Law, Liberty, and the Pursuit of Terrorism

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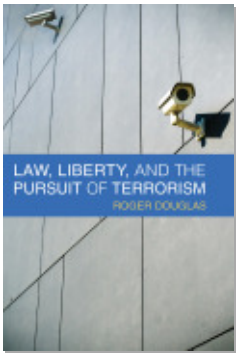

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EIGHT

Detention without Conviction

> Let the terrorists among us be warned: If you overstay your visa—even by one day—we will arrest you. If you violate a local law, you will be put in jail and kept in custody for as long as possible.
>
> *Attorney General John Ashcroft*[1]

> To deny extremists one of their most potent recruitment tools, we will close the prison at Guantánamo Bay.
>
> *President Barack Obama*[2]

The counterterrorist's dream is that of a government with the capacity to track down prospective terrorists and lock them away before they are able to execute their plans. The criminal law permits various forms of de facto preventive detention, but posttrial detention is usually possible only after a court is satisfied that the detainee has committed a crime; that the evidence proves the defendant's guilt; and that on the facts before the court, a custodial sentence is warranted. Otherwise defendants must go free, regardless of whether they pose a high actuarial risk. Further, in cases where proof of the relevant crime would require the disclosure of state secrets, proof of guilt might be difficult if the government wishes to protect secrets from disclosure.

For reasons set out in the previous chapter, the seriousness of these problems can be exaggerated, especially given the recently created precursor offences and the courts' willingness to impose long sentences on people who did little to give effect to their plans. Moreover, if there is insufficient evidence to support a conviction for a precursor offence, this may be because there is little evidence that the suspect is indeed a potential terrorist. In addition, there are costs involved in detaining the innocent. These include costs to the detainees, but even if one is indifferent to these, there are others. Detention is expensive. Detention of the innocent is wasteful and involves the use of resources that could be used more profitably elsewhere: in January 2012, detention at Guantánamo Bay cost $800,000 per detainee, and guarding each detainee required an average of 17 soldiers.[3] Ill-tailored preventive detention can sometimes have the effect of generating more terrorism than it prevents, by delegitimating governments and their counterterror policies.

Yet the craving for certainty means that the authoritarian's dream is capable of weaving its seductive web. There are precedents for the detention of people based on nothing more than attributes that mean that they are slightly less unlikely to constitute a threat than those without the attribute. An obvious example is provided by the wartime detention of enemy aliens, some of whom no doubt hoped their homeland would win, but few of whom ever seem to have done anything to further this end, either before or on release from detention. These precedents rightly stand as a warning as to the dangers of barely regulated detention. It is probably a warning heeded by modern governments and their judiciaries, but more by judiciaries than by governments.

Preventive detention is not the only reason for detention without conviction. In addition to the detention of suspected criminals, detention may also be used (legally or otherwise) against prospective deportees and people who might otherwise refuse to provide evidence to those entitled to demand it.

In wars on terror, the enemy lurks both within and without. Yet detention without conviction generally involves the enemy without, and this is reflected in the laws of the five countries discussed in this book. However, law and practices differ. In the United States, relatively restrictive laws have coexisted with strained executive interpretations, widespread illegal detention, and considerable, but belated, judicial resistance. Elsewhere, laws are sometimes repressive, but executive compliance with law is higher. In the United Kingdom and Canada, there has been statutory provision for the detention or house arrest of suspected terrorists, and the governments have made some use of these powers. But the legislation has fallen foul of the courts. Australian law is similar, but powers created by post-9/11 legislation have rarely been used, although their use has survived judicial scrutiny.

In this chapter, I outline detention regimes in the five countries, arguing that while detention laws have developed in response to heightened concerns about terrorism, their scope has been circumscribed, especially in relation to domestic detention. With some exceptions, they do not appear to have been enacted in haste, and despite evidence of public support for such laws, proposals to extend detention powers have aroused considerable political resistance. Institutional considerations are reflected in practices and, to a lesser degree, in law. Responses to detention regimes generally seem to be related to preexisting beliefs. To a considerable extent, civil libertarians have been substantively (if not symbolically) successful.

Detention Regimes

Preventive detention is governed by a variety of legal regimes. One set of regimes governs those captured in theatres of war, particularly Afghanistan and

Iraq. Prisoner-of-war regimes are formally concerned with preventing participation in armed conflicts rather than preventing terrorism. However, in both conflicts, the "enemy" included terrorism against civilians among its tactics. Taking prisoners therefore had the potential to serve antiterrorism functions as well as preventing armed attacks on service personnel. While the UK, Canada, Australia, and New Zealand accepted that the detention of prisoners was governed by the international law governing armed conflict, the US government argued that the nature of the Afghanistan conflict was sui generis and governed by a distinctive body of law.

Different bodies of law govern the detention of suspected terrorists who are not involved in "armed conflict." Such laws potentially include people living both outside and within a country's borders, but their operation is limited in practice to those within national borders. Moreover, the relevant powers to detain are highly circumscribed, both by legislation and by judicial supervision. Their importance is symbolic rather than substantive.

United States

The United States has detained thousands in its War on Terror. A 2005 Amnesty International report estimated that a total of 70,000 had been detained, the vast majority of whom had been released. Most were taken prisoner in Afghanistan and Iraq, but a small number had been captured elsewhere, including some who had been kidnapped in Europe. Of those still in detention in 2005, more than 10,000 were detained in prisons and bases in Iraq, and about 550 were detained at bases in Afghanistan. Moreover, despite arrangements for transferring prisoners into the custody of the Afghanistan government, the Bagram detention facility in Afghanistan has been expanded so that by December 2009, it could accommodate 1,200 detainees.[4]

A substantial number of those captured in Afghanistan and elsewhere in the immediate aftermath of the 9/11 attacks were transferred to Guantánamo Bay Naval Base in Cuba. At its peak, Guantánamo contained up to 800 prisoners, of whom 520 remained in custody as of April 2005. By January 2009, 234 people remained there, and one of the first orders issued by President Obama was an inquiry into the status of those remaining and the closure of the base within 12 months.[5] His target has not been met, closure being complicated by congressional prohibitions on the appropriation of money to bring Guantánamo detainees to the United States.[6] As of 13 May 2011, the Guantánamo facility still contained 172, and two years later, the figure was 166. More than half have been cleared to leave but remain in custody either because no country is willing to accept them, because there is no guarantee that their human rights would be respected in those countries that are willing to accept them,

or because of lingering doubts about whether possible destination countries could ensure that they would not constitute threats to security. In May 2013, following a months-long hunger strike by detainees, Barack Obama announced the lifting of a moratorium on the release of Yemeni prisoners and other measures aimed at reducing the number of detainees.[7]

