ¶ 25.

438. A more limited duration was also put forward by the House of Lords Constitution Committee. SELECT COMM. ON THE CONSTITUTION, *supra* note 52, at 5-6.

439. 670 PARL. DEB., H.L. (5th ser.) (Mar. 7, 2005) 515 (Baroness Scotland).

440. U.K. HOME OFFICE, *NEW POWERS AGAINST ORGANISED AND FINANCIAL CRIME*, 2006, Cm. 6875, at 28-35, available at <http://www.crimereduction.gov.uk/organisedcrime/organisedcrime013.pdf>.

antisocial behavior, sexual offenses, restraining orders, and football banning orders.<sup>441</sup> However, these existing laws are viewed as “piecemeal” and have the added “weakness” that the order’s issuance is dependent upon conviction of the target.<sup>442</sup> The government therefore proposed a new civil order, the “Serious Crime Prevention Order.” The purpose of the order would be administrative rather than intentionally penal—“to impose binding conditions to prevent individuals or organizations facilitating serious crime, backed by criminal penalties for breach.”<sup>443</sup> The process would involve the High Court (subject to appeal to the Court of Appeal) being enabled to impose an order if they believe on the balance of probabilities that the subject “[h]as acted in a way which facilitated or was likely to facilitate the commissioning of serious crime” and “[t]hat the terms of the order are necessary and proportionate to prevent such harms in future.”<sup>444</sup> It will be noted that these are very broad terms—for example, there is no reference to intention or explanation of the degree of involvement required by “facilitation.” Will the innocent delivery of a take-away to a suspect gangster result in the pizza delivery boy being subject to such an order? At best, the paper refers to the need to ensure proportionality, “particularly in cases where the degree of complicity in crime is unclear.”<sup>445</sup> In addition, there is no statutory need to consider a prosecution a priority, though the paper does call for “a conscious and careful choice between prosecution or the civil route.”<sup>446</sup>

This Home Office paper borders on the disingenuous in that the questions asked as part of the consultation do not consider whether it is justifiable to have such a concept in English law at all. Instead, it is simply asserted that “[i]n tackling organized crime, law enforcement is all too often faced with the choice of prosecution or no action.”<sup>447</sup> Two comments may be offered in response. First, it is quite inaccurate to say that in organized crime cases, the only possible disposal is prosecution. The Serious Organised Crime and Police Act 2005<sup>448</sup> (and the Proceeds of Crime Act 2002<sup>449</sup> beforehand) offer a range of options to investigate and also to restrict financial affairs, based on civil standards of proof. Second, it must indeed be mighty inconvenient for authorities such as the police to have to prove to a criminal standard and in an

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441. See Crime and Disorder Act, 1998, c. 37, § 1; Sex Offenders Act, 1997, c. 51, § 1; Criminal Justice and Court Services Act, 2000, c. 43, pt. III; Football (Spectators) Act, 1989, c. 37, § 15. For an analysis of this trend, see Eric S. Janus, *The Preventive State, Terrorists and Sexual Predators: Countering the Threat of a New Outsider Jurisprudence*, 40 CRIM. L. BULL. 576 (2004).

442. U.K. HOME OFFICE, *supra* note 440, at 29.

443. *Id.*

444. *Id.* at 30.

445. *Id.*

446. *Id.*

447. *Id.* at 28.

448. Serious Organised Crime and Police Act, 2005, c. 15.

449. Proceeds of Crime Act, 2002, c. 29.

open forum a criminal offense in order to restrict the liberty of a suspect individual. Yet, the concept of justice so requires. Ever since Magna Carta in 1215, English law has operated on the basis that a fair and open trial is required before life, liberty, and possessions can be adversely treated by the state. By paragraph 39:

No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgement of his equals or by the law of the land.<sup>450</sup>

These values are now reflected in articles 5 and 6 of the European Convention on Human Rights and the Human Rights Act 1998. Furthermore, the conditions imposed under an order might be held to be disproportionate under articles 8 through 11.

The Home Office paper can also be said to be disingenuous because it avoids discussion of what is obviously the closest parallel to what is being proposed. The precedent they seek to follow here is not the antisocial behavior orders or football banning orders, where the restraint is at a relatively limited level and will often follow a conviction or clear evidence of criminality which could be prosecuted. Rather, the precedent followed here is measures addressing anticipatory risk of serious harm akin to control orders under the Prevention of Terrorism Act 2005. It must be recognized that terrorism can be compared to organized crime in several respects and, in Northern Ireland at least, the two overlap.<sup>451</sup> However, the grant of control orders under the 2005 Act was expressly argued on the basis of the extraordinary threat of Al Qa'ida-type terrorism with its capacity to cause major loss of life and to destabilize social, economic, and political systems. It is submitted that organized crime in the United Kingdom does not represent anywhere near the same level of danger—there is no possibility, for example, of a valid derogation notice under article 15, as remains a live possibility under the 2005 Act.

