5

The British Experience with Terrorism: From the IRA to Al Qaeda

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The September 11, 2001, attacks on the United States prompted efforts by nations around the world to circumscribe some civil liberties to combat terrorism, and as Jeremy Waldron observed, courts were unlikely to oppose those reductions in freedom (2003: 191). Indeed, when faced with groups who are willing to employ unlawful violence strategically to advance political goals (Gross, 2006: 11), political panic becomes acute. Often, in that state of panic, to which judges are not immune, the first victims can be rights – rights of the criminally accused, of privacy, of speech, of press, of assembly, and even of life. Boundaries "between war and peace, emergencies and normality, the foreign and the domestic, the internal and the external" become blurred as terrorist acts transcend a single nation-state (Brooks, 2004: 676). Terrorism purposely and systematically induces "fear and anxiety to control and direct a civilian population" (Crenshaw, 1981: 380), and governments react as their constituents seek protection from elusive terrorists, often ones willing to lose their own lives to carry their message to a larger audience (Crenshaw, 1981: 379).

Many nations have confronted terrorism over the years and have fashioned various responses to this deadly phenomenon. This chapter considers the reactions of the highest courts of the United Kingdom to two different terrorist threats: first, the "Troubles" in Northern Ireland from 1969 until the end of the twentieth century, and then those more currently posed by the radical Islamist group, Al Qaeda. How do the courts of the nation that first penned the word "liberties" in the Magna Carta in 1215 and claimed "them and their heirs, for us and our heirs for ever" respond to terrorist threats? Chapter 29 of that document declared that "no free man shall be taken or imprisoned or be deseised [sic] . . . of his liberties . . . but by lawful judgment of his peers, or by the law of

the land" (Statute 25 Edw. 1, 1297 from Wallington and Lee, 1990: 1). The two strands of terrorism confronted in the United Kingdom – that attendant to Northern Ireland and that of Al Qaeda – "both involve entrenched, organized, political violence with complex ethnic dimensions yielding identifiable 'out groups'" (Campbell and Connolly, 2006: 937). More importantly, the courts of the United Kingdom heard challenges of government excesses in both situations and, particularly in the Northern Irish situation, largely deferred to the executive branch at the expense of civil liberties.

The British government decided that the terrorism arising from the strife in Northern Ireland and the events of 2001 in the United States constituted national emergencies warranting special actions. Indeed, many western countries have found themselves in a position described as a "defensive democracy" (Hickman, 2005: 655), and after the events of 2001 too often the rules put in place in reaction to "exceptional circumstances... are gradually transformed into permanent elements of domestic legal frameworks" (Tsoukala, 2006: 607). A state of emergency becomes normalized, as the boundaries between normality and exception blurs (Tsoukala, 2006: 608), and perhaps, as Conor Gearty muses, historians will "regard the idea of human rights as little more than a quaint reminder of a brief liberal interregnum between two kinds of world conflict, the first ending in 1989, the second starting in 2001" (2005: 19).

The assumption lying behind invocations of national emergency and assertions that some rights must be forfeited is that only by this route may the public be protected from unprovoked violent attacks. If the law is adjusted to loosen restrictions on policing bodies, so the argument goes, then consequential antiterrorist benefits will follow (Campbell and Connolly, 2006: 935). Yet, as Waldron asks, because our liberties are part of what governmental emergency powers are intended to protect, would not a better public policy be to retain those liberties and call for greater courage (2003: 194)? Alas, legislating greater courage poses some significant challenges unless the Wizard of Oz can be called on to distribute a potion that makes citizens lion-hearted. Moreover, executive officers do not necessarily want a more courageous citizenry, but rather a more submissive one. The diminution of those rights that hinder law enforcement enhances executive power and permits a rewriting of the rulebook. In Britain, in particular, where a tradition of separation of powers is absent, the executive gains even more. The executive frames legislation, can propose regulations free of potential amendments and

without extensive debate, and, relying on party discipline, can ensure the passage of laws, as well as enforce those laws afterward (Lustgarten, 2004: 7). This remains true whether the government is Tory (Margaret Thatcher and John Major) or Labor (Harold Wilson, Tony Blair, and Gordon Brown).

In most nations, courts can play a major role in "reviewing, reassessing and restraining executive and military powers" (Schulhofer, 2004: 1910), because when norms conflict, the judiciary comes into play (Lustgarten, 2004: 4). However, the situation in Britain is different in the absence of a tradition of separation of powers or, indeed, of a written constitution. With an unwritten and flexible constitution, the precise role of the judiciary when laws and official actions infringe fundamental civil liberties remains unclear (A. T. H. Smith, 2007: 80). Parliament is sovereign and represents the will of the people, and the executive is accountable to Parliament; courts are marginalized and the law is placed within the government process. However, courts are independent, and the judges staffing them are not selected with political or partisan leanings in mind (Woodhouse, 1995: 401). Only through the mechanism of judicial review (not to be confused with American judicial review) can the legality – but NOT the constitutionality – of official actions be challenged. That changed with passage of the Human Rights Act in 1998 and the Constitutional Reform Act of 2005, the former of which is discussed later.

Another confounding difficulty for British courts lies in the traditional conception of rights under an unwritten constitution. Until the Human Rights Act of 1998 came into force in 2000, there was no enumeration of rights to which one could point and claim that the government could not violate. Rather than rights, one had liberty, a negative form of liberty. Unless a law passed by Parliament expressly prohibited a person from taking a particular action, he or she was at liberty to act (Irvine, 2001: 15–16). One could point vaguely in the direction of the European Convention on Human Rights (ECHR), but until 2000 British courts were not bound by it, and only by taking a case to the Strasbourg European Court of Human Rights could a convention right be judicially vindicated.

The British courts chose, when dealing with possible executive excesses in the prevention of terror in Northern Ireland, to defer to the executive. That tendency was reversed after the Human Rights Act of 1998 came into force. However, this chapter does not cover the actions of the courts in Northern Ireland or those of the European Court of Human Rights, both of which are thoroughly covered by others in this volume. Instead, its focus is largely on those Northern Ireland cases that reached the U.K.

