

IMMINENCE AND PROPORTIONALITY: THE U.S. AND U.K. RESPONSES TO GLOBAL TERRORISM

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I. INTRODUCTION

He who trades liberty for security deserves neither and will lose both.

-attributed to Thomas Jefferson

The United Kingdom and the United States are two of the world's oldest liberal democracies, whose political institutions have evolved and changed numerous times in response to profound historical events and developments at the domestic and international levels. On the domestic front, democracy was born of violent political struggles in both countries through the Puritan Revolution in seventeenth century England and the Civil War in nineteenth century America,¹ where

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1. Two comparative historical analyses of the United States argue that the real revolution in American history occurred with the Civil War in which the Northern model of economic, social, and political organization triumphed and led to a profound set of transformations akin to the Puritan and Glorious Revolutions in

fundamental social, economic, and political differences were resolved through tremendous bloodshed and loss of life. The two countries share similar historical struggles for citizenship rights where various subordinate and marginalized groups sought to acquire equal legal standing vis-à-vis the state, including the bourgeoisie, workers, women, and minorities.² While the expansion of social rights has been arguably more extensive in the United Kingdom than in the United States, the protection of civil and political rights in both countries has remained a bedrock institution. In the international sphere, two countries that were once enemies in the eighteenth century became staunch allies that have shared a remarkably close relationship ever since. This so-called “special” relationship has included the enforcement of the Monroe Doctrine in the 1820s and 1830s, the experience of confronting tyranny in two World Wars, a Cold War, and two Gulf Wars, as well as numerous other conflicts. Such collaboration and mutual support also led to the United States and United Kingdom being the leaders in the construction of the system of international law across a variety of policy areas, most notably that of international human rights.³

More recently, however, both countries have fallen victim to violent terrorist attacks perpetrated by operatives from the loose global terrorist network known as al-Qaeda. Less than four years after the terrorist attacks on New York City and Washington, D.C. on the morning of September 11, 2001, London experienced a series of

England. *See* BARRINGTON MOORE, *THE SOCIAL ORIGINS OF DICTATORSHIP AND DEMOCRACY: LORD AND PEASANT IN THE MAKING OF THE MODERN WORLD* 152-53 (1966); DIETRICH RUESCHEMEYER ET AL., *CAPITALIST DEVELOPMENT AND DEMOCRACY* 122-26 (1992).

2. T.H. MARSHALL, *CLASS, CITIZENSHIP, AND SOCIAL DEVELOPMENT: ESSAYS* 70-83 (discussing the impact increased interest in citizenship has had on social class standing) (1976); J.M. BARBALET, *CITIZENSHIP: RIGHTS, STRUGGLE, AND CLASS INEQUALITY* 31-43 (1988); *see also* JOE FOWERAKER & TODD LANDMAN, *CITIZENSHIP RIGHTS AND SOCIAL MOVEMENTS: A COMPARATIVE AND STATISTICAL ANALYSIS* 26-35 (1997).

3. PHILLIPE SANDS, *LAWLESS WORLD: AMERICA AND THE MAKING AND BREAKING OF GLOBAL RULES FROM FDR'S ATLANTIC CHARTER TO GEORGE W. BUSH'S ILLEGAL WAR* 8-9 (2005); A.W. BRIAN SIMPSON, *HUMAN RIGHTS AND THE END OF EMPIRE: BRITAIN AND THE GENESIS OF THE EUROPEAN CONVENTION* 91 (2001); MICHELINE ISHAY, *THE HISTORY OF HUMAN RIGHTS: FROM ANCIENT TIMES TO THE GLOBALIZATION ERA* 120-21, 329-35 (2004).

successful terrorist attacks on July 7, 2005, followed by a series of unsuccessful attacks on July 21, 2005.⁴ These attacks from Islamist extremists have led to a response from both countries that has curbed the kinds of civil liberties and eroded long-cherished legal guarantees that have served as the beacon for free people the world over. The United Kingdom expanded already-permanent anti-terror legislation⁵ and the United States passed the U.S.A. Patriot Act⁶ and other related statutes that, taken together, have extended unprecedented power and discretion in the executive branches of government across broad dimensions of citizen and non-citizen life in both countries. Such discretion has meant that over the last five years the domestic protection of individual liberties has become more precarious as the writ of executive authority has expanded in ways that could never have been imagined before the attacks of September 11. Indeed, as *A More Secure World: Our Shared Responsibility: Report of the High-level Panel on Threats, Challenges and Change (A More Secure World)* notes, the newly declared “‘war on terrorism’ [now in its sixth year] has in some instances corroded the very values that terrorists target: human rights and the rule of law.”⁷

As part of the 2006-2007 speaker series sponsored by California Western School of Law and University of California San Diego’s Institute for International, Comparative, and Area Studies, this article uses *A More Secure World* as a backdrop for examining the U.S. and U.K. domestic responses to terrorism from a human rights perspective.

4. Todd Landman, *The United Kingdom: The Continuity of Terror and Counterterror*, in NATIONAL INSECURITY AND HUMAN RIGHTS: DEMOCRACIES DEBATE TERRORISM 84-85 (Alison Brysk & Gershon Shafir eds., 2007).

5. The U.K. Terrorism Act of 2000, which preceded the September 11, 2001 attacks in the United States, made permanent all previous anti-terrorist legislation, developed most notably to combat terrorism related to the troubles in Northern Ireland. See Landman, *supra* note 4, at 81; ANDREW BLICK ET AL., THE RULES OF THE GAME: TERRORISM, COMMUNITY AND HUMAN RIGHTS 31 (2006).

6. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (U.S.A. Patriot Act), Pub. L. No. 107-56, 115 Stat. 272 (codified as amended in scattered sections of 18 U.S.C.).

7. The Secretary-General, *A More Secure World: Our Shared Responsibility: Report of the High-level Panel on Threats, Challenges and Change*, ¶ 147, delivered to the General Assembly, U.N. Doc A/59/565 (Dec. 2, 2004) [hereinafter *A More Secure World*], available at <http://www.un.org/secureworld/report.pdf>.

A More Secure World identifies six clusters of threats facing all states in the world, including conflict between states; violence within states; poverty, infectious disease, and environmental degradation; weapons of mass destruction; terrorism; and transnational organized crime. This article addresses the terrorist threat and structures its argument around the two ideas of *imminence* and *proportionality* to examine the ways in which the United States and United Kingdom have judged the scale of the terrorist threat and the degree to which their responses have been proportional to that threat. This article argues that while both countries do face a terrorist threat, one that is arguably more imminent in the United Kingdom than in the United States, the scale of the response has been *disproportionately extreme* in both countries.⁸ This has led to a slow but noticeable reclaiming of authority from the U.S. Congress and Supreme Court, the U.K. House of Commons and judiciary, and in some degree, mass publics in both countries. This article argues further that adopting a human rights-based approach to fighting terrorism is not a “soft” option that leaves either country more open to attack. Rather, such an approach upholds hard-won and long-cherished values, fortifies the rule of law, curbs the unintended consequence of encouraging further terrorism, and serves as an example for other countries to follow in what appears to be a long-term struggle against violent extremism.

To advance this argument, this article is divided into four sections. The first section examines the ways in which imminence and proportionality feature in *A More Secure World* and other international and regional human rights standards to frame the main contours of the analysis presented here. It will be shown that international and regional human rights standards already have in place a series of provisions that stipulate when and under what conditions states can derogate from their legal obligations to protect

8. Two types of evidence support this claim. First, in the context of the United Kingdom, the December 2004 eight to one Law Lords ruling in *A. v. Secretary of State for the Home Department*, [2004] UKHL 56, [2005] 2 A.C. 68 (appeal taken from Eng.), found particular aspects of the United Kingdom’s response to terrorism disproportionate to the threat that has been posed. Louis Blom-Cooper, *Government and Judiciary*, in *THE BLAIR EFFECT 2001-5*, at 234-35 (Anthony Seldon & Dennis Kavanaugh eds., 2005). Second, in the United States, there has not been such a ruling, although an analysis across many dimensions of the U.S. response demonstrates a very large net cost to the American people in financial, legal, and rhetorical terms. IAN S. LUSTICK, *TRAPPED IN THE WAR ON TERROR* 70-114 (2006).

human rights. The second section examines the dilemma of liberal democracies, which face the twin challenges of suffering more terrorist attacks than non-democracies and upholding liberal democratic values that are deeply embedded in their history and political culture. This section challenges the implicit assumption and logic that liberal democracies face necessary trade-offs between the risk of terrorist attacks and the protection of civil liberties, and examines the importance of mechanisms for ensuring vertical and horizontal accountability. Ironically, such mechanisms are formally weaker in the United Kingdom than in the United States, although the U.K. government has been under more significant constraint and judicial oversight thus far than the U.S. government. The third section presents a brief comparison of the main contours of the domestic legislative response to terrorist threats and reflects on the fact that the United Kingdom has had a long history and much experience in tackling terrorism in the context of the conflict in Northern Ireland. In the fourth and final section, the article concludes with a summary of the main components of the argument presented, as well as an outline of how a human rights-based approach to combating terrorism at the domestic level is the preferred strategy in the long run if we are to heed Jefferson's warning and not sacrifice both our liberty *and* our security.