Various paths led to Guantánamo. Most detainees had been captured by US and allied forces in Afghanistan, but others had been captured elsewhere. The Guantánamo detainees had generally been taken prisoner in Afghanistan or Pakistan, and their detention was justified partly as pretrial detention pending trial before military commissions and partly on the grounds that those kept in custody were "unlawful enemy combatants" who could be detained as if they were prisoners of war. In practice, a major purpose of detention has been for interrogation. The choice of Guantánamo was based partly on doubts about the security of Afghan facilities and partly on the calculation that, not being an area over which the United States exercised sovereignty, prisoners would not be able to avail themselves of the rights enjoyed by those kept prisoner on US soil. In particular, they would not be able to apply for judicial review of their custody status.[8]

If the relevant "enemy combatants" had the decency to wear uniforms, prisoner-of-war regimes could operate reasonably easily. Since they do not, countries that take prisoners are confronted with the problem that their right to do so depends on whether they have adequate grounds for believing that the person is indeed a participant in the relevant conflict. While not acknowledging that the Geneva Conventions applied to the Afghanistan conflict, the United States established procedures for determining whether prisoners qualified for detention. On the basis of these procedures and on the basis of representations by a number of governments on behalf of their nationals, a substantial number of prisoners were eventually released. However, the procedures provided only rudimentary due process, and even when release was recommended, the recommendations were sometimes disregarded.[9] Provision was also made for military commissions to try prisoners for war crimes. These also fell far short of the procedures governing ordinary criminal trials in the United States, notwithstanding that the commissions were empowered to impose the death penalty.

Within months of the first arrivals at Guantánamo, lawyers acting on behalf of prisoners at Guantánamo and elsewhere challenged their detention. One issue related to whether the government had the power to detain "enemy combatants" and, if so, whether this power extended to the detention of US citizens who had been captured in Afghanistan. A potential obstacle to the detention of US citizens was 1971 legislation that forbade the imprisonment or detention of US citizens except pursuant to an "Act of Congress."[10] In *Hamdi*

v Rumsfeld,[11] a case involving an alleged US citizen who had been captured in Afghanistan and transferred to the United States, a majority of justices held that Congress's Authorization for Use of Military Force[12] provided authority for the detention of US citizens. Justices Scalia and Stevens dissented: if US citizens took up arms against their country, they should be prosecuted under the criminal law. It was constitutionally impermissible that they be otherwise detained. Justices Souter and Ginsburg dissented on different grounds: the Authorization for Use of Military Force was not an "Act of Congress" for the purposes of the 1971 legislation. But if US prisoners could be detained as enemy combatants, it followed, a fortiori, that enemy combatants who were aliens could also be so detained, and there has been no dissent from this position in later cases.

However, the right to detain did not necessarily mean a right to detain unfettered by judicial accountability. In 2004, the Supreme Court ruled that detainees at Guantánamo had a statutory right to petition for habeas corpus.[13] Congress responded by amending the relevant legislation.[14] The court ruled that the amendment did not operate to deprive petitioners who had already begun proceedings of their habeas corpus rights.[15] Congress amended the legislation yet again.[16] This time, its intention was clear. The petitioners therefore enjoyed a right to petition for habeas corpus only if they possessed a constitutional right to the writ. In *Boumediene v Bush*, the court held that they did.[17] Crucial to its ruling was a finding that the statutory procedures established for the determination of prisoners' status fell short of those needed to afford due process. The court left open the question of what procedures might satisfy these requirements,[18] and in the years following *Boumediene*, the DC district and circuit courts have developed standards and procedures for resolving habeas corpus cases. They have accepted that it is for the government to show that detention is warranted. The standard of proof required of the government is lower than the criminal standard but similar to the civil standard. Probative evidence is admissible notwithstanding that it would be inadmissible in a criminal trial. In limited circumstances, the government may rely on classified information without being required to disclose it to the petitioner, but the petitioner must be made aware of its gist. Judicial expositions of the law have varied somewhat, partly as a result of the facts of the case and partly as a result of differences as to the rigour of the standards to be imposed before detention is upheld.[19] Initially, petitioners had considerable success despite these differences and the role of classified information; and while more-recent petitions have failed, the overall success rate still exceeds 60 percent.[20] Litigation has largely related to detention at Guantánamo, and while an application by prisoners in Afghanistan for the writ had some suc-

cess before the district court, the government successfully argued on appeal that the writ did not lie in relation to detention in a theatre of war.[21]

In addition to those detained in Iraq, Afghanistan, and Guantánamo Bay, a smaller number of prisoners have been detained as part of the US extraordinary rendition program.[22] Some of these have been taken to prisons run by the Central Intelligence Agency.[23] Some were taken by the United States to third countries.[24] Some were taken from custody in third countries into CIA custody, and in some cases, prisoners were taken from third-party or CIA custody to Guantánamo. In many cases, they have been released by the third country or by the CIA and returned or allowed to return to their country of citizenship.[25] While one rationale for extraordinary rendition has been the extraction of information, preventive detention has been another—especially when rendition has been to countries whose interrogation techniques are unlikely to yield reliable information.[26] Practical considerations have meant that even if and when the victims of extraordinary rendition would have been legally entitled to apply for habeas corpus,[27] neither they nor those who would have wished to sue on their behalf were in a position to initiate habeas corpus proceedings. However, kidnapping exposes those who engage in it to criminal prosecutions in the country where the kidnapping occurs, and following an Italian investigation, twenty-two CIA employees were convicted in absentia for their involvement in the rendition of Abu Omar.[28]

US law confers limited powers to detain people other than prisoners of war within the United States. These include the power to detain for the purposes of deportation, and in October 2001, the de facto power to detain was extended by a rule providing that at the instance of a district director, an order by an immigration judge releasing a person from custody might be stayed pending the outcome of an appeal.[29] This power was used to justify the detention of at least 1,200 people from Arabic backgrounds in the immediate aftermath of the 9/11 attacks.[30] The power to detain was conditioned on the detainees' being illegally present in the United States and is for the purposes of facilitating deportation. Nonetheless, detainees were also questioned at length and sometimes detained for far longer than was needed in order to arrange their repatriation.[31] They were also mistreated, although not to the extent of the Guantánamo Bay inmates. Their attempts to seek legal redress were generally unsuccessful, except insofar as claims of mistreatment or detention for longer than the permitted period could be sustained.[32] By majority, the Supreme Court rejected a claim that the ethnically based arrest policy was improperly discriminatory: as far as the majority was concerned, it made perfect sense to target Muslim Arabs, since Muslim Arabs had been responsible for the 9/11 attacks.[33]

Yet there are limits to the use of immigration detention. Detention for more than six months is normally impermissible when an alien has entered the country and has subsequently become subject to a removal order but cannot or must not be deported to another country.[34] Detention may, however, be permitted for longer periods on security grounds.[35] The USA Patriot Act of 2001 made additional provision for preventive detention of aliens if the attorney general certified, on reasonable grounds, that the alien fell into one or more specified categories, including involvement in various terrorism-related activities.[36] This legislation has never been invoked: the powers were heavily circumscribed, and preexisting immigration law has meant that they have been unnecessary.[37]