House of Lords (the highest appellate court) on appeal and on those cases post–9/11 that arose in the courts in the U.K. House of Lords and Court of Appeals.

TERRORISM IN NORTHERN IRELAND

Northern Ireland's vexed relationship with the United Kingdom can be dated from 1609 when Protestant settlers drove native Irish from the six northern counties of Ireland, and no small amount of blood has been shed over the ensuing four centuries, with partition occurring in 1922.[1] The so-called Troubles that engaged Great Britain and the courts of England and Wales date from 1969 when clashes between Catholic and Protestant mobs became numerous. By 1972, the paramilitary Provisional Irish Republican Army (IRA) was waging a guerilla action (Smith, 1997: 17). In 1971 and 1972 alone, there were 12,384 shootings and 3,388 bombings that killed 641 people (Smith, 1997: 18). In the face of the violence and the inability of the Northern Irish officials to contain it, in March 1972 Great Britain assumed direct rule over the six northern counties (Schulhofer, 2004: 1933).

In 1974, the violence expanded into England, and as a result, Harold Wilson and the Labor Party unseated Conservative Edward Heath as prime minister. By the end of that year, the first Prevention of Terrorism Act (PTA), euphemistically carrying the parenthetical subtitle "Temporary Provisions," had passed Parliament in a hurried two days (1974 Chapter 56). The Prevention of Terrorism Act of 1974 was periodically renewed with some tweaks here and there until 1988, when it was made permanent and ultimately was succeeded by the Prevention of Terrorism Act of 2000. The essentials of the law proscribed some organizations (primarily the IRA), prohibited public display or support for the organization, allowed people to be excluded from entering Great Britain, extended detention before formal charging to forty-eight hours, and permitted warrantless searches in some circumstances (1974 Chapter 56). The 1976 version limited the time that police might detain someone at a port or airport to forty-eight hours (in line with the length of other detentions), gave people who had been excluded from entering the country the ability to have their exclusions reviewed after three or more years, and added the National Liberation Army to the schedule of proscribed

[1] Please see Geraghty, 2000, 355–379, for a full military chronology of Northern Ireland through 2000.

organizations. The succeeding version in 1984 allowed detentions without charges to be extended up to five days if authorized by the Secretary of State and limited exclusion orders to three years (Crime and Criminal Justice Unit, 2001). Generally speaking, very little changed from one act to another.

However, enforcement of the Prevention of Terrorism Act was complicated by the existence of a second code for Northern Ireland – the North Ireland (Emergency Provisions) Act of 1978 (Walsh, 1982) – because both were simultaneously applicable (Walker, 1984). Because a national emergency or crisis allows countries to derogate from some, but not all, provisions of the European Convention on Human Rights, the British chose that route and curtailed some rights (Jackson, 1997: 9). Another element, not specifically in the laws, was the practice of the "Judges Rules"[2] that governed police conduct and allowed people under detention to be denied access to their lawyers for forty-eight hours (Walsh, 1982: 43).

The IRA's violent campaign reached beyond Northern Ireland to Ireland, Great Britain, and Europe and involved not only random attacks in 1974 but also ones on security forces, political and judicial figures, Loyalist paramilitaries, and civilians (McEvoy, 2000: 544). Consequently, more aggressive means for fighting the scourge were deemed necessary. However, of the 5,555 people detained between 1974 and the end of 1982, only 98 or 1.76% were charged; of those, only 83 were found guilty, with 33 given suspended sentences (Sim and Thomas, 1983: 80). Those statistics, along with the judgments of the courts, suggest that the succeeding Prevention of Terrorism Acts did not effectively serve to arrest and punish the perpetrators.

The European Convention on Human Rights was signed in November 1950, and the United Kingdom was among the first states to ratify it. However, the United Kingdom did not allow it to be directly applicable in a U.K. court, and hence, the rights contained in it could not be protected in the courts of England and Wales (Harlow and Rawlings, 1997: 120). Rather, one had to appeal to the European Court of Human Rights in Strasbourg, as many did who were arrested, detained, and subjected to the "five techniques" of interrogation that approximate, if not constitute, torture as prohibited by the convention. Donald W. Jackson's chapter in this volume and his 1997 book on the subject address the cases arising

[2] The so-called Judges Rules govern what evidence obtained from interrogations may be admissible in court.

out of police behavior during "the Troubles," but what is relevant to this chapter is Article 15 of the convention. That article provides that "in time of war or other public emergency threatening the life of the nation . . . [a state] may take measures derogating from its obligations under this Convention." However, there are limitations; a derogation can only apply for as long as "strictly required by the exigencies of the situation." Only Article 2 (discriminatory segregation), Article 3 (discrimination in education), Article 4, paragraph a (provision of free and compulsory education), and Article 7 (reporting requirements) are not available for derogation (Brownlie, 1994: 331). In keeping with its obligations under the European Convention, the United Kingdom filed a formal notice of derogation from it to combat the terrorism arising from the strife in Northern Ireland.

A number of court cases arising from the enforcement by police and immigration officials of both the British laws passed to combat terrorism and others applying only to Northern Ireland still made their way to the European Court of Human Rights. Even so, the Judicial Committee of the House of Lords had opportunities to limit the excesses that were alleged in appeals from the Northern Ireland Court of Appeals. The cases decided tended to fall into these categories: the use of lethal force, criminal procedure, powers of search and arrest, and freedom of expression. In all categories, most legal observers found that the House of Lords failed in the cases that reached it to sufficiently explore human rights, at least through 1992. In fact, Stephen Livingstone's analysis of thirteen cases involving terrorism and Northern Ireland concluded that only in two cases did the Law Lords find against the government (1994: 334–335). Yet, a U.S. legal academic comparing the records of the United States, Israel, and the United Kingdom concluded that the British and Israeli high courts preserved a "system of effective checks on the executive" (Schulhofer, 2004: 1955).