II. IMMINENCE AND PROPORTIONALITY

The concepts of imminence and proportionality are fundamentally important in any assessment of a state's response to terrorism, and each concept has been the subject of much academic, policy, and legal debate. The attacks of September 11 raised the issue of imminence to a high level of salience in two important ways. First, while terrorist threats had been monitored in the years before the attacks, when they actually occurred, the sense of imminence became more palatable.⁹

9. There are numerous accounts about the monitoring of possible terrorist attacks on the United States, especially after the 1993 bombing of the World Trade Center, as well as the varying degree of importance the issue received by different presidential administrations. See RICHARD A. CLARKE, *AGAINST ALL ENEMIES: INSIDE AMERICA'S WAR ON TERROR* 238-46 (2004); LUSTICK, *supra* note 8, at 30-31; NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., *NAT'L POLICY COORDINATION: STAFF STATEMENT* 8 (Mar. 24, 2004).

The psychological fear and unpredictability surrounding the “next attack” increased dramatically,¹⁰ even though the probability of another large and well-coordinated attack decreased significantly.¹¹ Second, since the attacks came from a highly decentralized network of terrorists who had been operating within the United States, there was no way of knowing in the short to medium term if and when another attack would occur. These two factors had a similar impact on decision-makers in the United Kingdom after the July 2005 bombings. In a sense, the need to be seen to be doing something about terrorism has had its own political logic in leading to a proliferation of new legislation giving government more authority to combat terrorism. In the United States, the passage of the U.S.A. Patriot Act, the most significant piece of anti-terror legislation, was “a symbolic shake of the collective fist against the lurking terrorist menace.”¹² In the United Kingdom, former Prime Minister Tony Blair issued a twelve-point plan in August 2005 to combat terror using a variety of legislative and administrative means that consolidated and expanded existing powers to combat terrorism.¹³

10. BRUCE ACKERMAN, BEFORE THE NEXT ATTACK: PRESERVING CIVIL LIBERTIES IN AN AGE OF TERROR 1-9 (2006).

11. Paul Pillar, *Perceptions of Terrorism: Continuity and Change*, in LAW VS. WAR: COMPETING APPROACHES TO FIGHTING TERRORISM 3, 4 (2005), available at <http://www.strategicstudiesinstitute.army.mil/pdffiles/pub613.pdf>. In addition, a comparative study of terrorist attacks in Iraq, Colombia, and Afghanistan has shown that the probability of terrorist attacks that kill large numbers of people is remarkably low owing to the challenges of coordination. See Neil F. Johnson et al., *Universal Patterns Underlying Ongoing Wars and Terrorism*, <http://personal.rhul.ac.uk/uhte/014/PaperLANL6.pdf>; Neil F. Johnson et al., *From Old Wars to New Wars and Global Terrorism*, <http://xxx.lanl.gov/ftp/physics/papers/0605/0605035.pdf>.

12. ACKERMAN, *supra* note 10, at 2.

13. See Landman, *supra* note 4, at 85-86. The twelve-point plan included new grounds for deportation and exclusion; new anti-terrorism legislation; refusal of asylum for anyone having had anything to do with terrorism; enhanced powers to strip British citizenship from dual citizens and naturalized citizens; time limits on all extradition cases; significant extension of pre-trial detention; extension of control orders against those who cannot be deported; enhancement of court capacity to hear deportation and control order cases; proscription of extremist organizations; rise in the threshold for British citizenship; power to close places of worship that espouse extremist views; and speeding up of border control plans to include biometric data.

But what about the imminence of the terrorist threat? Beyond the reaction and the rhetoric, what has been the outcome of a more sober assessment of the threat in real terms? Is the threat more imminent in the United Kingdom than in the United States? The most far-reaching assessment of the existence of the threat in the United States to date can be found in Ian Lustick's *Trapped in the War on Terror*.¹⁴ He begins his analysis by pointing out the irony that the increase in government authority and freedom to pursue suspects relatively unhindered by judicial review or oversight has meant that there has been ample opportunity to collect intelligence and data on the post-9/11 terrorist threat.¹⁵ He notes that over thirty thousand "national security letters"¹⁶ have been issued per annum in an effort to uncover terror networks, sleeper cells, and other terrorist activities; data bases have been mined; phone calls have been tapped; five thousand persons of interest whose visas have expired have been detained; and eighty-three thousand suspects have been confined and interrogated outside the United States with over twenty percent remaining in custody as of late 2005.¹⁷ And he notes that at no time since 9/11 has the threat condition declared by the Department for Homeland Security been lower than "elevated," which indicates a "significant risk of terror attacks."¹⁸ The result since 9/11 has been thirty-nine convictions for terrorism and national security-related crimes and a handful of further convictions.¹⁹ Moreover, only one of the foreign nationals detained

14. See generally LUSTICK, *supra* note 8.

15. *Id.* at 31.

16. These letters are issued to federal agents without judicial or legislative oversight and allow their bearer to collect information on numerous activities of private citizens, such as financial transactions, cohabitation arrangements, travel movements, telephone calls, emails, and Internet usage. See *id.* at 33. The use of such letters was heavily criticized in a report published by the Inspector General of the Department of Justice on March 9, 2007. FBI Director Robert S. Mueller III conceded that in many instances, their use was improper. The Office of the Inspector General (OIG) traced the increase in the use of the letters after September 11, 2001. "There were 8500 in 2000, 39,000 in 2003, 56,000 in 2004, and 47,000 in 2005, the years covered in . . . [the] review." David Stout, *F.B.I. Head Admits Mistakes in Use of the Security Act*, N.Y. TIMES, Mar. 10, 2007, at A1.

17. LUSTICK, *supra* note 8, at 35.

18. *Id.* at 8-9.

19. *Id.* at 37.

since 9/11 has been convicted of a terrorist crime.²⁰ This assessment reveals not a complete absence of terrorist activity, but it does raise significant questions concerning the imminence of the threat for Americans, and it raises the larger question of the proportionality of the response.

The threat of terror in the United Kingdom is arguably greater than that facing the United States. Unlike the United States, Britain has lived with the spectre of terrorism throughout the conflict in Northern Ireland, which led to 3297 deaths, over 10,000 injuries, 35,798 shootings, 15,351 bombs, 21,049 armed robberies, as well as the discovery of 11,605 firearms and 115,517 kilograms of explosives.²¹ These totals do not include the terrorist campaign on mainland Britain, which included multiple assassinations and bombings throughout the period, the last of which were the 1996 bombings in Canary Wharf and Manchester City Centre. The violence was most pronounced in the early years of the conflict, especially during the years surrounding Bloody Sunday in 1972 and the Guildford and Birmingham bombings in 1974. It then declined dramatically during the period of direct rule between 1974 and 1998, which ended with the 1998 Good Friday Agreement.²² Britain has also been the victim of international terrorism relating to Palestine, Kenya, Malaysia, Cyprus, Aden, and Libya,²³ and there have been a series of terrorist events involving car bombs and shootings in London, as well as the 1988 bombing of Pan Am flight 103 en route from Frankfurt to New York over Lockerbie in Scotland where 259 passengers and eleven people on the ground were killed.²⁴

20. *Id.*

21. Terence Taylor, *United Kingdom*, in *COMBATING TERRORISM: STRATEGIES OF TEN COUNTRIES* 187, 201-03 (Yonah Alexander ed., 2002).