The government has also made use of a power to detain "material witnesses." This power was designed for use in cases where there was a danger that a possible witness in criminal proceedings might flee before giving evidence. Since 2001, it has also been used to detain and investigate people suspected of involvement in terrorism.[38] Between 2001 and 2005, at least 70 people, some of whom were US citizens, had been detained under this legislation, often in circumstances where the possibility of their being called on to testify has been no more than a pretext for their detention.[39] The use of the power as the basis for de facto preventative detention has provoked surprisingly little litigation. In a claim against former attorney general Ashcroft and others, a divided Ninth Circuit Court of Appeals held that pretextual detention could ground a claim under *Bivens v Six Unknown Agents of Federal Bureau of Narcotics*[40] claim for damages, but in an appeal by Ashcroft, the Supreme Court unanimously reversed, finding that since, at the time of the arrest, there was little or no authority suggesting that pretextual detention of material witnesses would be unconstitutional, the appellant enjoyed qualified immunity. Four justices also held that the reasonableness of detention under a warrant based on individualised suspicion turned on objective criteria—namely, whether the arrest would have been lawful if it had been for its proper purpose—and that the reasonableness had not been contested. Four other justices—Kennedy, Ginsburg, Breyer, and Sotomayor—doubted that the warrant had been validly obtained. Ginsburg, Breyer, and Sotomayor doubted whether a warrant would be properly obtained when the issuing authority was not told that its purpose was not to secure the target's presence at trial, and they further doubted whether the terms of the detention could be justified even if the detention itself could be.[41]

The case was remanded. A magistrate judge recommended summary judgment in favour of the plaintiff against one of the FBI agents, on the basis that the affidavit supporting the warrant application recklessly omitted relevant in-

formation and included misleading information. It would therefore have been defective even if its purpose were to secure its ostensible purpose. The district court adopted the report against the author of the misleading application and granted summary judgment (based on qualified immunity) in favour of the other defendant. There was no appeal.[42]

United Kingdom

Historically, the United Kingdom has not been averse to the use of preventive detention. During World War II, it interned most of the German nationals present in the United Kingdom, notwithstanding that most of those detained were refugees whose lives were at particular risk in the event of a German victory.[43] It also made intermittent use of internment as a response to Northern Irish terrorism, its last such use proving a disaster: the internees were chosen from lists that had long since ceased to be up to date, and the result was the arrest of hundreds of nonterrorists, with a minimal yield of current activists.[44] This unnecessarily alienated the Catholic community and was belatedly recognised to have been a self-defeating strategy. The Terrorism Act 2000 made no provision for internment. Post-2001 legislation has made only limited provision for preventive detention, and attempts to introduce even limited forms of preventive detention have encountered considerable political and judicial resistance.

Unlike the United States, the United Kingdom at any given time detained only a handful of people, and those were detained only for very brief periods.[45] Its arrangements with the government of Afghanistan provided that people detained by UK forces would be transferred as soon as possible to the Afghanistan government or, if that was not possible, to a facility approved by the International Security Assistance Force. Prisoners transferred to the Afghan authorities were not to be transferred outside the country without UK approval.[46] The United Kingdom was a detaining authority in Iraq, under a variety of legal arrangements.[47]

The UK government has been critical of the US government's analysis of the Geneva Conventions and of US procedures for determining combatant status, and it (successfully) sought the repatriation of UK nationals held at Guantánamo.[48] It had also been critical of the proposed military commissions.[49] However, aware that the Geneva Conventions could pose problems for its own powers to detain,[50] it declined to accept general responsibility for nonnationals who had enjoyed refugee status in the UK.[51] It was criticised by a House of Commons committee for not doing more to help nonnationals,[52] and it eventually agreed to their transfer to the UK.

The government has made only limited use of statutory powers permitting the detention of suspected terrorists. In the immediate aftermath of 9/11, the United Kingdom legislated to enable the detention of immigrants who seemed to constitute a security risk and whose deportation was impractical.[53] (The power supplemented a preexisting power to detain for the purposes of deportation, a power whose exercise sometimes involves lengthy custody, especially when suspected terrorists are resisting deportation to countries with poor human rights records.) The power was used sparingly,[54] official policy being that it be reserved for cases where prosecution for an offence commensurate with the risk posed by the person was not possible. This might be because the only incriminating evidence was either inadmissible or, if admitted, would involve the disclosure of confidential material.[55] The legislation was the subject of a highly critical report,[56] and the House of Lords ruled in 2004 that the legislation was incompatible with the ECHR.[57] Detention was replaced by a system of "control orders" under which the controlee was subjected to a form of house arrest, mitigated by limited daytime freedom of movement.[58] As of 3 February 2011, shortly before their replacement by measures based on the Terrorism Prevention and Investigation Measures Act 2011 (TPIMs, discussed further shortly), 48 people had been subject to control orders, and eight orders were currently in force.[59]

In principle, the rationale for the orders is clear: if people really are quite probably dangerous, restrictions on their freedom of movement might be justified even if their dangerousness could not be proved beyond reasonable doubt. However, Metcalfe points out that in 2006, seven of those under control orders had absconded. The home secretary had said that he "did not believe the public was at risk."[60] But it is hard to see how those orders could then be justified, especially as one would expect that those who complied with the orders would, if anything, be even less dangerous.

The ECtHR's decision in *A v United Kingdom* has meant that the government is now required to provide details of the gist of adverse allegations to the controlee,[61] but while the system survived this ruling, there have been cases where the government has concluded that the costs of disclosure outweigh the advantages of seeking continued controls, even when the person appears to the government to constitute an ongoing security risk.[62] In January 2011, the Conservative–Liberal Democrat government announced plans to introduce a less intrusive system.[63] The Terrorism Prevention and Investigation Measures Act 2011 (c 24) replaced control orders with TPIMs, which were substantially similar except that a TPIM could last for no more than one year (but was renewable). Measures were conditioned on reasonable grounds to "believe," rather than "suspect." Curfew hours were limited. There was no longer a power to order that a person relocate.

UK law also makes provision for detention pending investigation (see chapter 7).[64] The power is strictly for investigative purposes. It may not be used as a form of preventive detention[65] and would, in any case, be of little use for that purpose.

Canada

Canada has a history of using mass detention in response to emergencies. Like other British dominions, it interned thousands of German and Italian nationals during World War II, and like the United States, it interned tens of thousands of people of Japanese descent. In 1971, it arrested more than a thousand people suspected of links with the Front de libération du Québec. However, these potential precedents have acquired the status of cautionary tales, and their legislative foundation has been repealed.