McEldowney v. Forde, one of the first cases to reach the House of Lords, raised a challenge to prohibitions on political association and expression in the name of preventing terrorism. Sinn Fein is a nationalist political party that gained its first parliamentary seat in 1917, but has maintained a "symbiotic relationship [with the IRA] which has been cemented by a substantial overlap of leadership and membership" (Walker, 1984: 708). Consequently, Sinn Fein was a prohibited organization in Northern Ireland between 1956 and 1974. During that time, one means to circumvent the regulation was the formation of Republican Clubs, which were subsequently also prohibited. A member of one Republican Club, McEldowney, had been arrested for being a member

of an unlawful organization, but was acquitted after the arresting officer said that the club had not been a threat to the peace, and the Special Powers Act affected only organizations that were a threat to order. The Court of Appeals overturned that acquittal, on the grounds that the trial magistrate had no independent authority to determine the level of threat that the organization posed. In the House of Lords, the appellate court decision was upheld, because a majority of the Law Lords found that it was within the powers of the minister issuing the prohibition on organizations to decide what organizations were or were not a threat to peace and order. Notably, Republican Clubs were removed from the proscribed list in 1973, and Sinn Fein in 1974 (Walker, 1988: 609).

The level of violence occurring in Northern Ireland and subsequently across the Irish Sea can almost be measured by the number of cases that filtered up to the House of Lords during the years of "the Troubles." The "McElhone" case, named for the victim of a British soldier serving in Northern Ireland, reached the House of Lords as reference from the Attorney General of Northern Ireland (No. 1 of 1975). McElhone, an unarmed civilian, had failed to stop when so ordered by the British soldier and was fatally shot in the back. The soldier claimed that he believed that McElhone was a member of the IRA attempting to flee. Even though McElhone was known to be unarmed, the soldier apparently honestly believed that he was a party to the terrorist organization. The trial court acquitted the soldier on the grounds of justifiable homicide. The Attorney General exercised his authority to refer a point of law following an acquittal to the Northern Ireland Court of Appeals, the majority of whom agreed that justifiable homicide was an acceptable conclusion. The House of Lords also ruled unanimously that the verdict of justifiable homicide was reasonable, but it found that trying the case without a jury conflated findings of law and findings of fact. They referred to the Attorney General's reference of the point of law as an "academic" one, because "the circumstances in which a death may result from action by members of the armed forces . . . in Northern Ireland, are likely to be infinitely variable;" hence, the point of law to be settled in this case would not likely be of any value in assessing others (*Attorney General of Northern Ireland [No. 1 of 1975]*).

That same year, the Lords heard another criminal case arising out of a shooting, but this time the victim was a policeman in Northern Ireland. Lynch had been convicted of murder as a principal in the second degree, because he drove three others to murder police constable Raymond Carroll in Belfast in 1972. Lynch claimed that he had been forced to

drive the car by Sean Meehan, known as a ruthless gunman and member of the IRA. The trial judge had not allowed him to offer a defense of duress and did not instruct the jury on that charge. The Northern Ireland Court of Appeals had upheld the verdict, but the House of Lords ordered a new trial (*Director of Public Prosecutions v. Lynch*). This case represents one of the few examples of what Livingstone classified as an antigovernment decision by the House of Lords (Livingstone, 1994: 335).

Another criminal case that reached the highest British court was *Maxwell v. Director of Public Prosecutions for Northern Ireland*. Unlike Lynch, Maxwell did not use duress as his defense, but rather ignorance. He was a longstanding member of the Protestant version of the IRA, the Ulster Volunteer Force (UVF), and had led a group of UVF men from another part of the country to the area of a Catholic pub. He knew that there was a reconnaissance mission planned for that night, but claimed that he had no knowledge of a plan to bomb the bar. The Northern Ireland Court of Appeals rejected his appeal, as did the House of Lords.

Similar to the *McElhone* case in which an innocent civilian was killed, the *Farrell* case also involved a fatal mistake by British soldiers. In October 1971 in Newry, Farrell and another man had approached the safety deposit box of a bank and were shot dead by four British soldiers. A British officer had received information that there would be a bomb attack on that bank and took four soldiers to form an outpost around the bank. When Farrell and the other man approached the bank, a soldier called "halt," and then "halt, I am ready to fire." The men did not stop, and the soldiers opened fire, killing them. The two dead men were not armed and did not have a bomb, but they had a stolen bag. Farrell's widow sued the Secretary of State for Defense, as the employer of the soldiers, for damages that she claimed had been caused by negligence or by assault and battery. Farrell had a criminal record, and thirty-six bank bombings had occurred in Newry. Therefore, the Secretary of State for Defense argued that a reasonable expectation existed that the men were intending to bomb the bank. The trial judge excluded the issue of negligence, and the jury ruled against Mrs. Farrell. She appealed on the grounds that no examination of negligence by the officer in charge had been made in the trial. The Northern Ireland Court of Appeals ordered a new trial, but the House of Lords unanimously reversed (*Farrell v. Secretary of State for Defense*). The case raised a larger question of when lethal force may be used under English law. Yet, according to Clive Walker, this case did not provide an answer (Walker, 1980: 594).

Two cases in the 1980s arising from the conflict in Northern Ireland raised questions about the powers of the police to arrest and to search. Under the separate emergency legislation that only applied in Northern Ireland, police were given extreme discretion to arrest, detain, and search. Among other powers, police were able to arrest any person whom they thought might be a terrorist. Thus, McKee had been arrested and detained for eighteen hours and then released without charge; he subsequently sued for false arrest. The trial judge decided that the arrest was valid because the police involved had been told that McKee was a member of the IRA or of a "proscribed organization." However, the Court of Appeals of Northern Ireland reversed the decision because mere membership in the IRA, although known for violent acts, did not make one a terrorist. In turn, the Law Lords reversed the Court of Appeals, reinstating the trial judge's decision, because all that mattered was that the arresting officer thought that McKee was a terrorist, even if he was not one (*McKee v. Chief Constable*).