As might be predicted, the Home Office's response to the consultation is to press ahead with its plans. In a paper issued in November 2006,<sup>452</sup> it reported that the majority of respondents supported the creation of a civil order, and gave assurances as to consistency with the European Convention. The paper claimed that the plan would comply with articles 5 and 6, by confining to the courts the authority to impose orders and by placing restraints on the types of

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450. Magna Carta para. 39, available at <http://www.bl.uk/treasures/magnacarta/translation.html> (translated by the British Library).

451. See INDEP. MONITORING COMM'N (IMC), REPORTS, available at <http://www.independentmonitoringcommission.org>; John Horgan & Max Taylor, *Playing the "Green Card,"* 15 TERRORISM & POL. VIOLENCE, Summer 2003, at 1. The Offences Against the State Acts (Act No. 98/1939) (Ir.), in the Republic of Ireland have often been applied to organized crime. See GERARD HOGAN & CLIVE WALKER, POLITICAL VIOLENCE AND THE LAW IN IRELAND 175-276 (1989).

452. U.K. HOME OFFICE, *supra* note 440, at 7.

conditions which are set.<sup>453</sup> It did, however, recognize that problems may still arise by way of interference with private and family life under article 8 because of the potential impact of the orders on third parties, and so prosecutors and the court will have to consider that potential impact.<sup>454</sup>

The Serious Crime Bill was duly introduced into Parliament during session 2006-07.<sup>455</sup> Part 1 creates Serious Crime Prevention Orders. Although the main route for making serious crime prevention orders is by application to the High Court under clause 1,<sup>456</sup> clauses 19 to 22 extend the civil jurisdiction to impose an order to the Crown Court where a person has actually been convicted of a serious criminal offence. As yet, no special procedures are expressly included in the legislation concerning special advocates, closed hearings and the like, though some of this paraphernalia of secrecy could be implied as considered necessary.

#### CONCLUSION

At this point, the reader might expect some miraculous third way which avoids the pitfalls and unpleasantness of control orders. But no such invention is offered here. The debate continues as to whether 9/11 amounted to a wholly new form of terrorism or a novel form of war.<sup>457</sup> But the perception that there is an enhanced state of vulnerability, which deepens the preoccupations of the risk society, means that responses, such as control orders, which address anticipatory risk and “neighbor” terrorism will continue to have cogency. It is certainly preferable to face up to societal needs for safety than to resort to the blunter instrument of detention without trial<sup>458</sup> or to subvert other laws (such as

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453. Compliance with the Convention is aided by the fact that the United Kingdom has not ratified the right to freedom of movement under article 2 of protocol 4. *Cf.* *Labita v. Italy*, App. No. 26772/95 (Eur. Ct. H.R. 2000).

454. U.K. HOME OFFICE, *supra* note 440, at 23.

455. Serious Crime Bill, 2006, H.L. Bill [27]. The court must be satisfied that “(a) it is satisfied that a person has been involved in serious crime (whether in England and Wales or elsewhere); and (b) it has reasonable grounds to believe that the order would protect the public by preventing, restricting or disrupting involvement by the person in serious crime in England and Wales.” *Id.* § 1.

456. *Id.* § 1, 19-22.

457. See DEFENCE SELECT COMMITTEE, *THE THREAT FROM TERRORISM, 2001-2*, H.C. 348-I; U.K. HOME OFFICE, *RECONCILING SECURITY AND LIBERTY*, *supra* note 65, at 1-2; see also BRUCE HOFFMAN, *INSIDE TERRORISM* (1998); WALTER LACQUER, *THE NEW TERRORISM: FANATICISM AND THE ARMS OF MASS DESTRUCTION* (1999); Giandomenico Picco, *The Challenge of Strategic Terrorism*, 17 *TERRORISM & POL. VIOLENCE*, Spring-Summer 2005, at 11; Xavier Raufer, *New World Disorder, New Terrorisms: New Threats for Europe and the Western World*, 11 *TERRORISM & POL. VIOLENCE*, Winter 1999, at 30; David Tucker, *What Is New About the New Terrorism and How Dangerous Is It?*, 13 *TERRORISM & POL. VIOLENCE*, Autumn 2001, at 1.

458. The difficulties of detention without trial in the United Kingdom have already been described. Detention in Guantánamo Bay was condemned by the Attorney-General of England and Wales as “a symbol of injustice, a recruiting agent for terrorists.” Neil Rose,

deportation in the United Kingdom, or, in the United States, material witness statutes<sup>459</sup> or detention for minor immigration violations<sup>460</sup>) to achieve the same ends as control orders.