Canada has been involved in the Afghanistan War since 2001, having accepted that the conflict was an international armed conflict. Under the Canadian Task Force's Theatre Standing Order 321A, the power may be exercised on "reasonable belief" that detainees are, inter alia, "persons who are themselves not taking a direct part in hostilities, but who are reasonably believed to be providing support in respect of acts harmful to the CF/Coalition Forces."[66] Canadian practice is to transfer prisoners to the Afghan authorities within 96 hours of capture, but there is a discretion to detain for longer periods,[67] and between 5 November 2007 and 26 February 2008, transfers were suspended on the grounds that transferred prisoners were being ill-treated.[68]

The Canadian government has also been implicated, to a limited degree, in the foreign detention of Canadians and aliens. One instance of this involved a victim of the US extraordinary rendition program. The others involved Canadians who were initially detained by the Syrian authorities. Maher Arar, a citizen of Canada and Syria, was apprehended in New York, transported by the United States to Syria via Jordan, and detained there for a year. Canada's involvement in his fate was peripheral. His treatment was the subject of a commission of inquiry that found that it may have been prompted by the provision of unduly prejudicial material to the American authorities and that it may have been prolonged by the failure of Canadian government agencies to present a united front in relation to his release.[69]

Three other Canadians with dual citizenship were detained in Syria for various periods,[70] and one of them was subsequently transferred by Syria to Egypt (where he was detained for a further two years). An internal inquiry was unable to conclude whether Canada was responsible for the initial detention of one of the three, Abdullah Almalki, but it concluded that the sharing of "information" probably contributed indirectly to the detention of the other two,

Ahmad Abou-Elmaati and Myayyed Nureddin.[71] As in Arar's case, the information was highly prejudicial (and had been communicated to the Syrians). In addition, while details of the detainees' travel plans were not communicated to Syria, they were communicated to the United States, with the risk that they would be passed on.

Canadian courts found that the government failed to take adequate steps to ensure the release and repatriation of Canadians detained abroad. One was Omar Khadr, a Guantánamo detainee. Such subsequent steps as the Canadian government took were a qualified success. Khadr was not released but was tried before a military commission. He eventually pleaded guilty and was sentenced to 20 years imprisonment, but he will serve his sentence (less remissions) in Canada. The court also came to the rescue of Abousfian Abdelrazik, who had been arrested and later released in Sudan, where he subsequently sought refuge in the Canadian consulate. The court ordered that the Canadian government arrange and pay for his repatriation. (The Sudanese government had no objections to this, but Canada had argued that sanctions laws precluded it from making the requisite arrangements.)

The taking of prisoners by Canadian forces in Afghanistan appears to have been legally nonproblematic, but their release to Afghan police units has been politically controversial, given claims that this exposed the prisoners to near-certain torture. The government, however, doubted whether its arrangements with the Afghan authorities permitted the long-term detention of prisoners.[72]

Under legislation antedating the 9/11 attacks, there is provision for the detention of nondeportable immigrants suspected of constituting a threat to security.[73] In 2007, the Supreme Court ruled that aspects of the legislation were unconstitutional.[74] First, it failed to ensure that the subjects of certificates were adequately informed of their basis. Second, it concluded that the discrimination between permanent residents and foreign nationals exposed the latter to arbitrary detention. The Parliament amended the legislation to accommodate the decision. Most of the instances where the legislation has been used predate the 9/11 attacks,[75] but five people were arrested or rearrested and then subsequently detained under this legislation in or after 2001. By 2010, all had been released from detention after long periods of imprisonment, but three were still subject to conditions akin to the UK control orders. Their fate has generated more than 150 interlocutory or final orders.

Canada's post-9/11 counterterrorism legislation amended the Criminal Code by making limited provision for detention without conviction,[76] but this was subject to rigorous review procedures. The relevant powers were never used, and they lapsed when the Parliament refused to extend them following the expiry of a relevant sunset period.[77] However, despite the fact that the detention power (and a power to arrest for investigatory purposes) were never

used while they were available, Canada's Conservative government attempted to secure their restoration, finally succeeding in 2013.[78]

Australia

During World War II, Australia interned a higher proportion of German and Italian aliens than Canada or the United States, most being released within a year of their initial detention. It detained only a small number of nonaliens, and when Australians list injustices done in the name of national security, they rarely list wartime internment. Cold War plans envisaged the internment of prominent communists in the event of a war between the Soviet Union and the West, but in the absence of the war, nothing came of these plans. (The Korean War did not count.)

Although Australia was a participant in both the Iraq War (2003–9) and the Afghanistan War (2001–2, 2006–13), it did not maintain its own prisons, transferring those it detained into the custody of other governments. However, two Australians were among those detained at Guantánamo, both of whom were parties in *Rasul v Bush*. One, Mamdouh Habib, was detained in Pakistan, transported to Egypt and then to Guantánamo via Afghanistan, and released in 2005, following representations by the Australian government. The other, David Hicks, was seized in Afghanistan in December 2001, transferred to Guantánamo in January 2002, and not released from there until 2007. Unlike the UK government, the Australian government did not have a firm policy of seeking the release of its citizens.[79] Indeed, in February 2007, the prime minister rashly stated that while he could secure the release of Hicks at any time, he chose not to do so. His reasoning was that, given Hicks's alleged conduct, he should be tried, but trial in Australia would be pointless because the alleged behaviour was not, at relevant times, an offence under Australian law.[80] Hicks was eventually released from Guantánamo under a plea bargain whereby he pleaded guilty before a military commission in exchange for a seven-year sentence (with all but nine months suspended) for making a material contribution to terrorism. (The basis for this was contributions to and having received training from terrorist organisations.)[81] A conviction having been achieved, the United States and Australia agreed that Hicks could serve his nine-month nonsuspended prison sentence in Australia.

Australia has followed the United Kingdom by legislation providing for control orders in relation to suspected terrorists.[82] Only two such orders have been made, both on conditions far less onerous than those imposed in the United Kingdom. One involved David Hicks on his release from custody and was lifted on the expiry of his parole period. The other involved a defendant in a terrorism case who had been released on bail following a successful ap-

peal against a terrorism conviction, and the order was lifted after he was released following a retrial, which ended with a conviction and a sentence of time served, for presenting false documents.

Australia makes limited provision for detention for questioning by ASIO.[83] There is also provision for preventive detention, conditioned on reasonable grounds to suspect involvement in a proposed terrorist act or on a need to preserve evidence of an attack that has taken place within 28 days. Its duration is limited to 48 hours.[84] Neither the detention for questioning nor the preventive detention powers have been exercised.