Another arrest case involved Margaret Murray of Belfast, whose brothers had been convicted in the United States in connection with the purchase of weapons for the IRA. Mrs. Murray was suspected of attempting to raise money in the United States for the purchase of weapons for the IRA. Five armed soldiers and one unarmed one came to Mrs. Murray's house at 7:00 in the morning in June 1982. After Mrs. Murray was identified, all the other occupants of the house were brought to one room, and the house was searched. At one point, Mrs. Murray asked if she was under arrest and received no reply. A half-hour after the soldiers had arrived at the house, Mrs. Murray was arrested and taken to police headquarters where she was interviewed and eventually released at 9:45 that morning. Mrs. Murray sued, claiming damages for false imprisonment for the half-hour during which her movements in her house were restricted, but before she was formally arrested. The Northern Ireland Court of Appeals did not find that she had been unlawfully imprisoned, but did grant her an award of £250 for a pat-down search that was conducted. The Law Lords concluded, albeit on different grounds from the Court of Appeals, that if a person is detained by the police or military, it amounts to an arrest even if the word "arrest" is not used. Therefore, Mrs. Murray was not falsely imprisoned (*Margaret Murray v. Ministry of Defense*). She thereafter took her case to the European Court of Human Rights, where she was equally unsuccessful (*Murray v. United Kingdom*).

One of the more notable cases arising out of the Northern Irish conflict was the *Brind* decision, and like that of *McEldowney*, it was a case

involving freedom of expression. Brind was a journalist who challenged the 1988 government decision to restrict the broadcast of interviews and even of the voices of representatives of the proscribed organizations linked to terrorism, including the legitimate political party Sinn Fein. Brind argued in his petition for judicial review that the decision was unreasonable and also violated the protection of freedom of expression in the European Convention on Human Rights. The Northern Ireland Court of Appeals and the House of Lords ruled against Brind. Both courts upheld the reasonableness of the government's decision and argued that, under English law at the time, the European Convention on Human Rights could not be enforced in English courts. Indeed, the Lords said, "[I]n construing any provision in domestic legislation which is ambiguous in the sense that it is capable of a meaning which either conforms to or conflicts with the Convention, the courts will presume that Parliament intended to legislate in conformity with the Convention and not in conflict with it" (*R. ex parte Brind v. Secretary of State for the Home Department*). Brind took his case to the European Commission on Human Rights, which held that the government's decision was not disproportionate (Application No. 18714/01).

Two cases in two years dealt with inquests into the deaths of people killed by the army or police. The 1990 decision by the House of Lords involved the police killing of three men, all unarmed IRA members, who had run a roadblock (*McKerr v. Armagh Coroner*). The 1992 decision focused on the killing of three other suspected IRA members, who were armed but had not fired their weapons (*Devine v. Attorney General for Northern Ireland*). In both cases the police or army personnel involved in the deaths were not called to testify at the inquests. The House of Lords ruled that a coroner's inquest is an inquisitorial, not adversarial, proceeding; therefore, the coroner could choose to run the process as he or she saw fit.

The Prevention of Terrorism Act provides that "a constable may arrest without warrant a person whom he has reasonable grounds for suspecting to be . . . a person who is or has been concerned in the commission, preparation or instigation of acts of terrorism." That provision allowed O'Hara, like Farrell and Murray in earlier cases, to be arrested solely on the subjective suspicion of a police officer. Mr. Kurt Koenig had been murdered in Londonderry in what was an obvious act of terrorism. Some two months after his death, Constable Stewart was told in a morning briefing that O'Hara should be arrested in connection with the murder.

At 6:15 in the morning, police officers entered O'Hara's house, searched it, and at 8:15 a.m. arrested him. He was taken into custody, and that custody was extended by the Secretary of State for the Home Department for an additional five days, at which time O'Hara was released, but not charged. He subsequently sued for false arrest, assault, and unlawful confiscation of documents. The trial judge dismissed all claims except one regarding the confiscation of documents, for which O'Hara was awarded £100. The appellate court dismissed the case and the House of Lords did the same, asserting that the trial judge could reasonably infer from the scant evidence of suspicion leading to the arrest that the arrest was based on the constable's subjective belief that sufficient grounds existed for the arrest (*O'Hara v. Chief Constable of the R.U.C.*). Thus, in any case that reached them alleging false arrest, the Law Lords failed to find that the army or police had erred.

A new twist in the rights that might be invoked against the Prevention of Terrorism Acts emerged in 1998 when Parliament passed the Human Rights Act. Even though the United Kingdom had derogated from some provisions of the European Convention on Human Rights and was, therefore, not bound by its provisions, the 1998 Human Rights Act incorporated most of the convention into domestic law, effective in October 2000. Additionally, the Irish War finally ended, with the Unionists abandoning their "No Guns/No Government" policy and the IRA's decommissioning in January 2000. British troops were withdrawn from Northern Ireland the same year (Geraghty, 2000: 378–379).

A 2004 judgment in the House of Lords reached back to two earlier cases, *Devine* and *McKerr*, involving the conduct of inquests and could not have been brought had the Human Rights Act of 1998 not become law. In November and December 1982, in three separate incidents in Armagh County, six men, including Gervaise McKerr, were shot and killed by the same mobile unit of the Royal Ulster Constabulary. In all three incidents those killed were unarmed, and one of the men was shot in the back. Three police officers were tried for the murder of McKerr, but all were acquitted. McKerr's widow applied to the European Court of Human Rights, alleging that Article 2's guarantee that "everyone's right to life shall be protected by law" was violated. After her death, her son, Jonathan, continued the petition. In 2002, the Strasbourg Court determined that the United Kingdom had violated the convention by not holding an effective official investigation when someone was killed by lethal force; Mr. McKerr was awarded £10,000 for frustration, distress,

and anxiety. This amount was paid by the U.K. government, which also presented a package of proposals prospectively to avoid future repeat incidents. McKerr then sued under the Human Rights Act to force the government to conduct an effective investigation of his father's death. Nine other cases were pending at the time in courts in Northern Ireland, awaiting the outcome of the *McKerr* case before the House of Lords. The Law Lords could not, however, find a means whereby relatives of people killed eighteen years before the Human Rights Act came into force could claim rights under it. Parliament had not chosen to make the Human Rights Act retrospective, and therefore, the appeal was dismissed unanimously (*In re McKerr*).

