Law, Liberty, and the Pursuit of Terrorism

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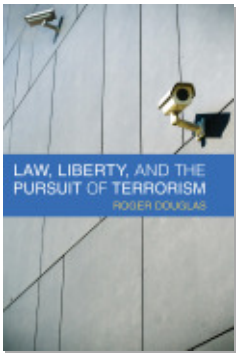

Published by University of Michigan Press

Conclusion

Terrorism has stimulated a variety of responses ranging from concessions to war, and including law. This book has examined some of the ways in which law has responded and some patterns underlying legal responses. In relation to the areas of law discussed earlier, the main conclusion to be drawn is that while there are some important differences, the substantive law tends not to vary markedly from country to country.

New Zealand law is almost certainly less illiberal than the law of the other four countries. New Zealand attaches relatively few consequences to terrorism per se and relies solely on the general law to address terrorism in the context of surveillance, state secrets, and migration. Moreover these general laws tend to provide greater protection than the equivalent laws in the other jurisdictions.

Canadian law goes a little further. It recognises two sanctions regimes. Its range of terrorism-related criminal offenses is slightly broader than New Zealand's. It provides governments with slightly expanded powers in the context of surveillance, evidence, and migration, when terrorism is involved, but the scope of these provisions has been qualified by Supreme Court decisions whose effect has been to condition the imposition of negative consequences upon the affected person's being afforded a substantial degree of procedural fairness.

Overall, UK legislation has tended to be less liberal than Australia's (which has drawn on UK models for much of its counterterror law). Its definition of terrorism is broader. It criminalises "glorification" of terrorism, whereas Australia doesn't. Its legislation in relation to stopping and searching suspected terrorists was far broader than Australia's. Its standards for control orders were slightly less rigorous than Australia's, and its provisions for investigatory detention are still a little broader than Australia's. But Australian law includes powers unavailable to their UK counterparts, including ASIO's (rarely used) detention and questioning powers and its very limited and never-used preventive detention powers. But Australian immigration laws have been interpreted in a manner that has been used to justify the lengthy detention of people be-

lieved by the government to constitute security risks.[1] Moreover, the effects of decisions by the UK courts and by the ECtHR have curbed many of the more egregious UK powers, while Australian courts (acting within a different legal framework) have so far done little to limit the scope of Australian laws.

In some respects US law is less illiberal than Australian and UK law. This is particularly so where the terrorism in question is largely domestic. Unlike the other four countries, the United States makes no provision for the proscription of groups not engaged in international terrorism, and the surveillance powers of its intelligence agencies are far more attenuated where the target is within the United States or when it is a US citizen or resident. Unlike Australia and the United Kingdom, it makes no provision for control orders. Unlike the United Kingdom, it has not criminalised the glorification of terrorism. In relation to international terrorism, the differences are more attenuated, and there are some respects in which US legislation has been considerably more illiberal than elsewhere. None of the other jurisdictions has attempted to limit the courts' powers to engage in the judicial review of detention decisions. Nor have any of the other jurisdictions legislated to protect officials who engaged in torture or inhumane treatment. The effects of some measures have been qualified by rulings by US courts, notably in relation to detention at Guantánamo Bay. But in other contexts, US courts have been less interventionist than UK and even Australian courts. Court rulings mean that the state secrets doctrine provides considerably greater protection for the government in civil litigation than the public interest immunity rules that apply in the other jurisdictions. The use of "material witness" powers as a pretext for detaining suspected terrorists would be unlawful, per se, in the other four jurisdictions, as would the use of immigration powers as a pretext for investigatory detention. Yet US courts have been prepared to countenance these tactics in at least some contexts. But generalizations about US courts are complicated by intra-court and cross-court variations and by decisions in which majorities dispose of constitutional issues on procedural grounds while hinting that they might agree with the minority on the substantive issues, but not necessarily. The indeterminacy of US case law complicates any attempt to rank US law in terms of its relative illiberalism. In some respects it is more liberal; in some, less; and in others the state of the law is such that it could be developed in either direction, depending on the composition of the Supreme Court and other courts.

The development of the law throws considerable light on the degree to which it can be understood as a response to attacks; as a reflection of the distinctive interests of the executive, the legislature, and the courts; and as a reflection of lawmakers' underlying political beliefs. It also suggests possible explanations for cross-national differences and similarities.