Immigration legislation permits detention pending deportation and has been held to permit the indefinite detention of people who cannot be deported in the foreseeable future. In a case involving a nonrefugee, the High Court held that the relevant legislation did not infringe on the constitutional separation of powers.[85] The operation of the legislation depends on the person's immigration status, but would-be immigrants who are assessed as being involved in terrorism may become deportable and therefore detainable under the power to exclude people constituting a threat to national security. Until recently, cases involving the use of these powers in relation to suspected terrorists were rare, but a considerable number of suspected members of the Liberation Tigers of Tamil Eelam have been refused entry and detained under these provisions, their deportation to Sri Lanka not being feasible, given the risk of torture. In March 2011, there were "about 14" people in detention following adverse ASIO assessments.[86] By the end of 2011, the figure had swelled to 54.[87] Responses to this increase have included both political pressures to relax the law and litigation. A parliamentary committee inquiring into immigration detention has recommended that those subject to adverse ASIO assessments be subject to periodic internal reviews and that they have a right of appeal to the Security Appeals Division of the Administrative Appeals Division.[88] A recent High Court challenge to the detention regime succeeded, in part, on the grounds that relevant regulations were inconsistent with provisions of the Migration Act governing the refusal or cancellation of protection visas.[89] The decision did not address the question of whether it would be constitutionally open to the Parliament to amend the act to permit the making of the offending regulations.

New Zealand

Like other countries, New Zealand law makes provision for the detention of immigrants pending deportation, and this includes the detention of those who face deportation on security grounds.[90] Under current legislation, a judge must order that a person who is a security risk be released on conditions, if

this would not be contrary to the public interest. Detained immigrants must normally be released on conditions once they have been in detention for a period of six months, dating from the later of their initial detention or their exhaustion of appeal rights or—in some circumstances—the determination of a claim for refugee status. This precludes the lengthy periods of detention potentially available elsewhere.

Heightened Concerns?

The timing of legislation is sometimes consistent with the model of heightened concern. Detention legislation can sometimes be explained as a reaction to heightened concerns. Moreover, after experience of their operation, governments and legislatures have sometimes recognised the desirability of curtailing the scope of the powers. That said, timing of relevant legislation poses some problems for both the panic and opportunism perspectives.

The Patriot Act's provisions relating to the detention of immigrants suggest a degree of panic and would-be opportunism on the part of the administration, and there is poll data suggesting that the climate was temporarily ripe for repressive detention legislation. In the administration's bill, the power would have been indefinite.[91] Moreover, at the time, there seems to have been considerable public support for preventive detention. In a September 2001 poll, 54 percent of respondents said they strongly favoured giving the government the power to detain indefinitely a legal immigrant suspected of a crime, and another 28 percent said they would accept that it was necessary.[92] In November 2001, 86 percent thought that the dragnet detentions in the immediate aftermath of the 9/11 attacks were justified.[93]

But Howell argues that these detention powers were among the provisions to the Patriot Act where Congress made important inroads into what the administration had originally proposed.[94] Indeed, the government has subsequently made no use of these powers, having evidently concluded that existing powers were sufficient. Moreover, subsequent legislation scarcely suggests that legislators have become more tolerant of people who might pose a threat. Most relevant post-9/11 legislation has been passed in response to the Supreme Court's Guantánamo Bay decisions and has involved a mixture of resistance and reluctant accommodation. More than 10 years after the 9/11 attacks, the National Defense Authorization Acts have been used to frustrate attempts to close Guantánamo, and a provision in the 2011 act was found by a New York district court to have (impermissibly) expanded the government's detention powers.[95]

The timing of the United Kingdom's Anti-terrorism, Crime and Security Act 2001—introduced on 12 November 2001 and granted royal assent on 14

December 2001—is consistent with heightened concerns, panic, and opportunism, and the legislation was criticised accordingly. But its detention provisions were subject to a sunset clause[96] and supported only by members from the governing Labour Party. The Conservatives abstained, and all other parties voted against them, as did 12 Labour rebels.

The legislation establishing the control order system is not so easily characterised: it was a response not to a terrorist attack but to a judicial ruling whose practical effect had been to strike down the 2001 detention legislation. It had been foreshadowed in a review of the 2001 legislation. Moreover, potential critics of the legislation resisted with some success, and the legislation that emerged included accountability procedures lacking in the original bill, as well as a requirement of annual renewal by an order approved by each House. While its repeal is consistent with its having been an overreaction, the 2011 legislation that abolished control orders simultaneously established a regime that was only slightly less rigorous than the regime it replaced.

The history of investigatory detention also suggests a high level of parliamentary resistance to detention without trial. In 2005, following the 7/7 attack, the government introduced a bill to extend the detention period to a maximum of 90 days but suffered a rare defeat in the House of Commons when a substantial number of backbenchers joined opposition parties to ensure that the extension was limited to 28 days. A subsequent attempt to extend the period to 42 days succeeded in the House of Commons but failed in the House of Lords, and the government decided against resubmission of the bill. But it may have taken the 7/7 attack to secure even the extension to 28 days. The 28-day extension has not survived. It was subject to a requirement that its operation be periodically affirmed by order, and the Conservative–Liberal Democrat coalition allowed it to lapse in January 2011 when the July 2010 order expired. A 2012 amendment gave legislative force to the 14-day limit.[97]

Poll data suggest that preventive detention nonetheless enjoyed considerable public support, even at a time when it aroused widespread parliamentary dissent. Following the bombing of commuter trains in Madrid in 2004, 66 percent of a national sample favoured the detention of asylum seekers until they could be assessed as not being terrorist threats, 63 percent favoured the indefinite detention of British terrorist suspects, 62 percent favoured the indefinite detention of foreign terrorist suspects, and 58 percent favoured the indefinite detention of people associating with terror suspects.[98] In response to a 2005 poll conducted prior to the 7/7 attacks, 61 percent of respondents said they regarded the detention of suspected terrorists without trial as acceptable, and 73 percent considered that placing suspected terrorists under house arrest was acceptable.[99] In 2006 (in the aftermath of a thwarted plot to bomb transatlantic aircraft), 69 percent of respondents said that it should be possible to detain terror suspects who had not been charged with any offence

for up to 90 days.[100] Such findings would be consistent with the hypothesis that the government was behaving in an electorally opportunistic manner, but if so, they raise the question, why did the opposition and substantial numbers of government backbenchers vigorously support apparently unpopular policies rather than trying to outflank the government on the right?

Canada's immigration detention regime predated the 9/11 attacks and was amended only to ensure that it conformed to the Supreme Court's decision in *Charkaoui v Canada (Citizenship and Immigration)*. The preventive detention provisions of the Anti-terrorism Act (SC 2001) received considerable opposition, were sunsetted, and expired after the government's failed attempt to secure a resolution extending the life of the legislation but were re-enacted in 2013.