In 2000, the number of people detained in connection with Irish terrorism was down to only seven, the lowest number recorded since 1974 (Crime and Criminal Justice Unit, 2001:1). Over the preceding two decades, the levels of violence and governmental repressiveness had decreased, but not because of the inability of terrorists to inflict damage. The IRA destroyed its arsenal of weapons in 2005, and the "stockpile is estimated to have included over two tons of Semtex and one thousand firearms" (Campbell and Connolly, 2006: 953). Consequently, one explanation for this shift is that the relationship between violence and repression is symbiotic: As repression decreases, so does the violence (Campbell and Connolly, 2006: 955). Until the Human Rights Act took effect in October 2000, there had been no charter of positive rights to which a detainee or arrested person could point. As a result, British judges acted negatively; "they curb arbitrary and unlawful abuses of power rather than develop new legal rights, except where these have an antecedent foundation in the common law" (D. G. Smith, 1986: 641). Most assessments of the rulings by the highest British courts throughout "the Troubles" in Northern Ireland conclude that the judges acted only at the margins to protect rights and were more inclined to uphold governmental actions to dampen the violence.

Indeed, except for the 1975 *Lynch* case involving the defense of duress, the government's actions were consistently upheld, and in the two instances when the claimants, Brind and Margaret Murray, took their cases to the European Commission and Court of Human Rights, they lost. Only the *McKerr* case involving an effective investigation of a death was won in Strasbourg. Two of the three search and arrest cases in which the Lords upheld arrests or detentions merely on the "belief" of the arresting officer did not entail lengthy detentions. The lethal force cases, of which there were four, nonetheless, remain disconcerting.

THE "WAR ON TERROR"

While the number of detainees in connection with Irish terrorism shrank in 2000, the number of people held on allegations of international terrorism rose. In 1999, eighty-seven people were detained and, in 2000, thirty-nine (Crime and Criminal Justice Unit, 2001: 1). The new Terrorism Act of 2000 replaced the multiply revised temporary provisions of the Prevention of Terrorism Acts and was considered to be more rights oriented than the earlier versions of the PTA. It inserted judicial oversight into the decision to detain individuals more than four days without charging, distinguished ordinary crime more clearly from acts of terrorism, introduced more procedural mechanisms to limit arbitrariness, and limited interferences with freedom of association (Gearty, 2005: 21). The Human Rights Act took effect that year and gave residents of Britain for the first time a list of positive rights. The events of September 11, 2001, in New York, Washington, D.C., and Pennsylvania presented a challenge to the new ways of thinking in Britain, and the highest courts responded in stark contrast to the role they had played in the conflict in Northern Ireland.

Reactions to the devastating attacks on the United States were swift. The Anti-Terrorism, Crime and Security Act (ATCSA) of 2001 was passed speedily, after only sixteen hours of consideration by the House of Commons (Lustgarten, 2004: 8). The section on detention powers was the most controversial because it permitted holding a person indefinitely, without the filing of charges, if the Secretary of State for the Home Department reasonably believed or suspected that the person was a terrorist or posed a national security risk (Gearty, 2005: 24). To square that provision with the requirements of the Human Rights Act and its obligations under the European Convention on Human Rights, the United Kingdom issued a derogation to the European Council suspending application of Article 5 (1) of the convention that limits arrest and detention (Human Rights Act 1998, Designated Derogation Order 2001). All of this was completed in less than two months after the September attacks. The political climate had changed dramatically, but so, too, did the legal one.

The 1971 Immigration Act allows the Secretary of State to deport individuals who are not British citizens if it is for the public good, with no appeal allowed. However, the European Court of Human Rights held in 1996 that the absence of an appeal meant the absence of an effective remedy for violations of the convention (*Chahal v. U.K.*). In response to that decision, the United Kingdom established the Special Immigration

Appeals Commission (SIAC), staffed by someone holding or having held a high judicial office, an immigration judge, and someone with experience in national security, to which appeals from the Secretary of State's decisions can be made. Shafiq Ur Rehman was a Pakistani national who had resided in the United Kingdom since 1993, where he married and fathered two children. In 1997, he applied for indefinite leave to remain, and the following year the Secretary of State for the Home Department denied that request. The Secretary's letter said that the decision was based on confidential information that Rehman was involved with a terrorist organization, Markaz Dawa Al Irshad (MDI). When Rehman appealed the deportation order to the SIAC, it concluded that the Home Secretary had employed an expansive definition of the term "national security." Rehman had stated that he was sympathetic to the organization, Lashkar-e-Taiba, insofar as it confronted illegal violence in the disputed territory of Kashmir. The Secretary of State for the Home Office appealed to the Court of Appeals, which found that the SIAC had relied on a definition of national security that was too narrow and did not take into account the executive's global policy on national security. The court returned the case to the SIAC, but Rehman petitioned to the House of Lords, which unanimously agreed with the Court of Appeals. National security interests were the prerogative of the executive branch, and greater weight should be given to the assessments made by the Secretary of State for the Home Office. Just because someone might be a threat to national security, but had not been one yet, did not mean that the Secretary of State could not deport that individual (*Secretary of State for the Home Department v. Rehman*). Thus, the Law Lords again deferred to the decision of the executive branch, despite the findings of the SIAC.