22. Landman, *supra* note 4, at 78-79.

23. Taylor, *supra* note 21, at 210-11; Clive Walker, *Policy Options and Priorities: British Perspectives*, in *CONFRONTING TERRORISM: EUROPEAN EXPERIENCES, THREAT PERCEPTIONS AND POLICIES* 11, 11-12 (Marianne van Leeuwen ed., 2003); Tom Parker, *Appendix A: Counterterrorism Policies in the United Kingdom*, in *PROTECTING LIBERTY IN AN AGE OF TERROR* 119, 119-48 (Philip B. Heymann & Juliette N. Kayyem eds., 2005).

24. CHRIS COOK & JOHN STEVENSON, *THE LONGMAN COMPANION TO BRITAIN SINCE 1945*, at 203 (1996).

Beyond these many different incidents related to Northern Ireland and elsewhere, the post-9/11 patterns in terrorist activity in the United Kingdom have a different character to those before 9/11 and represent a graver threat compared to the evidence of activity collected in the United States. The perpetrators of the July 7 bombings were British-born, second-generation young Muslims who had grown up under conditions of relative material comfort. Their parents owned businesses, and many of the bombers had qualified for higher education degrees. While their radicalization may well have come from external sources, these are British citizens on whom the British political system and culture has failed to make the kind of impression that would prevent their radicalization.²⁵ There have been subsequent attempts to carry out terrorist attacks on July 21, 2005 in London, again in late the summer of 2006 on transatlantic flights, and again in early 2007 in Birmingham, where security forces disrupted an alleged attempt to kidnap and decapitate a British Muslim soldier. Dame Eliza Manningham-Buller, the former head of MI5 (the United Kingdom's national security service), declared in November 2006 that British intelligence had been watching sixteen hundred people in two hundred cells believed to be plotting terrorist attacks in Britain or overseas.²⁶

Having considered these different portraits on the imminence of the terrorist threat facing the United Kingdom and the United States, what does the principle of proportionality entail and why is it important to consider here? There are many sources for the principle of proportionality. At the international level, it comes from just war theory and the international legal principles of *jus ad bello* and *jus in bello*, governed most notably by the Geneva Conventions and their additional Protocols. These principles make reference to the ways in which sovereign states ought to respond to attacks or the threat of attacks from other states, the ways in which states may intervene in an armed conflict on humanitarian grounds, as well as the ways in which they ought to conduct any armed action.²⁷ *A More Secure World* is

25. See BLICK ET AL., *supra* note 5, at 27.

26. Dame Eliza Manningham-Buller, Address at Queen Mary College: International Terrorist Threat to the U.K. (Nov. 9, 2006), available at <http://www.mi5.gov.uk/textonly/Page374.html>.

27. For the general arguments around just war and proportionality in international interventions, see MICHAEL WALZER, *JUST AND UNJUST WARS: A*

explicit that proportionality must be one of the five criteria used for governing states: seriousness of threat, proper purpose, last resort, *proportional means*, and balance of consequences.²⁸ Beyond the principle's application to inter-state interactions, it is also a fundamental principle underlying the activities of the European Union that draws on a longer German legal tradition.²⁹ At this level, the notion of proportionality states that any layer of government should not take *any action that exceeds that which is necessary to achieve the objective of government*. At the municipal legal level (i.e., domestic legal frameworks), proportionality refers to the system of punishment for crimes committed by persons found guilty in the judicial process. For example, there is considerable jurisprudence from the U.S. Supreme Court on the interpretation of the Eighth Amendment to the U.S. Constitution on what constitutes cruel and unusual punishment and how punishment fits the crime.³⁰

Despite its provenance in international, regional, and domestic legal standards, the term proportionality varies in definition and interpretation. While it has been traditionally associated with mathematics, it has clearly become a useful principle in politics and law. In an article referring to the Israeli war with Lebanon in the summer of 2006, William Safire defined proportionality as:

[T]he Latin *pro portione*, "according to each part" — can mean "balance, symmetry, corresponding in magnitude or intensity." But "corresponding" is not the same as "equivalent"; rather, the noun and adjective *proportional* deals with the relationship among parts.

MORAL ARGUMENT WITH ILLUSTRATIONS 86-108 (1977); for an application of just war theory in the age of terror, which justifies the invasion of Afghanistan as well as Iraq, see JEAN BETHKE ELSHTAIN, *JUST WAR AGAINST TERROR: THE BURDEN OF AMERICAN POWER IN A VIOLENT WORLD* 59-70 (2004).

28. *A More Secure World*, *supra* note 7, ¶ 207.

29. See generally PAUL CRAIG & GRAINNE DE BURCA, *EU LAW* (3d ed. 2003) (discussing the history of the European Union and the legal disputes which have arisen out of its existence).

30. See generally Shawn E. Fields, Note, *Constitutional Comparativism and the Eighth Amendment: How a Flawed Proportionality Requirement Can Benefit from Foreign Law*, 86 B.U. L. REV. 963 (2006) (surveying U.S. Supreme Court decisions in which the Court contemplated the proper role of comparative law in Eighth Amendment proportionality analysis).

As used in today's headlines and polemics, it carries a special sense of "not excessive."³¹

Others see the term as implying *balance* or *evenness* between that which has been done and that which must be done in response. For the purposes of this article, it is important to relate the notion of proportionality to that of the social contract. Within a sovereign state, citizens agree to give the state powers over them but only to the extent that is necessary to create order and harmony. Otherwise, the excessive response from the state to external and internal threats undermines the social contract, compromises the legitimacy of the state, and may well encourage citizens to mobilize violently against the state. International human rights and humanitarian laws have sought to extend this logic of the social contract to all humans, not just citizens within a particular state (a point that becomes crucial in the overall argument presented here).

There is an intimate and fundamental relationship between the imminence of the terrorist threat and the proportionality of the response. Any assessment of that relationship should then be used to formulate a longer-term strategy for states to pursue in their response to terrorism. This article offers such an assessment in the case of the United States and the United Kingdom and examines the degree to which judgments about proportionality have been reached and the degree to which the Bush and Blair governments have indeed exceeded that which is necessary to achieve their objectives. But before examining the nature of the response in both countries, it is first necessary to consider how that response and its proportionality are located in larger questions of liberal democracy and its different mechanisms for horizontal and vertical accountability.

III. THE DILEMMAS OF LIBERAL DEMOCRACY

Liberal democracies in the world today face a double challenge from global terrorism: 1) they suffer significantly more terrorism than non-democratic countries, and 2) there is a natural tension between the values of liberal democracy and the need for greater security. Cross-national time-series analysis of terrorist "events" has shown that

31. William Safire, *Proportionality*, N.Y. TIMES, Aug. 13, 2006, § 6, at 20.

liberal democracies, especially “old” democracies,³² suffer a disproportionate number of terrorist attacks.³³ A recent test of the Huntington thesis about the “clash of civilizations”³⁴ shows that the Islam-West civilizational “dyad” has significantly more terrorist incidents and has suffered more killings as a result of terrorist activities than other civilizational pairs in the world.³⁵ The dominant interpretation of these statistical findings is that liberal democracies by their very nature are more open and thus suffer more attacks.³⁶ Such an interpretation may well lead to the conclusion that liberal democracies should not be so open. Rather, they should curb liberties in an effort to stop the attacks. But some additional qualifications to the statistical findings are necessary. For the civilizational analysis and the analysis of suicide attacks, the data sets used counted attacks on U.S. facilities in foreign countries as attacks on the United States.³⁷ This coding rule necessarily leads to an over-counting of attacks against the United States *as a nation*, and by extension may well skew the results for the Islam-West dyad. The pattern of attacks may well be due to weak state capacity and lower resource levels for security in countries that host U.S. facilities, and counting these attacks as equivalent to attacks on the continental United States misrepresents them. For the greater propensity of democracies to suffer terrorist

32. Old democracies are those countries that have established and maintained democracy before the advent of the “third wave” of democratization with the Portuguese democratic transition in 1974. *See generally* SAMUEL P. HUNTINGTON, *THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY* (1991) (discussing the global transitions to democracy between 1974 and 1990).

33. Robert A. Pape, *The Strategic Logic of Suicide Terrorism*, 97 AM. POL. SCI. REV. 343, 349-50 (2003); WALTER ENDERS & TODD SANDLER, *THE POLITICAL ECONOMY OF TERRORISM* 25-27 (2006); MONTY G. MARSHALL & TED R. GURR, *PEACE AND CONFLICT* 70 (2006); Quan Li, *Does Democracy Promote Transnational Terrorism?*, 49 J. CONFLICT RESOL. 278, 281 (2005).