Australian immigration law's provisions for immigration detention also predated 9/11 and targeted immigrants ineligible for entry, regardless of whether they were security risks. Post-9/11 legislation provides little evidence to suggest that heightened concerns of terrorism played a major role in its form and passage. The original suite of counterterror bills introduced in 2001 included a proposal for detention for the purposes of questioning by ASIO. It evidenced executive hunger for expanded powers but was strongly opposed by the nongovernment parties, and the detention for questioning legislation was not passed until 2003, after extensive amendments designed to protect questionees.[101] Legislation giving police a limited investigative detention power was not introduced until 2004. A bipartisan Senate committee recommended greater judicial supervision of extended detention. The government accepted the recommendation, and the legislation[102] passed with support from the opposition Labor Party. The 2005 measures for preventive detention and control orders followed the London 7/7 bombings but also implemented decisions of a conference of heads of government (a majority of whom were Labor state and territory premiers and first ministers).[103] The legislation nonetheless elicited considerable opposition and, in any case, becomes salient for preventive purposes only in the exceptional circumstance where ordinary arrest powers are inadequate.

The 2007 defeat of the Howard government made little difference to the relevant legislation, except insofar as legislation was later passed to provide greater safeguards for those subject to investigatory detention in connection with criminal justice proceedings. In New Zealand, the only relevant post-9/11 legislation tightened the standards for immigration detention.

Institutional Concerns

Detention law can partly be understood as the outcome of interinstitutional conflict. The executive seeks broader detention powers. The legislature generally limits executive proposals. Courts set limits on what the political arms

can do. But institutional considerations play out much more visibly in relation to the detention of aliens than in relation to the detention of citizens. Conspicuous features of detention regimes are the narrowness of the laws permitting the detention of citizens and the rarity with which powers are used against citizens. Powers of preventive detention in a context outside criminal law are either nonexistent or so rudimentary as to be of little practical relevance, and when they are potentially intrusive, they are usually used against noncitizens. Governments and parliaments generally appear to be content to rely on the criminal law to achieve preventive detention of citizens and permanent residents. Noncitizens enjoy far less protection. Relevant laws are typically initiated by the executive and encounter mild resistance from the legislature (but Congress was prepared to strip Guantánamo detainees of habeas corpus rights), and governments or coalitions with parliamentary majorities have introduced legislation to curtail detention powers.

The record of the courts can be viewed in two ways. First, it is clear that they did more to protect human rights than did the other two branches of government. The Guantánamo litigation established the right of aliens to seek habeas corpus if detained by the United States. It established, first, that the government had to demonstrate that it had evidence to justify detention and, second, that detainees had a right to know the content of the case against them. It affirmed the (partial) application of the Geneva Conventions to unconventional wars. It has resulted in the freeing from detention of people who ought not to have been taken or kept prisoner.

The decision by the House of Lords in *A v Secretary of State for the Home Department* (no 1, 2004)[104] went even further, striking down the 2001 immigration detention regime on the grounds that the secretary's order on which its operation depended was discriminatory (against nonnationals) and unreasonable (since if measures were needed to deal with nonnational threats, they must also be necessary to deal with the threat posed by nationals). (But, basing its decision on the different language of the Canadian Charter, the Canadian Supreme Court rejected a similar argument in relation to the corresponding Canadian legislation.[105])

Decisions in UK and Canadian cases have also insisted on the existence of a firm evidentiary foundation for detention decisions and have tended to expand detainees' rights to know the details of the case against them, even if this might come at some cost to security. They have, moreover, been willing to use the writ of habeas corpus to require governments to take steps to secure the release of people in the custody of foreign states. In Canada, the relevant detainee was a citizen. In the United Kingdom, the duty was grounded in the detainee's having been detained by UK forces, coupled with memoranda of understanding that governed rights in relation to prisoners transferred to

another party to the memoranda. In 2004, the detainee had been transferred from Iraq to Afghanistan, without the consultation required by the memoranda. The courts proceeded on the basis that the detention was unlawful. The Geneva Conventions applied, and the war was over. There were steps the secretary could take that might secure the detainee's release, and those steps should be taken.[106] But they were in vain. The United States denied that the continued detention was unlawful and made it as clear as diplomatic language could that it was not going to agree to the detainee's release. The court of appeal concluded that the secretaries had done al1 they could. That was sufficient compliance with the writ.[107]

However, these decisions cannot be understood simply in terms of courts' devotion to the rule of law. Like other political actors, judges disagree about what the law means. In every detention case to reach the highest court, there have been dissenting decisions and disagreement between the highest court and courts lower in the hierarchy. This is partly a reflection of the obvious: cases that find their way to final courts of appeal tend to be cases where the law is unclear, but this implies, in turn, that in relation to many important detention-related issues, law yields only slightly better results than tossing a coin. The plaintiffs in *Rasul* lost before both the district court and the court of appeals,[108] before succeeding by majority[109] before the Supreme Court. Following *Rasul*, two sets of detainees' cases yielded different results at first instance.[110] *Hamdan v Rumsfeld* succeeded at first instance, but the government succeeded on appeal.[111] Following *Hamdan* (in which Justices Scalia, Thomas, and Alito dissented), the court of appeals ruled in *Boumediene v Bush* that Congress had successfully stripped the courts of their habeas corpus jurisdiction,[112] and the Supreme Court's subsequent decision in *Boumediene* provoked dissents from Chief Justice Roberts and Justices Scalia, Thomas, and Alito. However, the litigation finally went some way towards settling the law (at least for the time being). The aftermath has been ambiguous. Initially, applicants enjoyed considerable success: detainees won 38 out of 52 cases decided between 2008 and July 2010. Since then, the position has changed: between July 2010 and November 2011, five detainee successes were reversed on appeal, and none of the 11 cases heard by the district court resulted in a win for the detainee.[113] In one sense, only 6 percent of detainees owe their release to litigation, but this underestimates the political and legal effects of the litigation.