The following year, the Court of Appeals decided a case that raised two fundamental questions about the justiciability of actions or obligations of the executive in foreign affairs: Are executive actions in foreign affairs and the legitimacy of an action taken by a foreign sovereign state justiciable? The case evolved from the capture of a British national, Feroz Ali Abbasi, by U.S. forces in Afghanistan. Along with seven other British nationals, Abbasi was then transferred to Guantanamo Bay, Cuba, in January 2002, where he had been held for eight months without access to a court or tribunal or lawyer at the time of the Court of Appeals decision. Or, as Lord Phillips succinctly stated it, "Mr. Abbasi is at present arbitrarily detained in a 'legal black hole'" (*R. ex parte Abbasi v. Secretary of State for Foreign Affairs and Secretary of State for the Home Department*). A petition for judicial review had been brought by Mr. Abbasi's mother to compel the Foreign Office to make representations on her son's behalf to the U.S. government or to explain why it had not done so. The Court of Appeals concluded that actions of the executive in foreign affairs may be justiciable, but that depended on the subject matter. While condemning Abbasi's indefinite detention in a U.S. territory without an opportunity to challenge his detention in court, the Court of Appeals found that there was no effective remedy available in the courts of the United Kingdom (*R. ex parte Abbasi v. Secretary of State for Foreign Affairs and Secretary of State for the Home Department*). The case was not heard subsequently by the House of Lords.

The House of Lords did hear the case of *A and others v. Secretary of State for the Home Department* (2004), also known as the *Belmarsh Detainees* case, which Baroness Hale of Richmond deemed "the most important case to come before the House since I have been a member" (*A and others v. Secretary of State for the Home Department* [2004]) and, indeed, perhaps in the recent history of English and Welsh jurisprudence. The case's importance rests on two grounds: First, the House of Lords quashed the United Kingdom's derogation from Article 5 of the European Convention on Human Rights, and, second, the Law Lords exercised their new ability under the Human Rights Act of 1998 for the first time to declare a portion of a British law incompatible with the convention.

The case arose from the detention under the Anti-Terrorism, Crime and Security Act of 2001 (ATCSA) of nine non-British nationals, five of them since December 2001. Two chose to leave the United Kingdom, one to go to Morocco and another to France. One was hospitalized for mental health reasons, and one subsequently was released on bail. None of them had been charged with a crime and, therefore, were not facing a criminal trial. They challenged the legality of their detentions. A number of substantial issues were before the Lords, among them the existence of a national emergency that would qualify for a derogation and discrimination between British nationals suspected of being international terrorists and non-British nationals who were similarly under suspicion. Resolution of these two issues was central to determining the legality of the British derogation from the European Convention on Human Rights and the compatibility of the ATCSA of 2001 with the Human Rights Act of 1998.

For a national emergency to exist under the jurisprudence of the European Court of Human Rights, the emergency must be actual or imminent,

must affect the nation as a whole, must threaten the organized life of the nation, and must represent an exceptional danger or crisis. Indeed, at the time of the decision, the United Kingdom had been the object of direct threats by Osama Bin Laden. Yet, France, Italy, and Germany had also been so threatened, and only the United Kingdom had derogated from the convention on arrest and detention.

To the second issue, the convention prohibits discrimination on any ground, and clearly the 2001 ATCSA made a distinction between non-British nationals and British nationals. Yet, according to Lord Bingham, about 30% of those arrested for terrorism had been British nationals, including the "shoe bomber" Richard Reid. Therefore, the Lords determined by a majority of 8–1 that indefinite detention without charging of non-British nationals violated Article 14 of the convention prohibiting discrimination and that the British derogation from the convention was not legal (*A and others v. Secretary of State for the Home Department* [2004]). Because U.K. courts cannot invalidate a law that is incompatible with the Human Rights Act, they can merely declare the incompatibility and wait for Parliament to act. Indeed, the offending provisions were repealed by the Prevention of Terrorism Act of 2005, effective as of March 11, 2005.

The following year, another case involving the same petitioners reached the House of Lords and raised yet another difficult question: Could evidence obtained in a foreign jurisdiction, without the complicity of the British government, that has or might have been obtained as a result of torture, be used in British tribunals? At that time, the British policy (not law, but policy) was to preclude use of any evidence known or believed to have been obtained as a result of torture in another country, but that policy could be altered. The United Kingdom had "regarded torture and its fruits with abhorrence for over 500 years," and 140 other nations joined it in signing the Torture Convention. The Law Lords, in a divided decision, determined that evidence that the information used in a tribunal, as *established* by diligent inquiries to have been obtained through torture, must be excluded and thus placed the burden of proof on the appealing party (*A and others v. Secretary of State for the Home Department and A and others v. Secretary of State for the Home Department* [2005]).

England became a victim of a terrorist attack on July 7, 2005, when the London subway system and city buses were bombed. An attempt to repeat the attack occurred two weeks later. These events had preceded the Lords' decision in *A and others* and may have influenced the court to give investigating authorities more leeway in presenting evidence obtained

outside the jurisdiction of the United Kingdom. The 2005 events clearly, however, affected how the judges viewed the stop and search provisions of the Prevention of Terrorism Act of 2000 that permitted uniformed police to stop and search vehicles and pedestrians whether or not the officers have grounds for suspecting that those stopped have articles that might be used in terrorism. A doctoral student and a freelance journalist brought a petition for judicial review after being stopped and searched. Both were detained for less than a half-hour and then permitted to proceed. The Law Lords unanimously agreed that the stop and search procedures were lawful and that discrimination had not been involved in either instance. Indeed, Lord Hope remarked that "the sight of police officers equipped with bundles of the stop/search form 5090... has become familiar in Central London since the suicide bombings" in July 2005 (*R. ex parte Gillan and another v. Commissioner of Police for the Metropolis* [2006]).

A High Court judge declared that a portion of the Prevention of Terrorism Act of 2005 that allowed the Secretary of State for the Home Department to issue "control orders" with restrictions on suspected terrorists was incompatible with the Human Rights Act of 1998. A control order imposes obligations on an individual in order to protect the public from possible terrorism. "MB" was subject to such a control order that required him (1) to give at least seven days notice of intent to move his residence, (2) to report to the local police department daily, (3) to surrender his passport and other travel documents, (4) to not leave the United Kingdom, (5) to stay away from all air or seaports and train stations that provide international rail service, and (6) to submit to police monitoring of his residence. The Court of Appeals held that, although MB had not been appraised of the information that led the Secretary of State for the Home Office to issue the control order, under the European Convention the state of national emergency allowed for some flexibility in the requirement for a fair and public hearing. The judges determined that sufficient safeguards were provided in the Prevention of Terrorism Act for the use of closed evidence to comply with the requirements of fair trial (*Secretary of State for the Home Department v. M.B.* [2006]).