34. SAMUEL P. HUNTINGTON, *THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER* 125-39 (1996).

35. Eric Neumayer & Thomas Pluempfer, *International Terrorism and the Clash of Civilizations: Was Huntington Right After All?* (Working Paper), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=952208.

36. ENDERS & SANDLER, *supra* note 33, at 25-27.

37. Ed F. Mickolus et al., *International Terrorism: Attributes of Terrorist Events, 1968-2002*, ITERATE Project (2003), <http://ssdc.ucsd.edu/ssdc/ite00001.html>.

attacks, one analysis that controls for different components of democracy shows a negative relationship between high levels of participation and high levels of terrorism on the one hand, and a positive relationship between greater constraints on governments and higher levels of terrorism.³⁸ In other words, those countries in which there are greater controls over the arbitrary exercise of government power and authority tend to experience more terrorist attacks. Once again, one outcome of this result would be to loosen such controls on the authority of government.

These data and interpretations on the propensity for liberal democracies to be victims of terrorist attacks have led to a natural response from academics and policy makers to posit that there is a necessary trade-off between the risk of future terrorist attacks and further terrorist damage on the one hand, and the curbing of civil liberties on the other hand.³⁹ For example, Campbell and Connolly note that “[d]ominant legal discourses on the ‘war on terror’ proceed from an assumption that a revised legal regime, loosening restrictions on security agencies, will yield consequential anti-terrorist benefits.”⁴⁰ In political science and political theory, there is an emerging consensus that some adjustment on our individual freedom is justified, where commentators vary on their relative degree of reluctance to accept this view and as to what ought to be the appropriate balance between liberty and security.⁴¹ A starker illustration of this trade-off is presented by Enders and Sandler, who provide a formal model of

38. Li, *supra* note 33, at 281, 294.

39. Alex P. Schmid, *Terrorism and Democracy*, in 4 TERRORISM AND POLITICAL VIOLENCE 14 (1992); Joe Eyerman, *Terrorism and Democratic States: Soft Targets or Accessible Systems*, 24 INTERNATIONAL INTERACTIONS 151-70 (1998).

40. Colm Campbell & Ita Connolly, *Making War on Terror? Global Lessons from Northern Ireland*, 69 MODERN L. REV. 935, 935 (2006). See also Michael German, *Squaring the Error*, in LAW VS. WAR: COMPETING APPROACHES TO FIGHTING TERRORISM 11, 13-14 (2005).

41. ACKERMAN, *supra* note 10, at 2; MICHAEL IGNATIEFF, THE LESSER EVIL: POLITICAL ETHICS IN THE AGE OF TERROR 54-63 (2005); Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029, 1045-53 (2004); David Cole, *The Priority of Morality: The Emergency Constitution's Blindspot*, 113 YALE L.J. 1753, 1785-99 (2004); Fernando R. Tesón, *Liberal Security*, in HUMAN RIGHTS IN THE ‘WAR ON TERROR’ 57 (Richard Ashby Wilson ed., 2005); Jeremy Waldron, *Security and Liberty: The Image of Balance*, 11 J. POL. PHIL. 191, 191-210 (2003).

the trade-off between “expected terrorism damage” and civil liberties.⁴² The model posits a societal constraint curve that intersects with a series of indifference curves, where at different moments, different equilibria between expected terrorist damage and civil liberties are obtained. Figure 1 is a reproduction of their model.

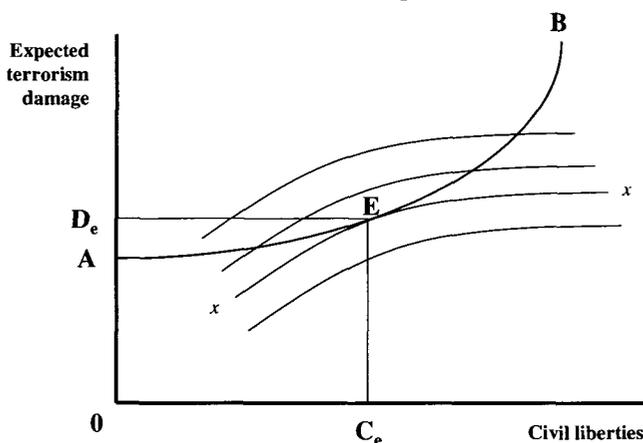


Figure 1. The terror damage-civil liberty trade-off⁴³

The figure shows that expected terrorism damage is on the vertical axis and civil liberties protection is on the horizontal axis. The constraint curve AB represents the relationship between terrorism and civil liberties, where the cost of increasing civil liberties is a greater exposure to terrorism. For this model, the most benefit accrues from the reduction of civil liberties along the upward sloping end of the curve, where there is a decreasing benefit from significant reduction in civil liberties. In other words, for this part of the model, “[e]ach additional sacrifice of freedom gains less additional security from terrorist attacks.”⁴⁴ This constraint curve is combined with a series of indifference curves (*x*), which are meant to indicate how willing society is to trade civil liberties for terrorism risks. At the intersection of the indifference curves and the constraint curve AB we find equilibrium point E, the point at which society experiences an optimal ratio of civil liberty protection (C_e), and terrorist damage (D_e).⁴⁵

42. See ENDERS & SANDLER, *supra* note 33, at 34.

43. *Id.*

44. *Id.* at 32.

45. *Id.* at 34.

But is this trade-off depicted in Figure 1 necessarily correct? There are two significant qualifications that need to be made to the logic presented in the model. First, research on the conflict in Northern Ireland has shown that increased repression from the British Government, particularly during the period of home rule between 1974 and 1998, led to a proliferation of terrorist activity and recruitment of new members in the IRA.⁴⁶ Qualitative analysis of released prisoners reveals the cumulative effect of the British Army presence and tactics, such as house raids and the exercise of stop and search powers, in Northern Ireland oftentimes provided a series of “tipping factors” that propelled terrorists into activism.⁴⁷ The experience in Northern Ireland suggests that at some point, the increased restriction on civil liberties may actually lead to an increase in terrorist activities and, by extension, terrorist damage; an argument that has been made for other contexts in which governments adopt a harsh response to terrorism.⁴⁸

The recent police interrogation of terror suspect Abu Bakr in the Birmingham kidnapping plot led to his public accusation that Muslims were living in a “police state.”⁴⁹ The veracity of the claim is not as important as the view that it represents. There is a growing fear in the Muslim community that they are disproportionately affected by the anti-terror response; this response is linked to the radicalization of Muslim youth in Britain; and the response inhibits Muslim community cooperation in identifying suspects.⁵⁰ This suggests that perhaps the constraint curve in the model should be upward-sloping at the low end of civil liberty protection, which captures the idea that, at some point, the perceived restriction on civil liberties has the counter-productive impact of increasing terrorist violence.

46. Landman, *supra* note 4, at 78-79, 90.

47. Campbell & Connolly, *supra* note 40, at 945-51; Parker, *supra* note 23, at 125-28.

48. Martha Crenshaw, *The Causes of Terrorism*, 13 COMP. POL. 379, 384-85 (1981); Peter Rosendorff & Todd Sandler, *Too Much of a Good Thing? The Proactive Response Dilemma*, 48 J. CONFLICT RESOL. 657 (2004) (discussing the negative impact overreaction to terrorism can have on controlling terrorism).

49. *Ex-Terror Plot Suspect Speaks Out*, BBC NEWS, Feb. 8, 2007, <http://news.bbb.co.uk/1/hi/uk/6340935.stm>.

50. See BLICK ET AL., *supra* note 5, at 18, 23-24, 29.

A second qualification to the model is that there is also a lower limit as to how much a country may legally curb civil liberties. The international law of human rights is clear about derogable and non-derogable rights. For example, Article 4 of the International Covenant on Civil and Political Rights (ICCPR)—of which the United States and United Kingdom are states parties—stipulates that in times of a “public emergency that threatens the life of the nation,” certain rights protections cannot be eliminated, including the right to life (Article 6), freedom from slavery and servitude (Article 8), imprisonment for failure to uphold a contractual obligation (Article 11), protection against *ex post facto* legislation (Article 15), the right to legal personality and recognition (Article 16), and the right not to be subjected to arbitrary interference in privacy, home, and correspondence.⁵¹ For the United Kingdom, Article 15 of the European Convention on Human Rights stipulates that during times of war or public emergency threatening the life of the nation, a country may not derogate from similar rights protections as those found in the ICCPR.⁵² These examples suggest that there is indeed a lower boundary of curbing liberties below which countries may not go in their efforts to fight terrorism, even if such terrorist activities threaten the life of the nation.