It is therefore almost certain that the notion of control orders will persist (just as registration orders lingered from 1939 to 1954 and exclusion orders lasted from 1974 until 2001). It is a further forecast that control orders will proliferate into other jurisdictions, which also face anticipatory risks and “neighbor” terrorism. Indeed, the concept has already cropped up in Australia. Expressly borrowing from the U.K. precedents, the Australian Anti-Terrorism Act (No. 2) 2005, schedule 4 (inserting division 104 of the Criminal Code), allows for a senior police officer from the Australian Federal Police, subject to permission from the Attorney-General, to apply to a federal court to issue a control order to permit close monitoring for up to twelve months of terrorist suspects who pose a risk to the community. The legislation is subject to a sunset clause of ten years, whereupon any outstanding order will cease to be in force. The first control order was issued in August 2006 against Joseph Terrence, “Jihad Jack,” Thomas.<sup>461</sup> Thomas had been convicted under the Suppression of the Financing of Terrorism Act 2002, but the conviction was overturned ten days before the control order when his confession in Pakistan was found to have been unfairly admitted.<sup>462</sup> A new prosecution is pending, based on media interviews he gave following his release.<sup>463</sup>

Alongside the attempted assessment of future risk comes uncertainty<sup>464</sup> and unfair process,<sup>465</sup> giving rise to the inevitability of unjust intrusions on the

*Goldsmith Calls for US to Close Down Guantanamo and Back the Rule of Law*, LAW SOC'Y GAZETTE, Sept. 21, 2006, at 6. For other views, see HELEN DUFFY, THE “WAR ON TERROR” AND THE FRAMEWORK OF INTERNATIONAL LAW (2005); Manooher Mofidi & Amy E. Eckert, *Unlawful Combatants or Prisoners of War*, 36 CORNELL INT'L L.J. 59 (2003); Jordan J. Paust, *Judicial Power to Determine the Status and Rights of Persons Detained Without Trial*, 44 HARV. INT'L L.J. 503 (2003); Diane Marie Amann, *Guantánamo*, 42 COLUM. J. TRANSNAT'L L. 263 (2004); Johan Steyn, *Guantánamo Bay*, 53 INT'L & COMP. LEG. Q. 1 (2004); Robert M. Chesney, *Leaving Guantanamo: The Law of International Detainee Transfers*, 40 U. RICH. L. REV. 657 (2006).

459. 18 U.S.C. § 3144 (2007); see also *United States v. Awadallah*, 349 F.3d 42 (2d Cir. 2003); Robert Boyle, *The Material Witness Statute Post September 11: Why It Should Not Include Grand Jury Witnesses*, 48 N.Y.L. SCH. L. REV. 13 (2003).

460. See DAVID COLE, ENEMY ALIENS 22-47 (2003).

461. Natasha Robinson et al., *Police Restrict Jihad Jack*, AUSTRALIAN, Aug. 29, 2006, at 1. The High Court has been asked to overturn the order as unconstitutional. Cath Hart, “Jihad Jack” Asks High Court to Lift Restrictions, AUSTRALIAN, Dec. 6, 2006, at 2; see also <http://www.justice4jack.com/>.

462. Katie Laphorne, *Jihad Jack Goes Free*, HERALD SUN (Austl.), Aug. 19, 2006, at 1.

463. Natasha Robinson, *Courts Turn on “Jihad” Retrial*, AUSTRALIAN, Dec. 21, 2006, at 1.

464. See PAT O'MALLEY, RISK, UNCERTAINTY AND GOVERNMENT ch. 1 (2004).

465. See Andrew Ashworth, *Social Control and Anti-Social Behaviour Order: The Subversion of Human Rights?*, 120 LAW Q. REV. 263 (2004).

moral autonomy of the individual. Equally, the executive-based response may be seen to impinge upon the rule of law and separation of powers.<sup>466</sup> In view of these inherent qualms about measures of “control,” societies such as the United Kingdom and the United States would be well advised to adopt a criminal justice approach as the core response to terrorism rather than resorting to exceptional or extraordinary measures.<sup>467</sup> A criminal justice response carries the important moral platform of legitimacy and fairness,<sup>468</sup> whilst also offering a practical response to danger. Expedients such as control orders may be acceptable *in extremis* by providing short-term abeyances from criminal justice but should not be adopted as long-term solutions to troublesome friends or foes.

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466. See Council of Europe, *supra* note 350, ¶ 16.

467. Compare Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional*, 112 YALE L.J. 1011 (2003), with Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029, 1044 (2004).

468. See Lucia Zedner, *Securing Liberty in the Face of Terror: Reflections from Criminal Justice*, 32 J.L. SOC'Y 507 (2005).