The Secretary of State for the Home Department's use of control orders was at issue again before the House of Lords in the case of five Iraqi nationals and a sixth man who was either Iranian or Iraqi. All had entered the United Kingdom seeking asylum. The five Iraqi nationals had been arrested under the Prevention of Terrorism Act of 2000, then released without charge, and later rearrested for deportation; the sixth had been detained pending deportation and had disappeared by the time of the

hearing before the Law Lords. The case revolved around whether the conditions imposed by the control order violated the Human Rights Act's requirements on deprivation of liberty. The men were all required to remain in their homes eighteen hours per day and could only venture into confined, restricted urban areas – each containing a mosque, hospital, medical facilities, and shops – between the hours of 10:00 a.m. and 4:00 p.m. Their residences were subject to spot search by the police, and their social contacts were subject to approval by the Home Office. Relying on decisions by the European Court of Human Rights, the Lords in a split decision determined that the control orders were excessive, particularly the eighteen-hour daily curfew and limitations on movement during the six hours each day when they could be outside their residences. The essence of the decision was captured in Lord Hoffman's rhetorical question and response: "Why is the prohibition on the deprivation of liberty regarded as so quintessential a human right that it trumps even the interests of national security? In my opinion, because it amounts to a complete deprivation of human autonomy and dignity." The Lords upheld the decision by the Divisional Court to quash the orders (*Secretary of State for the Home Department v. J.J. and others* [2007]).

The territorial reach of the Human Rights Act of 1998 was the subject of a case before the House of Lords involving the conduct of British soldiers in Iraq. Relatives of Iraqi civilians killed by British soldiers in Iraq brought a petition for judicial review to compel the Secretary of Defense to order an independent inquiry into the circumstances of the deaths. Five of the deceased died at the hands of British soldiers in situations in which the facts were highly disputed. The sixth, Baha Mousa, died from injuries inflicted on him by British soldiers while he was imprisoned on a British military base. Because Article 2 of the European Convention establishes the right to life, the question that the Lords confronted was the territorial reach of the Human Rights Act. Could it apply beyond the confines of the United Kingdom? In a 4–1 decision, the judges determined that in the first five cases, "it is a sad but inescapable consequence of armed conflict that lives will be lost." However, British jurisdiction and, therefore, the Human Rights Act of 1998 did extend to Baha Mousa who was imprisoned by British soldiers and who died at their hands. The case was returned to the Divisional Court for evidentiary proceedings (*Al-Skeini and others v. Secretary of State for Defense* [2006]).

Do the various terrorism acts distinguish among the nations against whom the terrorism might be directed? That question reached the Court of Appeals in the case of a Libyan national who was granted asylum

in 2003, but was later arrested for having materials useful for committing terrorism. Specifically, he had a CD demonstrating how to fashion explosives and a handwritten document describing how to create a terrorist cell and a plan for removing Colonel Gaddafi from power in Libya and establishing an Islamic state. The Terrorism Act of 2005 prohibited terrorism waged against any government, not only the United Kingdom, primarily because terrorism is international. Nevertheless, the argument was that waging terrorism to unseat a tyrannical dictator should be an exception. The court noted, however, that the legislation was not restricted to terrorism against representative governments, and no list of countries was provided. The judges concluded that "terrorism is terrorism, whatever the motives of the perpetrators," and "terrorist legislation applied to countries which are governed by tyrants and dictators" (*R. v. F* [2007]). The appeal was dismissed.

The case of Lotfi Raissi raised another rather novel issue: Can a person receive compensation under a U.K. law aimed at wrongful detention or conviction when the detention was prompted by an extradition request from the United States? Mr. Raissi was arrested under the Terrorism Act of 2000 just ten days after the events of 9/11, held for the allowable seven days at that time, released, and then rearrested for extradition. In total, he spent four and one-half months in jail and was never extradited. Although the U.S. government had initially alleged that he had been in flight school in Arizona with one of the 9/11 hijackers and had instructed some others, the only charges for which the United States could provide evidence were that Raissi had falsely completed his Federal Aviation Administration application by failing to list a knee surgery he had undergone and he had a minor criminal charge for an action done when he was nineteen years old. The Court of Appeals took note that the terrorism charges that led to the detention and extradition proceedings had never resulted in charges in either the United States or the United Kingdom. The court decided that abuses had occurred and that, even though the statute on compensation specifically related to wrongful conviction or charges, the statute should apply to those wrongly detained because of a serious default of some public authority. The application for compensation was returned to the Secretary of State for the Home Department for reconsideration (*R. ex parte Lotfi Raissi v. Secretary of State for the Home Department* [2008]).

In half of these cases, the House of Lords or the Court of Appeals might be seen as deferring to the executive branch. In one of those, the *Abbasi* case, the Lords spoke clearly of their abhorrence at Abbasi's situation, the "legal black hole," in Guantanamo Bay. Their decision

not to act was one of realism – there was no remedy that an English court could offer. In *Rehman*, *J.J.*, and *Gillan*, the court did uphold the challenged executive action: the use of closed evidence and brief stop and search procedures. The second *A and others* [2005] case involved evidence that potentially was obtained by torture in another country, and the Lords chose the higher standard of proof for the petitioning party than others available. However, those were minor nods to executive power when juxtaposed to the bold acts of the Lords in quashing the United Kingdom's derogation order from the European Convention, declaring a provision of the terrorism law incompatible, ordering reconsideration of control orders by the Home Secretary, ordering the Defense Secretary to investigate the death of a prisoner, and sending a claim for compensation for unwarranted detention back to the Home Secretary.