Taken together, the possibility that curbing liberties may well encourage greater terrorism and the notion of the lower boundary suggest that the model depicted in Figure 1 should be modified to some degree. Figure 2 shows this modified version, where the constraint curve AB has a rising lower tail to capture the idea of an increase in terrorism damage in response to a significant curbing of civil liberties, and a vertical boundary of rights protection (C_f) that may not be crossed under any circumstances.

51. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 383 [hereinafter ICCPR].

52. Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms art. 15, Nov. 4, 1950, E.T.S. No. 5, 213 U.N.T.S. 222 [hereinafter ECHR]; ICCPR, *supra* note 51. There are similar provisions in the American Convention on Human Rights. See Org. of Am. States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

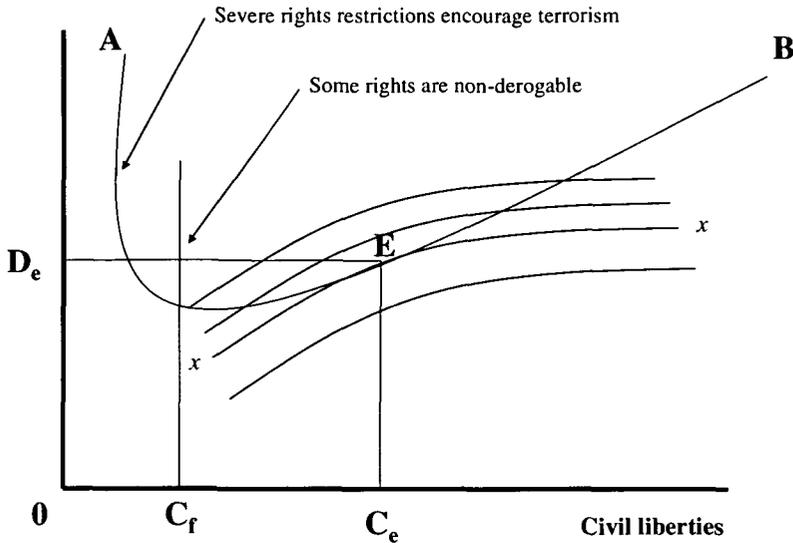


Figure 2. Constrained terrorist damage-civil liberty trade-off

The response to terrorism in the United Kingdom and United States has been to curb liberties in ways that attempt to cross the lower boundary, even though this may encourage more terrorism. The United Kingdom crossed the boundary in its response to terrorism associated with the conflict in Northern Ireland, one significant aspect of which (the treatment of prisoners in interrogation) was ultimately adjudicated by the European Court of Human Rights (ECHR) in its 1978 judgment on *Ireland v. United Kingdom*.⁵³ The United Kingdom crossed the boundary again with its legislation passed after the July 2005 bombings. Again, two significant aspects (the indefinite detention of foreign terror suspects and the use of control orders) have been adjudicated under the auspices of the 1998 Human Rights Act,⁵⁴ which brings further effect to the ECHR within the domestic jurisdiction of the United Kingdom.

The U.S. government also crossed the lower boundary, in part by re-writing the law and in part by disregarding it altogether. The war metaphor has led the United States to respond in ways that have

53. *Ireland v. United Kingdom*, 23 Eur. Ct. H.R. (ser. B) (1976).

54. Human Rights Act of 1998 (U.K.), available at <http://www.opsi.gov.uk/ACTS/acts1998/19980042.htm> [hereinafter Human Rights Act].

missed the opportunity for the application of criminal law and the methodology of “proactive criminal investigation.”⁵⁵ In an abstract sense, it is easier for non-democracies to fight terrorism on the domestic front because they are less accountable to their citizens and can introduce a range of measures that curb any rights protections that may have existed or that citizens may have been able to exercise in the absence of formal legal protection. In contrast, it is much harder for democracies to fight terrorism because they are accountable to their citizens; and, in liberal democracies, rights are enshrined in national constitutions or find expression through other legal mechanisms. The combination of majority decision-making and minority rights protections is a firm principle in liberal democratic theory, and was a key set of compromises reached in the founding of America as Madison sought to prevent the tyranny of the majority.⁵⁶ The practical solution has been to construct models of democratic government that have a variety of mechanisms for both vertical and horizontal accountability.

Democracies achieve vertical accountability formally through periodic elections and the alternation of control over government through some form of representative political party system. They achieve this less formally through providing a set of rights and freedoms that allows to flourish a “free and lively civil society”; this society both contributes to setting the issue and policy agenda and holds government to account through its ability to mobilise mass publics in times of severe crisis and critique. Mechanisms for horizontal accountability, on the other hand, include those institutional checks and balances among different branches of government as well as among civilians, military personnel, and the security services. The principle of judicial review and legislative oversight of executive powers is meant to constrain leaders and prevent the worst forms of abuse of power.

Both the United States and United Kingdom have a long history of fortifying the mechanisms for vertical accountability, including the extension of suffrage and the protection of the rights to assembly, association, speech, thought, and religious faith; however, the mechanisms for horizontal accountability vary considerably between

55. German, *supra* note 40, at 14.

56. THE FEDERALIST NO. 47 (James Madison).

the two countries. The historic decision in *Marbury v. Madison*⁵⁷ established the principle of judicial review, while the U.S. Constitution formally outlined the powers of the all three branches, established the separation of powers, and left any residual powers to the individual States. In contrast, the United Kingdom does not have a written constitution that explicitly delineates the powers of the different governmental institutions; the power and authority of government and the liberal constraints on it have evolved in piecemeal fashion since the seventeenth century.⁵⁸ Power has shifted increasingly from the Crown to Parliament and has given rise to the principle of parliamentary sovereignty, where the House of Commons has become the primary chamber following the 1911 Parliament Act,⁵⁹ and the executive (i.e. the Government) has dominated the Commons, effectively leaving less room for horizontal accountability.⁶⁰ But, Britain has been a key architect in the development of the European Human Rights “regime”⁶¹ as one of the authors of the 1950 European Convention for the Protection of Human Rights and Individual Freedoms,⁶² whose articles were finally brought into the domestic legal system through the enactment of the 1998 Human Rights Act.⁶³ Participation in the European regime has meant that Britain is subjected to the judgments of the ECHR and is open to scrutiny by

57. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

58. Landman, *supra* note 4, at 76-77.

59. *Id.*

60. On March 7, 2007, the House of Commons made an historic decision to remove the last ninety-two hereditary peers in the House of Lords to call for new legislation that would create a fully elected second chamber, thereby ending the 700 years of unelected rule. One week later, the House of Lords responded by voting for an all-appointed house. Will Woodward, *Historic Vote for All-Elected House of Lords*, *GUARDIAN*, Mar. 8, 2007, available at <http://politics.guardian.co.uk/lords/story/0,,2028928,00.html>; *Lords Reform in 'Next Manifesto,'* BBC News, July 19, 2007, available at http://news.bbc.co.uk/1/hi/uk_politics/6906518.stm.

61. Jack Donnelly, *International Human Rights: A Regime Analysis*, in 40 INT’L ORG. 620-24 (1986). See generally JACK DONNELLY, *UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE* 138-41 (2d ed. 2003).

62. ECHR, *supra* note 52. See also Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, in 54 INT’L ORG. 217 (2000); SIMPSON, *supra* note 3, at 713.

63. Human Rights Act, *supra* note 54.

other institutions within the Council of Europe (e.g., the Human Rights Commissioner).

The mechanisms for horizontal accountability are different in the United States. The separation of powers as laid out formally in the U.S. Constitution, coupled with the principle of judicial review in theory, suggests that the mechanisms for horizontal accountability should provide the kind of oversight that would curb excessive usurpation of executive authority. The power of the three branches has indeed vacillated throughout American history. In fact, the twentieth century has witnessed various periods in which one or another branch of government has exerted greater power, such as the rise of the “imperial” presidency in the 1960s,⁶⁴ the perennial post-war “problem” of divided government,⁶⁵ and the waxing and waning of “judicial activism,”⁶⁶ most notably in cases such as *Brown v. Board of Education* in 1954 and *Roe v. Wade* in 1973.⁶⁷ Under the exigencies of the immediate post-9/11 period, however, the general mood in the political establishment was that enhancing executive branch power was necessary to provide greater security. Since the attacks, the President has amassed significant new powers exercised through federal agencies to collect and analyze private information that has been obtained secretly (e.g., telephone, internet, library, medical,

64. See generally ARTHUR M. SCHLESINGER, *THE IMPERIAL PRESIDENCY* 177-207 (1973) (discussing the events in the 1960s and 1970s that led to the development of an “imperial presidency”); ANDREW RUDALEVIGE, *THE NEW IMPERIAL PRESIDENCY: RENEWING PRESIDENTIAL POWER AFTER WATERGATE* 57-100 (2006) (discussing the major developments in executive power during the 1960s and 1970s).