My analysis provides ample evidence of rapid responses and of pressures on legislators to pass complex legislation within exceptionally short periods. But it also cautions against assuming that counterterror law is typically the product of haste and therefore ill considered. It concludes that counterterror laws enacted in haste often differ relatively little from laws enacted after longer deliberation and that post 9/11 innovations have tended to survive political and judicial review, notwithstanding that the perceived threat posed by terrorism appears to have declined.

The Patriot Act is an almost perfect example of legislation enacted in haste and passed in highly emotional circumstances. The 9/11 attacks had led to enhanced fears of further attacks, and at the time of its passage, these fears had barely begun to evaporate. In pressing for rapid enactment, the administration has resorted to moral blackmail (if you delay, the blood of those killed in future attacks will be on your hands). Congress agreed to fast track the legislation (notwithstanding that the legislation is extraordinarily hard to understand without access to the legislation it amends). It was passed within a month, its title highlighting the emotional context in which it was considered and enacted.

The effects of the attack were not confined to the United States. Canada responded almost as quickly, passing a complex bill before the year was out. The United Kingdom responded with a raft of additional measures (which included the ill-fated power to detain immigrants with terrorist proclivities), securing the passage of the legislation within weeks.

But passage of post 9/11 measures was not always so fast. The Australian government announced that it recognised the need for urgent action, but it was not until March 2002 that it was able to present a bill to the House of Representatives. The government insisted that passage was urgent, and used its numbers to ensure rapid passage of the legislation by the House, but it lacked the numbers to do so in the Senate, and the slightly watered-down legislation was passed only after lengthy committee hearings and debate. New Zealand was already considering legislation to give effect to recent counterterrorism conventions and decided to incorporate these into comprehensive counterterrorism legislation, but passage was slow and delayed by public hearings on the bill.

However, terrorist attacks are not a sufficient condition for wide-ranging amendments. The most obvious example of a failed quest for enhanced powers comes from the legislative response to the post-Oklahoma legislation. This got off to a good start, with bipartisan support and tear-jerking speeches mobilizing memories of those who had died in Oklahoma and over Lockerbie, but was derailed following an FBI raid on an armed religious sect, which had had a bloody ending. Conservative Republicans, who decided that the FBI was

not to be trusted, and whose denunciation of the federal government occasionally suggested that they were not particularly outraged by violent attacks on government targets, combined with Democrat civil libertarians to scuttle most of the proposals to increase the government's powers in relation to domestic terrorism. Nor did Canada and New Zealand (or the United States) initiate or pass additional counterterror measures in response to the London 7/7 bombings, and Australia responded only after discussion with state and territory governments. (And more recently, and for different reasons, Norway seems to have reacted with remarkable stoicism to Anders Breivik's twin attacks.)

A more compelling problem for the "haste" hypothesis is provided by the content of counterterror legislation enacted without the spur of a recent attack. The UK Terrorism Act 2000 was such an act. While the Canadian legislation was passed in haste, it relied heavily on the UK act, yet in important respects it limited government powers and the scope of the criminal law to a greater degree than the UK legislation. Moreover Australia continued to expand government counterterrorism powers well after the initial shock of the 9/11 attacks. After Australia failed in 2002 to secure the passage of legislation giving ASIO the power to require people to provide information relating to terrorism, such legislation was passed in 2003, albeit with much greater safeguards. Government powers to proscribe terrorist organisations were expanded in 2004. Legislation governing use of security sensitive information in civil and criminal trials was passed in 2004–5. In 2007 New Zealand amended its legislation to transfer the power to extend proscription periods from the courts to the prime minister. Moreover, as noted in chapter 4, governments other than the US government had enjoyed surveillance powers about as wide as and in some respects wider than those conferred on the US government under the Patriot Act amendments. Legislation permitting immigration detention antedated the 9/11 attacks.