UK courts were less divided. Cross-tier and intracourt unanimity was achieved in litigation relating to the validity of a control order involving house arrest for 18 hours a day, and there was almost as much judicial consensus when the House of Lords (overruling a single judge) upheld the validity of orders lasting 12 to 14 hours.[114] There was, however, slightly less agreement in *A v Secretary of State* (no 1, 2004),[115] but only 3 of the 13 judges who dealt with

the case found for the government. In the Canadian *Charkaoui* litigation, the government succeeded at first instance and in the federal court of appeal, only to fail before a unanimous Supreme Court.[116]

In assessing the role of courts in counterterror cases, it is also important to note that justice sometimes comes slowly and that practical obstacles may stand between detainees and their legal rights. While *Boumediene* was a substantive triumph for liberty, it was not a procedural one. The time taken to resolve the question meant that by the time of *Boumediene* and its progeny, the government had been able for a considerable time to detain those it suspected of being terrorists. While prisoners at Guantánamo had formal access to the courts, staff at the prison sometimes sought to subvert trust between prisoners and counsel (by using people pretending to be lawyers as interviewers) and to obstruct effective representation (by limiting contact between counsel and their clients).[117]

In the United Kingdom, the plaintiffs in *A v Secretary of State* (no 1, 2004) had succeeded before the Special Immigration Appeals Commission in July 2002. The court of appeal found for the government in July 2003, and the House of Lords gave its decision in December 2004. Yusuf Rahmatullah was detained in 2004, but it was not until 2010 that habeas corpus proceedings became possible, and it was another 21 months before they were (unsatisfactorily) resolved. Litigation involving control orders is faster, but the UK Parliament's Joint Human Rights Committee concluded, "[T]he slow service of evidence, the need for the special advocates to be able to do their job, the secret hearings to consider closed evidence, these all mean that it is an extraordinarily prolonged process with no immediate remedy."[118] Delay means that courts effectively give governments what they want in the short run, although they may have to pay in the end.[119]

Moreover, courts were sometimes highly deferential to the executive. In the Guantánamo litigation, the government had generally succeeded before the lower courts. Indeed, in a post-*Boumediene* decision, *Al-Adahi v Obama*,[120] the DC Circuit Court of Appeals suggested that the government was not required to meet a preponderance of evidence standard in habeas corpus cases, but the court noted that the government had argued for a more rigorous standard. In *Ashcroft v Iqbal*, the Supreme Court itself had proved remarkably tolerant of the government's post-9/11 roundup of immigrants from Arab countries. Deferential courts summarily dismissed *Bivens* claims by José Padilla and Maher Arar, based on their alleged unlawful detention and torture.[121]

Deference seems to have played a more limited role in the UK and Canadian litigation and a complex one in Australia. In *A v Secretary of State* (no 1, 2004), one of the conditions for the exercise of the relevant power was the existence of a "public emergency threatening the life of the nation." The ma-

jority concluded, first, that this question was such that great weight should be given to the judgment of the political arms of government and, second, that the possibility of future terrorist attacks could fall within this rubric. (Lord Hoffman disagreed.) But deference was not required in relation to whether the response to the emergency could be justified as proportionate. Moreover, UK courts have intervened in areas where US courts still seem reluctant to intervene, notably in relation to inquiring into the seedy practices of foreign governments. In the security certificate cases in Canada, the legislation required something akin to merits review, thereby limiting the role for deference. In cases involving detainees abroad, Canadian courts, like their UK counterparts, have treated constitutionally protected rights as prevailing over traditional executive prerogatives.

In a challenge to the validity of Australia's legislation on control orders, the plaintiff's arguments included the contention the criteria governing the making of control orders were such that legislation was purporting to invest federal courts with non-judicial powers. The basis for this argument was that the assessment of the risk posed by potential controlees was outside the expertise of judicial officers. The High Court majority held that the power was of a judicial character.[122] However, Justice Hayne, dissenting, concluded that the findings it required could properly be made only by the executive and that the legislation therefore impermissibly purported to confer executive powers on the judiciary. A condition for the validity of the legislation was, paradoxically, lack of deference. However, complicating Justice Hayne's dissent was his finding that conferring the powers on the executive would probably constitute an impermissible violation of the judiciary's near monopoly over the right to make detention orders. (He concluded that a section analogous to the (then inoperative) section 83.3 of the Canadian Criminal Code was needed.)

Also suggestive of lack of deference is an interlocutory decision in relation to an application by David Hicks for judicial review of the government's decision not to seek his release from Guantánamo. A government application for summary dismissal was unsuccessful,[123] which suggested that even in the absence of a human rights act or a charter, Australian courts might be willing to intervene in foreign policy decisions. But Australian courts are reluctant to accede to summary dismissal applications. The case suggests only that Hicks might have succeeded if the case had proceeded further. It did not, because it became moot on his repatriation.

The ability of courts to play an active role was also limited, to some extent, by practical obstacles to effective litigation. People aggrieved by their detention can litigate only if they are in a position to initiate litigation. This requires a degree of cooperation from captors, who must, at the very least, be willing to allow the prisoner to communicate to a court or (less fancifully) someone

who can initiate litigation on their behalf. Effective litigation also requires the capacity to obtain and contact legal advisers. For those detained outside the United States, this may not be easy, and even those detained at Guantánamo were often hard-pressed to pursue their legal rights. Even those detained within the United States as material witnesses or in immigration detention were sometimes unable to contact counsel and were kept so ill-informed as to the basis for their detention as to leave them unable to contest it.[124] Practical obstacles to litigation elsewhere seem to have been weaker, partly because the governments engaged in far less extraterritorial detention, partly because detention regimes condition detention on a judicial order, and partly because the governments seem to have been less ruthless in obstructing access to the courts.

Underlying Beliefs

The US experience is consistent with the importance of underlying beliefs as a determinant of receptivity towards detention without trial. Typically, congressional responses to the more controversial features of detention-related issues have been strongly along party lines. An attempt to amend the proposed Military Commissions Act so as to preserve the right to habeas corpus failed narrowly, but largely along party lines, and the final votes on the passage of the Military Commissions Act were also strongly along party lines. This cannot be dismissed merely as an artifact of partisans supporting their government and opposing governments of the other party. One of President Obama's first measures was to initiate plans to close down the Guantánamo prison, and resistance has come from the Republicans, consistent with their earlier enthusiasm for detention. Moreover, under Obama, the government has predicated its resistance to habeas corpus applications on the government's having to meet a higher standard than that previously adopted by the DC Circuit.[125]

Poll data suggest that a similar phenomenon is to be found among the population at large. In response to a May 2009 Gallup poll, 68 percent of Republicans, 36 percent of independents, and 22 percent of Democrats believed that the prison had strengthened US security.[126] Given this finding, it is not surprising that numerous polls have yielded a similarly strong relationship between party identification and beliefs about whether the prison should be closed,[127] and self-identification as a conservative or a liberal is also strongly related to attitudes towards the prison's closure: 68 percent of liberals polled in January 2009 wanted the prison closed, while 61 percent of conservatives wanted it kept open.[128]

The preventive detention regime in Australia was also the subject of partisan division. It was passed when the Liberal-National coalition enjoyed a rare

majority in both houses: the Parliament voted strictly along party lines, the coalition in favour and Labor and the other nongovernment parties against. Similar divisions also characterised the initial proposals in relation to ASIO's powers to detain for questioning, but legislation conferring more-limited powers was later passed with Labor support, as was legislation providing for detention for the purposes of criminal investigation. (The Australian Democrats and the Greens voted against the legislation at the Senate third reading.) The 2010 amendments to the legislation also received cross-party support.