65. DAVID MAYHEW, *DIVIDED WE GOVERN: PARTY CONTROL, LAW MAKING AND INVESTIGATIONS, 1946-1990*, at 1-7 (1991); MORRIS P. FIORINA, *The Causes and Consequences of Divided Government: Lessons of 1992-1994*, in *DIVIDED GOVERNMENT; CHANGE, UNCERTAINTY, AND THE CONSTITUTIONAL ORDER* 35, 35-59 (Peter F. Galderisi, ed., 2d ed. 1996); see also David McKay, *Divided and Governed? Recent Research on Divided Government in the United States*, 24 *BRIT. J. POL. SCI.* 517, 517-18 (1994).

66. Keenan D. Kmiec, *The Origins and Current Meanings of “Judicial Activism,”* 92 *CAL. L. REV.* 1441, 1447 (2004). See also CHRISTOPHER WOLFE, *JUDICIAL ACTIVISM: BULWARK OF FREEDOM OR PRECARIOUS SECURITY?* 2-31 (2d ed. 1997).

67. *Brown v. Bd. of Educ.*, 349 U.S. 294 (1954); *Roe v. Wade*, 410 U.S. 113 (1973).

educational, and financial records),⁶⁸ while the White House has sidestepped usual mechanisms of horizontal accountability⁶⁹ in order to be able to prosecute the war on terror.

IV. THE U.S. AND THE U.K. RESPONSE TO TERRORISM

The attacks of September 11 and the July attacks in London four years later have produced a robust legislative response from the U.S. and U.K. governments that has tested significantly the boundaries of law and challenged the values associated with democracy and human rights. Previous sections of this article have made some references to this response, but this section provides a fuller examination of the post-9/11 response. Britain already had a considerable record of anti-terror legislation on its statute books, most of which had been directed toward the problems in Ireland and, since 1921, Northern Ireland.⁷⁰ Indeed, between 1761 and 1972, there were twenty-six legislative acts with provisions for combating Irish nationalism, including special courts, detention without trial, and the suspension of habeas corpus.⁷¹ “Since the 1970s, [thirteen pieces of significant legislation] have been introduced to combat domestic and international terrorism, including laws concerning hostage-taking, transport and use of nuclear materials, aviation and maritime security, and terrorist acts committed in Northern Ireland and on mainland Britain as part of the struggle for Irish nationalism”⁷² These various provisions for combating terrorism were always temporary and required new parliamentary approval to be amended and extended.

However, the Terrorism Act of 2000 made permanent these past efforts, and since September 11, 2001, the Labour government has

68. LAWYERS COMM. FOR HUMAN RIGHTS, *ASSESSING THE NEW NORMAL: LIBERTY AND SECURITY FOR THE POST-SEPTEMBER 11 UNITED STATES* 17 (2003), available at <http://www.humanrightsfirst.org/pubs/descriptions/Assessing/AssessingtheNewNormal.pdf>.

69. Julie A. Mertus, *Human Rights and Civil Society in a New Age of American Exceptionalism*, in *HUMAN RIGHTS IN THE ‘WAR ON TERROR’* 318-19 (Richard Ashby Wilson ed., 2005).

70. Landman, *supra* note 4, at 78-81.

71. Richard Ashby Wilson, *Human Rights in the ‘War on Terror,’* in *HUMAN RIGHTS IN THE ‘WAR ON TERROR’* 32 (Richard Ashby Wilson ed., 2005). See also CONOR GEARTY, *CAN HUMAN RIGHTS SURVIVE?* 99-101 (2006).

72. See Landman, *supra* note 4, at 80.

introduced six new significant pieces of anti-terror legislation (see Table 1). These various acts expanded the powers of the Home Office, the police, and Security Services across a wide range of issues relating to the establishment and maintenance of terrorist organizations, the incitement of terrorist acts on British soil, the involvement in international terrorism, and, more generally, the support of terrorist organizations and acts, as well as the glorification of terrorism itself. These powers, coupled with a formal derogation from Article 5 of the European Convention on Human Rights,⁷³ allowed the Home Office to detain indefinitely without charge fourteen foreign terror suspects, a decision that was later overruled by the Law Lords in December 2004 for being *disproportionate* and *discriminatory*.⁷⁴ The government responded with new provisions in the Prevention of Terrorism Act of 2005 that allowed the Home Secretary to use “control orders” that limit the freedom of movement and communication of the original detainees as well as any new suspects deemed appropriate. As in the indefinite detention of foreign suspects, these control orders also have been found to be incompatible with Article 5 of the European Convention on Human Rights.⁷⁵

73. ECHR, *supra* note 52, art. 5.

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

75. ECHR, *supra* note 52, art. 5.

Table 1. Counterterror Legislation in the United Kingdom⁷⁶

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1. Tokyo Convention Act 1967
 2. Suppression of Terrorism Act 1978
 3. International Protected Persons Act 1978
 4. Taking of Hostages Act 1982
 5. Aviation Security Act 1982
 6. Nuclear Material (Offences) Act 1983
 7. Prevention of Terrorism (Temporary Provisions) Act 1984
 8. Prevention of Terrorism (Temporary Provisions) Act 1989
 9. Aviation of Maritime Security Act 1990
 10. Northern Ireland (Emergency Provisions) Act 1991
 11. Criminal Justice and Public Order Act 1994
 12. Northern Ireland (Emergency Provisions) Act 1996
 13. Criminal Justice (Terrorism and Conspiracy Act) 1998
 14. Terrorism Act 2000
 15. Anti-Terrorism, Crime and Security Act 2001
 16. Crime (International Cooperation) Act 2003
 17. Civil Contingencies Act 2004
 18. Prevention of Terrorism Act 2005
 19. Terrorism Act 2006
 20. Immigration, Nationality and Asylum Act 2006

The British anti-terror legislation also allows the government to detain without charge any terror suspect for a period of up to twenty-eight days, the debate over which cost the Government its first Commons defeat since taking power in 1997. In addition to these events and those surrounding the investigations into the bombings on July 7, 2005, the further attempted bombings in the same month and in August 2006, and the Birmingham beheading plot in January 2007, these powers have been used to stop and search large numbers of people living in Britain. Between April 1, 2001 and March 31, 2005, the police and security services stopped and searched 111,900 under the Terrorism Act of 2000, of whom approximately 1.4% were subsequently arrested.⁷⁷ During the previous four years since Labour

76. See Landman, *supra* note 4, at 81.

77. HOME OFFICE STATISTICAL BULLETIN, ARRESTS FOR RECORDED CRIME (NOTIFIABLE OFFENCES) AND THE OPERATION OF CERTAIN POLICE POWERS UNDER PACE 12 (2005), available at <http://www.homeoffice.gov.uk/rds/pdfs05/hosb2105.pdf> [hereinafter HOME OFFICE STATISTICAL BULLETIN]; Campbell & Connolly, *supra* note 40, at 957.

came to power, 27,000 people were stopped and searched, with a subsequent arrest rate of 1.5%.⁷⁸

These figures suggest the possibility of indiscriminate use of anti-terrorist powers by British police and security services even though the arrest rate has remained roughly the same.⁷⁹

The response in the United States has been markedly different. The existing National Security Act of 1947 was deemed appropriate to give the National Security Council the power to consider issues of domestic security arising as external threats, but since the 1993 bombing of the World Trade Center, successive administrations have sought to consolidate and coordinate the responsibility for combating terrorism. President Clinton passed Presidential Decision Directive 39 in June 1995 with the aim to reduce vulnerabilities, deter terrorism, respond to terrorism, and prevent terrorists from acquiring weapons of mass destruction.⁸⁰ Presidential Directive 62 followed in 1998 to strengthen the ability of one agency to take the lead in combating terrorism.⁸¹ The attention of the U.S. government throughout the Clinton Administration had been on the Bin Laden network, which saw the East African embassy bombings as watershed events, as well as the October 12, 2000 attack on the *USS Cole* in Yemen. But, as has been reported widely, during the first nine months of the Bush Administration, the White House reduced the seniority of principal actors involved in combating terrorism, most notably Richard Clarke.⁸² All of that was to change with the attacks of September 11.