Further, if the civil libertarian version of the haste argument were correct, one would expect that legislators would have second thoughts. To a limited degree this expectation has been borne out. The controversial "library records" provision was amended when the relevant sunset clause required that the amendment be once more ratified by Congress if it was to survive. Despite government efforts, the Canadian provisions relating to compulsory questioning and binding suspected terrorists to keep the peace were not renewed on expiry. In addition to amendments necessitated by court rulings, the United Kingdom has reduced the period during which suspected terrorists can be detained for questioning and tightened the rules governing what were formally called control orders. After a 2006 review of its counterterrorism legislation, Australia belatedly limited the circumstances in which police

could detain suspected terrorists, and the duration for which they could do so. It also provided procedures for review of proscription decisions by the foreign minister (but retained the status quo in relation to other decisions). But these amendments have generally involved little more than tinkering, and legislation apparently passed in haste has generally survived remarkably well.

One reason why the haste perspective does not receive more support may be that haste does not necessarily denote cursory consideration. For instance in Canada, where the legislation was introduced and passed within a period of a little more than two months, committees of both houses conducted hearings and prepared recommendations, and professors from the University of Toronto managed to produce and publish a book providing a comprehensive evaluation and critique of the bill in time to contribute to legislative deliberation.[2] Moreover while deliberation on the Patriot Act was hectic, the issues surrounding some of the controversial amendments had already been before Congress in other contexts.[3]

Another reason may be legislative inertia. Consistent with this is the fact that provisions subjected to sunset clauses seem to have been a little more vulnerable than other provisions. However most sunset clauses have survived, and nonsurvival may reflect not procedural vulnerability but the fact that such clauses would not have been sunsetted but for their controversial nature, which in turn makes them more vulnerable to repeal. It may also be that controversial clauses survive because they appear to do no harm. The appearance may be misleading, but there is some evidence to suggest that where powers do appear to be misused, they may become vulnerable. Sometimes, notably in the United Kingdom, courts step in. Sometimes, legislatures see fit to curb executive powers. The Snowden and Wikileaks revelations about the level of surveillance by US government agencies have also prompted both litigation and legislative proposals for limiting surveillance powers insofar as they expose Americans to surveillance. Little can be said about either at this stage. Two district courts have ruled, and they have disagreed. The time that has elapsed since the revelations indicates that outrage does not always prompt hasty legislation and this raises questions about the salience of surveillance-related concerns and the ease with which they can be translated into effective political action. Changes seem inevitable. Their nature is less clear.

Governments and civil libertarians tend to agree on one thing: governments want wide-ranging powers, and other institutions—and courts in particular—sometimes stand in their way. Given this consensus, it seems almost trivial to conclude that the expectation is borne out. But coexisting with the obvious conclusion is evidence that suggests that the relationship is not always particularly strong and that it may vary cross-nationally.

The most consistent finding to emerge from this analysis is that support

for wide-ranging counterterrorism laws is most pronounced within the executive and in particular its military, police, and security agencies. The political executive may share the agencies' concerns but does not necessarily do so. Several bodies of evidence bear out this unsurprising conclusion. First, in hearings before legislative committees, the support for broader executive powers is largely confined to the bodies that will exercise those powers and to people with obvious links to those bodies. Opposition comes from numerous nongovernment organisations, but one usually looks in vain for submissions from nongovernment organisations committed to the enhancement of government powers. Second, proposed legislation is almost always watered down in its progress through the legislature. Indeed, there are almost no examples of proposed counterterrorism legislation being amended to enhance government powers, and only rarely have there even been attempts to amend the legislation in order to expand government powers.

Exceptions arguably include the US Appropriation Act amendments that precluded the movement of prisoners from Guantánamo to the United States, but these also reduced government powers by precluding the Obama administration from exercising powers in the way it thought best. The few unsuccessful attempts by opposition parties to expand government powers included a Conservative amendment which would have made provision for preventive detention under the *Terrorism Act 2000* and proposals by the New Zealand Nationals to tighten the definition of terrorism to include "eco-terrorism." However, Conservative enthusiasm for preventive detention soon eroded, and the Nationals may have been primarily concerned with annoying the Greens. The rarity of legislative pressures for tougher laws is such as to constitute a potential puzzle, but it is one that can be resolved. If, as is sometimes contended, the proponents of "tough" legislation are motivated by a desire to win votes rather than to protect their country, one might expect a few attempts to embarrass governments by opportunistic amendments whose rejection could be the basis for proclaiming the government to be soft on terrorism. The lack of such amendments suggests that nongovernment politicians doubt that there are votes to be won by giving governments powers they don't want. Poll data suggest that their assessment may correct.