After Prime Minister Blair stepped down in 2008, his successor Gordon Brown declared that prevention of terrorism would be the cornerstone of his term in office. He proposed doubling the length of detention without charges from twenty-eight to fifty-six days (Perlez, 2007). Notably, Blair had initially sought authority to detain suspects for ninety days, but Parliament rejected his plan and a compromise had been reached on twenty-eight days of detention ("Britain Unveils Sweeping," 2008). The Court of Appeals had unanimously upheld the twenty-eight-day detention law in October 2002 (Hermes Database, 2003). Brown's proposal for fifty-six days was buttressed by his claim that fifteen attempts at terrorism in Britain had occurred since 2001 and that investigations of these plots involved deciphering of cell phones, computers, DVDs, CDs, and disks. The investigation of the allegedly foiled attempt to bomb airplanes headed to the United States involved 6,000 gigabytes of data (Perlez, 2007). Brown subsequently reduced his proposal to forty-two days of detention ("Britain Unveils Sweeping," 2008). In October 2008, the House of Lords, acting in its legislative capacity, rejected the increase by a vote of 318 to 118 (Bonner, 2008). Since the House of Lords can only delay, not block, legislation and can delay it for no longer than one year (Leyland, 2007), Prime Minister Brown could have still attempted to secure its passage. He did not, however, since the bill had passed in the House of Commons by a mere nine votes (Bonner, 2008).

In October, 2009, the Judiciary Committee of the House of Lords was officially transformed into the Supreme Court, but its powers were not enlarged. Therefore, no likelihood exists that the new incarnation of the highest court will become a version of the U.S. Supreme Court. However, in the run-up to the 2010 parliamentary elections, the Conservative Party indicated that, if elected, it would repeal the Human Rights Act. If such a move would happen, it would simply shift authority for implementing the European Convention on Human Rights back to the European Court of Human Rights in Strasbourg (Gearty, 2010).

CONCLUSION

Terrorism constitutes a scourge that has proven difficult to contain, as terrorists traditionally have sought to use violence to gain recognition or attention for their causes (Crenshaw, 1981: 386). The terrorism that accompanied the strife in Northern Ireland and that of radical Muslims, though, seems to go beyond gaining attention and aims at vengeance and retribution. The rationale behind terrorist acts, if reason there be, does not alter their effect: "Violence and bloodshed always excite human curiosity, and the theatricality, suspense and threat of danger inherent in terrorism" entice, and "as the audience grows larger, more diverse and more accustomed to terrorism, terrorists must go to extreme lengths to shock" (Crenshaw, 1981: 386). Hence, public authorities go to greater and greater lengths in attempts to protect the public. Most people talk about rights as balanced against other interests, even in normal times: liberty versus security. Yet, as Jeremy Waldron reminds us, "'balance' also has connotations of quantity and precision" (2003: 192), and neither liberty nor security easily submits to precise measurement. Yet, locating some semblance of reconciliation between the two has become the task of courts, as well as legislatures.

The British courts, marginalized as they were because of the country's constitutional arrangement, tipped toward security during the "Troubles" in Northern Ireland and regularly deferred to executive decisions. No stunning rebukes to overly zealous police, military, or home secretaries were forthcoming from the Judicial Committee of the House of Lords. The reverse has been obvious in the years since 9/11, as the House of Lords and the Court of Appeals have rapped the knuckles of the executive branch for overreaching. What changed? Obviously, the Human Rights Act of 1998 that incorporated most provisions of the European Convention on Human Rights stands as a totally new entity in the British constitutional scheme. The Human Rights Act not only provides a charter of rights for the first time in Britain but also invites the judges to declare when rights

have been abused by government. Its use has clearly made a significant difference.

Other changes occurred as well. As early as 1995, Woodhouse was writing about the changing relationship between politicians and judges. She ascribes a new assertiveness on the part of the British judges to several factors, including a new skepticism about the ability of Parliament to hold ministers accountable, increasing media coverage of abuses, consolidation of a judicial review jurisprudence, and what she has called "the European influence" (1995). Since the United Kingdom acceded to the European Union in 1973, British judges have been required under EU treaties to invalidate domestic legislation that violated treaty obligations. However, European law had been invoked before the House of Lords in only 45 cases and in only 214 cases before the Court of Appeals from 1973 to 1998; even so, a number of those cases had substantial impacts on British politics and the British treasury (Chalmers, 2000: 10). Because of the United Kingdom's record before the European Court of Human Rights, the judges were also exposed to another body of rights jurisprudence. In their own opinions the judges in the House of Lords and the Court of Appeals demonstrated a knowledgeable facility with that jurisprudence.

National security and emergency powers tend to fall into a legal "gray zone" that typically is "'executive oriented,' 'catch-all' (widely drafted) and 'judge proof'" (Campbell and Connolly, 2006: 943), and low-level enforcers, whether police or military, are granted wide discretion that may be used prudently or arbitrarily without much oversight or accountability (Campbell and Connolly, 2006: 944). The House of Lords exerted its authority in these gray zones to question the existence of a national emergency that would warrant a derogation from detention provisions of the European Convention on Human Rights, to invalidate control orders, to order compensation for abuse by a public authority, and to order investigations of a death on a British military base in Iraq. The only cases where they wavered were those involving so-called closed evidence or evidence that could not be disclosed publicly. One man's deportation was permitted on the basis of closed evidence, and when evidence was offered that might have been obtained through torture in another jurisdiction, the burden of proof to demonstrate that torture was involved was placed on the complaining party.

Much has changed over the four decades during which Britain has confronted different forms of terrorism. Undoubtedly, the passage of the Human Rights Act gave U.K. judges an additional brief in their portfolio. Clearly more and more judges on Britain's highest courts are agreeing

with Lord Hoffman's statement about the Anti-Terrorism, Crime and Security Act of 2001: "The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and values, comes not from terrorism but from laws such as these" (*A and others v. Secretary of State for the Home Department* [2004: 1106]).