The first significant legislative response after the attacks was the passage of the U.S.A. Patriot Act on October 24, 2001. As in the United Kingdom where the 2001 Anti-Terrorism, Crime, and Security Act was rushed through the House of Commons in less than one month,⁸³ the U.S.A. Patriot Act took less than six weeks to go through both houses of Congress and become law on October 26, 2001. In the years since the passage of the U.S.A. Patriot Act, there have been

78. HOME OFFICE STATISTICAL BULLETIN, *supra* note 77, at 12.

79. Campbell & Connolly, *supra* note 40, at 956-57.

80. 9/11 Comm'n Staff, *Counterterrorism Before 9/11: National Policy Coordination, 9/11 Commission Staff Statement No. 8*, in UNDERSTANDING THE WAR ON TERROR 166 (James F. Hoge Jr. & Gideon Rose eds., 2005).

81. *Id.* at 168.

82. *Id.* at 176-77; CLARKE, *supra* note 9, at 230.

83. Landman, *supra* note 4, at 83.

sixty-five pieces of legislation and executive orders concerning the fight against terror across a range of policy areas, including border security and immigration, communications and equipment, critical infrastructure, cyberterrorism, domestic security, economic and fiscal issues, first responders, medical and public health issues, transportation security, and weapons of mass destruction.⁸⁴ Of these, there have been more than ten addressing the domestic security issues of combating terror (see Table 2), where a significant number of the human rights issues arise and where, between 2001 and 2006, the Bush Administration had “more than tripled spending devoted to non-defense homeland security.”⁸⁵ For the 2007 fiscal year, proposed non-defense homeland security expenditure was \$41.6 billion with 67% dedicated to the Department for Homeland Security.⁸⁶ To provide an indication of the overall scale of expenditure in the U.S. prosecution of the war on terror, Lustick estimates that the average expenditure per annum is nearly 80% higher than that on education.⁸⁷

84. The U.S. Department of Justice Counter-Terrorism Training Coordination Group has collated a series of resources related to counter terror in the United States across different federal bodies and established a website for further information and training, where all the relevant documentation has been made available, <http://www.counterterrorismtraining.gov/leg/index.html> (last visited Sept. 21, 2007).

85. LUSTICK, *supra* note 8, at 21 (quoting Budget of the United States FY 2007, Department of Homeland Security, Office of Management and Budget, *available at* <http://www.whitehouse.gov/omb/budget/fy2007/dhs.html> (last visited Sep. 18, 2007)).

86. Budget of the United States FY 2007, Department of Homeland Security, Office of Management and Budget, *available at* <http://www.whitehouse.gov/omb/budget/fy2007/dhs.html> (last visited Sep. 18, 2007).

87. LUSTICK, *supra* note 8, at 24.

Table 2. Legislation and/or Executive Directives for Domestic Security Since 9/11

1. Authorization for Use of Military Force, 15 U.S.C. § 1541 (2001)
2. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (U.S.A. Patriot Act) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified as amended in scattered sections of 18 U.S.C.)
3. Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (codified as amended in scattered sections of 6 U.S.C. and 18 U.S.C.)
4. Designating September 11 as Patriot Day, 36 U.S.C. § 144 (2001)
5. Department of Homeland Security Appropriations Bill, 2005, Pub. L. No. 108-334, 118 Stat. 1298
6. Intelligence Reform and Terrorism Prevention Act of 2004, 50 U.S.C. §§ 401, 403
7. Notice of Continuation of the National Emergency with Respect to Persons Who Commit, Threaten to Commit, or Support Terrorism, Exec. Order No. 13,224, 69 Fed. Reg. 56,921 (Sept. 21, 2004)
8. Terrorist Penalties Enhancement Act of 2004, H.R. 2394, 108th Cong. (2004)
9. Patriot Act Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, 120 Stat. 192 (codified as amended in scattered sections of 18 U.S.C. and 50 U.S.C.)
10. Further Strengthening the Sharing of Terrorism Information to Protect Americans, Exec. Order No. 13,388, 70 Fed. Reg. 62,023 (Oct. 25, 2005)
11. Department of Homeland Security Appropriations Act for 2006, Pub. L. No. 109-295, 120 Stat. 1355
12. Military Commissions Act of 2006, H.R. 6054, 109th Cong. (2006)

Legislative oversight of executive authority in the United States and United Kingdom has been markedly different. Despite greater mechanisms for horizontal accountability in the United States than in the United Kingdom, Congress has sought to curb very few of the powers assumed by the President in the post-9/11 period. Sixteen of the most controversial sections of the U.S.A. Patriot Act contained sunset clauses for 2005 that, when amended in the form of the Patriot Act Improvement and Reauthorization Act of 2005, actually gave more power to the executive.⁸⁸ At its best, the position of Congress vis-à-vis the President has been one of “ambivalence,” where it stepped aside in 2001, re-emerged in 2003-2005 with a new consensus

88. U.S.A. Patriot Act Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, 120 Stat. 192 (codified as amended in scattered sections of 18 U.S.C. and 50 U.S.C.).

on the need to strengthen congressional oversight of the U.S.A. Patriot Act, and then stepped aside again when the moment for renewing the act arrived.⁸⁹ The new period of divided government may well see the re-emergence of a Congress that seeks to fortify its oversight of the battle against terrorism.

In the United Kingdom, the greatest resistance to the Government came on the issue of the length of time terror suspects can be detained without charge. In an October 6, 2005 letter to Home Secretary Charles Clarke, Assistant Commissioner of the Metropolitan Police Andy Hayman outlined the case for the “operational requirements for an extension to the maximum period of detention without charge to three months.”⁹⁰ The briefing note accompanying the ensuing bill accepted that judicial oversight was crucial, but that police investigations into terrorist activity that uses sophisticated technology require extensive forensic expertise that may, in certain circumstances, require a full ninety-day detention of certain suspects.⁹¹ The bill passed its second reading with a majority of 379 votes, but it faced fierce opposition during the committee stage, which considers proposed legislation on a line-by-line basis. The Liberal Democrats argued for fourteen days in line with existing legislation, the Conservatives argued for twenty-eight days, while the Government stuck to its claim that it needed the full ninety days.⁹² Ultimately, the ninety-day detention provision did not carry the vote (twenty-eight days did), with MPs (Members of Parliament) saying “no” by a majority of thirty-one votes, where forty-nine of 322 “no” votes came from the Labour benches.⁹³ Upon assuming the office of the Prime Minister, Gordon Brown has called for an increase in the time for detention possibly up to fifty-six days.⁹⁴

Judicial oversight of the executive also has differed markedly between the two countries. In the United Kingdom, the Law Lords,

89. Jasmine Farrier, *The Patriot Act's Institutional Story: More Evidence of Congressional Ambivalence*, 40 POL. SCI. & POL. 93, 93-97 (2007).

90. Liberty U.K., *Terrorism Bill: Liberty's Briefing for Second Reading in the House of Lords* ¶ 34 (Nov. 2005), www.liberty-human-rights.org.uk.

91. *Id.*

92. *Id.* ¶ 30.