Third, distinctive institutional interests are evidenced by executive "deviance" and the secrecy surrounding it. Secrecy may reflect sound assessments of its necessity, but it may also reflect recognition that aspects of executive conduct are legally and/or politically unacceptable. Deviance seems to reflect a sense that powers are too narrow and that there is no prospect of their being broadened.

However, these generalisations require some qualification. First, the executive branch includes agencies with diverse views about how best to deal

with terrorism, and the responses of the political arms may take account of these. The arguments within the Bush administration over the status of the Geneva Conventions and the permissibility of acts that arguably constituted torture highlight the degree to which even "tough minded" agencies can differ, depending on their particular institutional interests, and on how institutions with conflicting interests go about resolving them. Goldsmith's account of his period in the Department of Justice points to the importance of personal differences as determinants of institutional output. And modern executives usually include niches that provide a home for institutional tender-mindedness: proposals for relaxed surveillance laws meet resistance from privacy commissioners, especially in Canada, New Zealand, and Australia, and the New Zealand commissioner has published several searing critiques of counterterrorism law.

Second, while post-9/11 legislatures never gave governments more powers than they were seeking, they frequently gave the government all or almost all the powers it wanted. Indeed, sympathetic critics of the Bush administration's response to terrorism have argued that its powers might actually have been enhanced had it sought to work with the legislature, rather than relying on the president's alleged inherent powers.[4] Indeed, legislative responses to executive deviance suggest a considerable degree of sympathy towards executive interests, even in the face of arguable illegality. The statutory protection for the communications companies that assisted in the Terrorism Surveillance Program and for those involved in the interrogation of US detainees also indicates congressional reluctance to permit criminal and civil proceedings against organisations and people who have acted in good faith but illegally.

Those aggrieved by counterterror laws and their execution have had some success in challenges to the legislation or behaviour in the courts. The net effect of judicial decisions is almost necessarily to frustrate governments and legislatures. Even if courts were sympathetic to strong counterterror laws, it would require extraordinary imagination to extract from constitutions implied executive obligations to pursue terrorists with more vigor than governments are inclined to use and by mechanisms that legislatures have chosen not to sanction. Courts have almost never shown such imagination and instead have tended to rely on more orthodox forms of judicial reasoning based on bills of rights, separation of powers, the language of legislation, and the desirability of evidence to justify measures likely to impinge adversely on people and organisations. The effect of this has been that courts have tended to provide more protection for civil libertarian values than governments or legislatures.

But they have done so unevenly. The areas of greatest intervention have involved two related issues: prolonged preventive detention and government attempts to rely on evidence kept secret from the nongovernment party. In

the United States and the United Kingdom, prolonged preventive detention itself raises constitutional problems, except in cases where it involves detention pending deportation, where deportation is a practical possibility. In the United Kingdom control orders have been found to infringe the ECHR when their duration exceeds sixteen hours daily. In the United States, the United Kingdom, and Canada, courts have also held that insofar as detention is not, per se, impermissible, detainees must be given an opportunity to reply to the government case. In Australia, in the context of litigation relating to the legality of the prolonged detention of immigrants found by ASIO to be security risks, the High Court, in its current mood, may find that the detention regime is inconsistent with the courts' powers to determine who may be incarcerated.

Due process concerns mean that if the government intends to rely on secret information, it may do so only if the affected party has sufficient notice of its content to be able to respond effectively to it. Provisions for special advocates may not suffice. These requirements have evoked government criticism, and in the United Kingdom, even some members of the Appeals Committee of the House of Lords were critical of the ECtHR's ruling in relation to the validity of the control order procedures.

Other areas of counterterrorism law have fared remarkably well. An attempt to challenge the legality of the targeted killing of suspected terrorists failed on standing grounds, in circumstances that suggested that this obstacle was not insuperable, so long as the claim was brought by the target himself, and that this might not require his presence in the United States. But it also failed on the basis that the issue was a nonjusticiable "political question."[5] The Patriot Act has survived judicial scrutiny almost unscathed.[6] The only surveillance power to have fallen foul of metalegal constraints has been the United Kingdom's much abused stop and search power, and even that survived all the way to the ECtHR. US, Canadian and Australian legislation governing the use and nonuse of state secrets in ordinary judicial proceedings has so far survived almost intact (except in Canada, insofar as it purported to require hearings from which the public but not the parties were excluded). Proscription legislation has generally survived constitutional challenge (but the UK sanctions regimes were struck down on the grounds that the relevant acts did not permit the relevant subordinate legislation). Constitutional challenges to the validity of laws creating special terrorism offences have almost invariably failed.