Poll data disclose a relationship between party preference and support for the propositions, first, that the government should have the right to detain terrorist suspects for as long as they liked without putting them on trial and, second, that police should have the power to detain a person they suspect of planning a terrorist attack, until satisfied otherwise. In a 2007 poll, Liberals were strongly supportive of detention without trial (40 percent definite and 29 percent probably), as were Nationals (39 and 26 percent). Labor voters were evenly divided (22 and 26 percent), and Greens were opposed (12 and 15 percent). In response to the second question, the vast majority of Liberals strongly agreed or agreed (53 and 36 percent), as did Nationals (50 and 31 percent). Labor voters were less enthusiastic (30 and 33 percent), and Greens were considerably less so (18 and 28 percent). In each case, the attitudes of voters for smaller parties were consistent with their party's rank on a right-left continuum.[129] But it is difficult to separate out the role of being in opposition and the role of beliefs. Complicating beliefs-based explanations is the fact that when in power, Labor has done little to amend the relevant measures.

Canadian evidence is also equivocal. Preventive detention legislation has been the subject of partisan conflict, but the partisanship seems to be a surrogate for the effect of being in office. The Liberals introduced preventive detention but sunsetted it. When an incoming Conservative minority government sought a resolution extending the operation of the section, the Liberals joined the New Democrats and Bloc Québécois to ensure its defeat, notwithstanding that the Liberal members of a committee reviewing the act had earlier agreed that the power should remain. It was restored in 2013.

The United Kingdom provides even messier findings. In 2000, the Conservatives had unsuccessfully moved to amend the Terrorism Bill to provide for preventive detention, arguing that, properly administered (as it had not been in Northern Ireland), the power might prove valuable. They abstained on the 2001 legislation that established a regime for detaining immigrants certified to be a security risk. The Liberal Democrats opposed it. The opposition parties also opposed attempts to extend the maximum investigatory detention period, and they were joined by enough Labour backbenchers to ensure the defeat of 2005 proposals to extend the period to 90 days or, failing that,

60 days. Consistent with this opposition, the recently elected Conservative–Liberal Democrat government legislated to replace control orders with orders that were slightly less intrusive.

A second manifestation of the limited relevance of party allegiance comes from the reports of parliamentary committees. Reports from the House of Commons Foreign Affairs Committee and from the Joint Committee on Human Rights have been critical of the government's position in relation to the treatment of prisoners at Guantánamo.[130] More important, the reports have generally been unanimous, as have committee reports on preventive detention laws.[131]

Finally, poll data suggest that public attitudes towards detention measures also bear no obvious relationship to preference for one of the major parties over the other. In response to a 2005 poll, Conservatives were at most only slightly more likely than Labour voters to approve of detention of suspected terrorists without trial (62 percent compared to 59 percent), although Liberal Democrats are far less likely to do so (38 percent). House arrest was most likely to be approved by Labour voters (81 percent) and less likely to be approved by Conservatives (67 percent) and Liberal Democrats (66 percent).[132] However, in 2010, there was a change of government, Labour being replaced by an uneasy Conservative–Liberal Democrat coalition. Respondents to a 2011 YouGov poll were asked whether the government should have the power to use control orders. Eighty-five percent of Conservatives said that it should, as did 69 percent of Liberal Democrats. Only 65 percent of respondents intending to vote with the Labour Party agreed. Fifty-one percent of Conservatives were also more likely to believe that reducing the constraints imposed as part of control orders would put people at greater risk of terrorism, as compared with 35 percent of Labour voters and 28 percent of Liberal Democrats.[133] Among Conservatives and Labour voters, attitudes towards control orders vary according to whether one's party is in power. But there is a complication to what would otherwise be an elegant hypothesis: there were indeed proposals to limit the scope of control orders. They came from the coalition. But the pressure for them seems to have been one of the rewards given to its junior partner by the Conservatives.

Conclusions

Preventive detention is designed to fill gaps left by the criminal law by virtue of both the law's requirement of proof beyond reasonable doubt and the rigorous procedural standards it ostensibly requires. But advocates of preventive detention face two major obstacles. First, the logic of preventive detention is that the law should be willing to countenance the detention of people

who are probably innocent in order to protect the interests of those who remain free. Poll data suggest that the public may be willing to accept this, but questions rarely put the issue so starkly and in relation to imprisonment at Guantánamo, which squarely posed this issue, American opinion tended to be evenly divided. Moreover, official rhetoric suggests recognition that detaining the innocent is not electorally appealing. Ashcroft's message was to "terrorists." Detention at Guantánamo was defended on the grounds that it housed the "worst of the worst," rather than on the more honest basis that it housed people who might pose a risk to American troops if released and that since it was difficult to determine who were and were not risks, it was wiser to err on the side of caution. Furthermore, a striking feature of preventive detention regimes is that they have typically involved nonnationals. This makes limited sense from a preventive perspective unless the threat is largely external, and even if that is the case, the logic of preventive detention is that legislation should at least permit it if a citizen is planning to embark on an attack. It makes some sense politically, but not as much as one might expect on the basis of crude analyses based on widely shared prejudice against the "other" or on the others' inability to vote and lack of political resources. The interests of the others coincide with the economic and ideological interests of people with far more political resources. The post-9/11 roundup was exceptional. It suggests executive panic. It soon came to a halt, and it was not replicated elsewhere. Low-intensity harassment continues, but it is not reflected in indiscriminate detention, at least within national borders.

Second, insofar as the rationale for preventive detention rests on mistrust of traditional criminal procedures, it meets political and judicial resistance. One reason is that traditional procedures are designed to avoid the detention of the innocent, but another is that they have the potential to increase the likelihood of well-informed decision making, regardless of whether the standard of proof is beyond reasonable doubt, on the balance of probability, or something lower. Courts have a constitutional and quasi-constitutional basis for insisting on rigorous standards, but these are not determinative. For instance, "due process" is the process that is due, and this is potentially highly malleable. But courts have proved reluctant to depart from exacting procedural standards. Except in the United States in relation to habeas corpus rights, legislatures have either agreed or recognised that it would be futile to legislate if the legislation will only be struck down.

The upshot is laws that allow limited scope for preventive detention other than pursuant to criminal law.[134] These have frustrated governments, but except in the United States, this has self-evidently done them no harm, even when their consequence has been the release of people regarded by the executive as dangerous. Indeed, no one who has absconded from house arrest

or been released in order to protect secrets has been involved in any kind of subsequent terrorist attack. Prisoners released from Guantánamo have sometimes fought against US and allied forces.[135] But these include both those released by Combatant Status Review Tribunals and those released later, and while they can be taken as evidence that preventive detention may have saved American lives, this conclusion is valid only if detention at Guantánamo also did little to stimulate terrorism among those who were detained and among others angered by their detention. Its relevance to the wisdom or otherwise of preventive detention is also complicated by the degree to which detention was accompanied by torture and mistreatment.