93. *Id.*

94. Dominic Casciana, *Q&A: Anti-Terrorism Legislation*, BBC NEWS, July 25, 2007, available at <http://news.bbc.co.uk/1/hi/uk/6729027.stm>.

newly fortified by the 1998 Human Rights Act, have challenged the Government on the detention without charge of foreign terror suspects and the subsequent use of control orders.⁹⁵ In these instances, the Law Lords have shown that the Government has acted in ways that are incompatible with provisions found in the European Convention on Human Rights and have in many ways asserted a new level of judicial control over the executive. In the United States, there are mixed reviews for the activities of the Supreme Court, which has focused its attention primarily on the detention of terror suspects at Guantánamo Bay. The *Hamdi v. Rumsfeld* decision in 2004 ruled that detainees who were U.S. citizens had the right to habeas corpus even if they were classified as “enemy combatants.”⁹⁶ The *Hamdan v. Rumsfeld* decision in 2006 found that the proposed military commissions for trying terror suspects violated the Uniform Code of Military Justice and the four Geneva Conventions.⁹⁷

The Supreme Court’s decision in *Hamdi* could be seen as a triumph for international law and human rights, or perhaps it was more complex. First, *Hamdi* had been detained for over three years before the Supreme Court considered his case after successive decisions by courts determined that the President had the authority to detain him. Second, only two Justices in the Court’s decision (Justices Stevens and Scalia) insisted that the U.S. Constitution required *Hamdi*’s guilt to be proven in front of a jury of his peers,⁹⁸ while Justice Thomas argued that the president had the power to “unilaterally decide to detain an individual if the Executive deems this necessary for the public safety *even if he [was] mistaken.*”⁹⁹ For Bruce Ackerman in *Before the Next Attack*, it is Justice Thomas’s opinion that is the most shocking, since it seeks to “vindicate the president’s authority *unilaterally* to declare an emergency in response to *any* perceived threat [imminent or otherwise] . . .” and to detain indefinitely without charge any U.S. citizen even if the President is

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

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

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

98. *Hamdi*, 542 U.S. at 573 (Scalia, J. & Stevens, J., dissenting); ACKERMAN, *supra* note 10, at 27.

99. *Hamdi*, 542 U.S. at 590 (Thomas, J., dissenting).

mistaken.¹⁰⁰ Overall, Thomas's view is in the minority and Justice Sandra Day O' Connor swung the plurality opinion and upheld that the principle of habeas corpus does apply to Hamdi, but Ackerman worries nonetheless about the continued precariousness of the Bill of Rights in the United States¹⁰¹

V. CONCLUSION

This overview of the response to terrorism in the United States and the United Kingdom shows that the governments in both countries have pushed against and, in many cases, crossed the "lower boundary" of rights protections that ought to be in place *even if a country faces an existential threat*. Assessments of the terrorist threat suggest that neither country faces an existential threat to the life of the nation. The Law Lords' ruling on the detention of foreign terror suspects declared that the United Kingdom simply had not made the case for derogation under Article 15 of the European Convention on Human Rights.¹⁰² The evidence presented by Lustick and Ackerman suggests that the United States, like the United Kingdom, does not face an existential threat. Moreover, the threat may well be greater in the United Kingdom than in the United States and yet, the political institutions in the United States have been slow to act in providing increased oversight for the use of executive power to combat terrorism. Of the many options open to democracies in responding to terrorism—a criminal justice model, a war model, or the causes of terrorism model¹⁰³—Britain has by and large followed a criminal justice model for dealing with its threat of terror, although there remains a significant temptation for the criminal justice model to be superseded by a "security model that is based on fear and suspicion."¹⁰⁴ The United States has adopted a war model that has been based precisely on such fear and suspicion. The rhetorical construction of the "war on

100. ACKERMAN, *supra* note 10, at 28.

101. *Id.* at 28-29.

102. ECHR, *supra* note 52, art. 15.

103. Judith Large, *Democracy and Terrorism: The Impact of the Anti*, in 2 DEMOCRACY, CONFLICT, AND HUMAN SECURITY: FURTHER READINGS 140, 143 (2005), available at http://www.idea.int/publications/dchs/upload/dchs_vol2_sec4_2.pdf.

104. GEARTY, *supra* note 71, at 137.

terror” has prevented adoption of alternative metaphors and has led to a self-reinforcing cycle of threat perception, policy formulation, and government expenditure that Lustick labels the “whirlwind” of the war on terror.¹⁰⁵ It has also allowed the President to exercise his authority as the Commander-in-Chief in the conduct of this war, against whom Congress and the Supreme Court have far fewer mechanisms for constraint.

But how do the developments in both countries address the themes of this article and the larger debate over the ways in which to fight terrorism while not undermining a commitment to fundamental international human rights? First, while the themes of imminence and proportionality feature throughout *A More Secure World*, they are recurring themes in the broader literature on international relations and international law. Both terms are also relative in the sense that any perception of threat will always be related to the validity, reliability, and availability of evidence, while the proportionality of response is always relative to the threat itself. In his attempt to measure the terrorist threat in the United States, Lustick cautions us in line with the former Secretary of Defense Donald Rumsfeld that the “absence of evidence does not constitute evidence of absence.”¹⁰⁶ Lustick’s assessment shows that future terrorist attacks are plausible, but he queries the attention given to the issue relative to other national priorities, and he queries the enormity of the response.¹⁰⁷ Second, in laying out criteria for an appropriate response that does not undermine the basic values for which free countries have fought, the normative evolution of international human rights instruments becomes a useful resource and reflects at one level a consensus of U.N. member state views on the need to uphold fundamental rights while combating terrorism.

The basic premise of the human rights-based approach to combating terror is that the international law of human rights already has the criteria established for the conditions under which certain rights may be curtailed. The Office of the High Commissioner for Human Rights has compiled a digest of all developments with respect to protecting human rights while combating terror and has provided a

105. LUSTICK, *supra* note 8, at 72.

106. *Id.* at 29 (quoting former Secretary of Defense Donald Rumsfeld).

107. *Id.*

useful note to the Chair of the U.N. Counter-Terrorism Committee outlining a human rights perspective on counter-terrorism measures.¹⁰⁸ The principles underlying this advice include legality (preclusion of all arbitrary or discriminatory enforcement), non-derogability, necessity and proportionality, non-discrimination, due process and rule of law, and the right to seek asylum and/or non-refoulement.¹⁰⁹ Such an approach to combating terrorism is not a soft option that disregards security, nor does it claim all rights must be protected at all times. Rather, it seeks to establish a legal bottom line that recognizes the need to protect human dignity while providing security. This approach is entirely consistent with the principles laid out by Dr. James Jay Caravan, an assistant director and senior research fellow with the Heritage Foundation, who argued in front of the Senate Judiciary Committee in January 2007 that “[n]o fundamental liberty guaranteed by the laws of a sovereign state can be breached or infringed upon. This should include the protection of human rights guaranteed by international treaties, which when ratified by the state have the force of national law.”¹¹⁰ Such an approach is also wholly consistent with the February 23, 2007 judgment of the Canadian Supreme Court striking down a law that allowed the indefinite detention of terrorism suspects. In that judgment, Chief Justice Beverly McLachlin wrote “The overarching principle of fundamental justice that applies here is this: before the state can detain people for significant periods of time, it must accord them a fair judicial process.”¹¹¹

Such an approach is also consistent with a criminal justice model for fighting terrorism outlined in this article. Michael German, former undercover FBI agent, who had infiltrated right-wing and white

108. Office of the High Comm’r for Human Rights, *Note to the Chair of the Counter-Terrorism Committee: A Human Rights Perspective on Counter-Terrorism Measures*, <http://www.un.org/Docs/sc/committees/1373/ohchr1.htm> (last visited Sept. 21, 2007).

109. *Id.*

110. *Balancing Privacy and Security: The Privacy Implications of Government: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. (2007) (statement of James Jay Carafano, Assistant Director, Heritage Foundation), available at http://judiciary.senate.gov/testimony.cfm?id=2438&wit_id=5948.

111. *Charkaoui v. Almrei*, [2007] 276 D.L.R. (4th) 594 ¶ 28 (citing *New Brunswick v. G.(J.)*, [1999] 3 S.C.R. 46).

supremacist organizations in the United States (of which Timothy McVeigh, the Oklahoma bomber, was a member) argued strongly for a criminal justice model of the kind that is consistent with a human rights-based approach developed here.

By treating terrorists like criminals, we stigmatize them in their community, while simultaneously validating our own authority. Open and public trials allow the community to see the terrorist for the criminal he [or she] is, and successful prosecutions give them faith the government is protecting them. Judicial review ensures that the methods used are in accordance with the law, and juries enforce community standards of fairness. The adversarial process exposes improper or ineffective law enforcement techniques so they can be corrected. Checks and balances on government power and public accountability promote efficiency by ensuring that only the guilty are punished.¹¹²

Too often in the past, concerns over national security have become “catchall” excuses for systematic violations of human rights. History shows that there is an easy temptation to abandon the basic principles that have been essential for the foundation of liberal societies around the world in the name of combating subversion and terrorism while attempting to provide increased security. But the unintended consequences of state action during the current war against terror will create the outcome most feared by Jefferson: the loss of security *and* liberty.

112. German, *supra* note 40, at 14.