Governments have also had considerable success in criminal cases, winning around 80 percent of cases resolved by plea or verdict. Moreover, pretrial detention and heavy sentences for precursor offences have meant that the criminal law system provides the basis for de facto preventive detention of many potential terrorists. Courts have generally allowed applications for

control orders or their equivalents. In the United States, governments and government officials have generally—but not invariably—been successful in defending themselves in civil actions arising out of their counter activities. Elsewhere, civil claims for counterterrorism related activities have been rare, but governments have been less successful, and in both the United Kingdom and Australia, governments have concluded that it was necessary to settle cases brought by former Guantánamo detainees for sizeable amounts of money.

Governments' successes can be attributed to a variety of considerations. In the United States, procedural obstacles have played a major role in thwarting attempts to raise constitutional and even civil claims. Courts have relied on standing rules and state secrets immunity to thwart attempts to challenge, or seek redress in relation to, allegedly unlawful surveillance, torture, and targeted killing, thereby enabling them to dispose of cases summarily. But elsewhere, standing rules have played almost no role in counterterror decisions, public interest immunity has rarely thwarted suits against the government in relation to counterterror measures, and attempts to rely on summary disposition almost invariably have failed.

Governments have also been able to rely on a degree of judicial deference. Again, this has been most explicit in the United States, where there is ample authority for the proposition that courts should defer to government judgments in cases involving questions of national security. Elsewhere, courts are more wary of the language of deference. In *A v Secretary of State for the Home Department*, Lord Bingham was critical of suggestions that courts might owe a duty of "deference" to the political authorities, preferring the idea that the demarcation of powers be guided by "relative institutional competence," with the courts' potential role being greatest when the relevant question involved considerable legal content.[7] Rejections of the language of deference are an assertion that courts do not defer, but the logic of recognising "relative institutional competence" is that there will be cases calling for de facto deference. Indeed in the *A* litigation, all but one of the judges who considered the issue concluded that the question of whether the threat of terrorism constituted a "'public emergency threatening the life of the nation" was largely a political question and that the Secretary's decision that it was a public emergency could stand. Control order cases have generated undeferential decisions, but in *Secretary of State for the Home Department v AF*, in which the House of Lords held that a decision of the European Court of Human Rights gave controlees the right to know the gist of the case against them, several speeches were critical of the ECtHR decision's potential to undermine what the Lords regarded as a valuable counterterrorism tool.

In Canada, judges have rejected the language of deference, but in the con-

text of legislation that made judges responsible for determining the relevant substantive issue. In other contexts, judges have exhibited signs of de facto deference by giving considerable weight to government assessments of what national security demands. In Australia, the lack of a constitutionally entrenched bill of rights reduces the range of circumstances in which deference issues might arise, and a functional equivalent of deference is arguably provided by the messy logic of the constitutional separation of powers. But, as in Canada, Australian courts have been prepared to give considerable weight to government evidence in decisions as to whether the disclosure of information would endanger national security.[8]

Moreover, very occasionally, US courts have hinted that the government has underestimated its powers and its obligations. The state secrets doctrine may mean that a court must forbid the disclosure of a secret even if the government is willing to do so. And there have been suggestions that the standard of proof required of the government in habeas corpus cases may be more relaxed than that accepted by the government. But these examples are exceptional.

The passions generated in debates about the proper scope of counterterror laws would seem to suggest that legislation would reflect the politics of the legislators. To some extent it does, but the relationship between beliefs and votes is complex. For one thing, the beliefs that matter are not the beliefs of individual legislators but the beliefs adopted by the parties to which they belong. In Australia and New Zealand, this is a trivial observation: parliamentarians almost invariably vote strictly by party, whether the issue is terrorism or the control of sheep diseases. In the United Kingdom and Canada, party is a very good predictor of vote, but in each country there are instances of MPs from the larger parties voting against their party. In the United States, party is a strong predictor of vote, but nonparty voting is more extensive than in the parliamentary democracies.

The relevance of party seems to reflect two distinct mechanisms: responses reflective of the different political beliefs of those attracted to different parties; and responses to the exigencies of being, or not being, in power. There is evidence consistent with the former explanation. When there are divisions on terrorism issues, party preferences generally reflect the party's position on a left-right continuum. This is particularly the case in the United States, Australia, and New Zealand. Parties of the right (Republican, Liberal-National, National) are more supportive of expanded counterterror powers than parties of the Centre (Democrat, Labor, Labour) and, a fortiori, parties of the Left (Green/s), and there are no exceptions to this. Canadian parliamentary divisions yield results that are weakly consistent with this analysis. The New Democrats take a predictably leftist stance, as to some extent does the Bloc Québécois. Conservatives have tended to favour "tougher" stances than the Liberals (Centre),

but during the passage of the *Anti-terrorism Act*, the Progressive Conservatives sometimes outflanked the Liberals on the left, and the more conservative Canadian Alliance also joined the leftist parties on some issues.

But if beliefs mediated by party were a powerful explanation of parliamentary votes, one would expect that on coming to power, parties would change counterterrorism laws in a direction consistent with their prior politics. There is, however, little evidence of this. In Australia, Labor, on coming to power in 2007, made a large number of minor amendments to counterterror legislation. Some of these slightly limited government powers, a few expanded them, and most simply clarified ambiguities. Labor did not repeal any legislation it had earlier opposed. Under New Zealand's National government, its terrorism laws have remained largely unchanged, and in some minor respects (migration law, warrants), they have been liberalised. The Nationals have, however, expanded New Zealand's list of proscribed organisations, consistent with their earlier criticisms of the then government's failure to do so. Canada's minority conservative government tried to save the sunsetted provisions of the *Anti-terrorism Act*, and after winning a House of Commons majority, it restored them, albeit subject to a sunset clause, and in conjunction with legislation to respond to judicial findings in relation to the unconstitutionality of provisions for the mandatory closing of courts to the public in cases where courts were hearing disputes about the use of security-sensitive information.

A further expectation would be that party would also be related to attitudes to counterterror measures among the general public. There is some evidence from Australia and Canada consistent with this explanation. US polls have generally borne out this expectation, but several 2013 polls have suggested that Republicans are slightly less supportive than Democrats of large-scale surveillance and only slightly more supportive of the use of drones to assassinate suspected enemies when this is done under a Democratic administration.

The role of party is even messier in the United Kingdom. If the political beliefs model explained voting, Conservatives would tend to support "tough" measures. Labour would do so with reservations and muttering from the left. The Liberal Democrats would oppose. The Liberal Democrats and to some extent the Labour left behave as predicted, and the Conservative amendment proposing the restoration of preventive detention powers in 2000 was consistent with its position on the right. Since 2000, however, the Conservatives have shifted to the "left" on counterterror measures. They abstained on the preventive detention of immigrants in 2001, but they opposed longer investigatory detention and sought more rigorous intention requirements in relation to the new 2006 terrorism offences. Moreover, the Conservative-Liberal Democrat coalition has allowed the investigatory detention period to revert to its 2003 level. It has slightly relaxed the control order regime. This may

reflect the influence of the Liberal Democrats. It would be a relatively cost-free sop to compensate them for the humiliation of having to be complicit in the Conservatives' unpopular cost-cutting program. But it is also consistent with the Conservatives' stance on counterterror measures prior to having come to power. But complicating matters still further is the coexistence of liberalisation with proposals for limitations: limits on the circumstances in which litigants can require the production of information in cases where governments fear that disclosure will undermine national security; and limits on the circumstances in which the ECtHR can hear objections to the decisions of United Kingdom courts.

Consistent with this is the fact that the relationship between party support and UK voters' attitudes to counterterror measures also takes a different form in the United Kingdom. Most polls suggest that the relationship is weak and by no means consistent from item to item. There is, however, one poll that has yielded a strong relationship between party and terrorism-related attitudes. Voters were asked about whether they thought Labour had been effective in controlling terrorism and were also asked whether they thought the coalition would be effective. Party preferences were strongly related to the answers to the two questions in the predicted directions. There was, however, one surprising finding. Respondents were also asked whether they thought that the threat of terrorism had increased or decreased over the past five years. Labour voters were only slightly more likely to think it had decreased, and there was almost no difference in the percentages of Labour voters and Conservatives who thought the risk had increased. Where questions relate expressly to the performance of governments, they are much more likely to arouse partisan responses than when they lack the relevant cues. It is possible that Labour and Conservative partisans were torn in two directions: by party-related beliefs and by cues given by their party's stance on counterterrorism.

UK exceptionalism is not easily explained. A tentative explanation takes as its starting point the Blair government's willingness to play an important role in the deeply unpopular Iraq war, a decision that suggests a government uncharacteristically indifferent to its traditional supporters' political beliefs. If so, it is understandable that the same might have been the case in relation to the government's counterterror measures. Assuming that supporters would normally have been disposed to scepticism in relation to wide-ranging counterterror laws, the discrepancy between political dispositions and party loyalty could be partly resolved by following the government line (which received considerable publicity). Conversely, the Conservatives' stance could be expected to encourage a shift in Conservative voters' attitudes. The result would be the observed blurred relationship between party and attitudes. This analysis may not withstand reanalysis of relevant UK poll data, but it sug-

gests limits to explanations in terms of party-related political dispositions and also suggests that the exigencies of being in government may sometimes trump such beliefs as the members of the government brought with them to government.

Judges vote too, and one of the striking features of judicial responses to counterterrorism laws is the lack of unanimity. The US Supreme Court terror cases all involved split decisions, and all involved rejection of decisions of district or circuit courts and sometimes both. In the United Kingdom, complete unanimity is rare. There are several exceptions, notably *Gillan* and *Al Jedda*, but these led to appeals to the ECtHR, which found—unanimously in *Gillan*, with one dissent in *Al-Jedda*—that the UK courts had erred. In other cases, there was usually either intracourt disagreement, cross-court disagreement, or—usually—both. But there was almost invariably a sizeable majority for the "winning" position and usually no more than a single dissenter in the House of Lords/Supreme Court. In Canada, *Charkaoui* (No. 1) involved a unanimous Supreme Court overruling a unanimous Federal Court of Appeal that had upheld the first instance decision.

If legal materials provide an imperfect guide to judges, they must rely on something else, but that "something else" seems to be more important in the United States than in the United Kingdom, and its nature is sometimes elusive. In the United States, it is apparent that judges tend to be reasonably consistent in their relative propensity to answer terrorism-related questions in favour of the government, although Justice Scalia's judgment in *Rasul* indicates that judges' responses are sometimes too nuanced to be predicted on the basis of rank along a single dimension. However, in the House of Lords/Supreme Court, differences of judicial opinion are expressed more subtly, and voting patterns provide no evidence consistent with general dispositions to favour the government. Typically there were no more than one or two dissents, and different judges dissented in different cases. Lord Hoffmann dissented in favour of the government in relation to control orders but was also the only judge in *A v Secretary of State* to find that terrorism did not pose a threat to the nation. Lords Rodger and Carswell held that a reverse onus provision cast a legal as well as an evidentiary burden but that this was not incompatible with the ECHR. (They also found that, on the facts, this did not matter since, given the evidence, the defendant had discharged this burden.) Lord Brown dissented in relation to whether the Al Qaeda Order was validly made. This evidence is inconsistent with explanations of decisions in terms of the assumption that decisions of the House of Lords and its successor, the Supreme Court, can be understood in terms of their relative rank on a hypothetical civil libertarian dimension, although it does not rule out the possibility that UK judges are politically more homogeneous than their US counterparts. More-

over, the fate of UK decisions before the ECtHR suggests that UK judges are more deferential to perceived security interests than the Strasbourg judges. This may be for attitudinal reasons, but it may also reflect institutional culture. The fate of UK decisions might have been different if appeals went instead to a hypothetical and improbable European Security Court.

The analysis throws only limited light on the reasons for cross-national differences, although it is suggestive. Prior to 9/11, the laws of the five countries seemed to reflect national experiences of terrorism. In the United States, where the threat had typically come from international rather than national terrorism, the law reflected this, and UK law had evolved in the context of Northern Irish terrorism. In Australia, Canada, and New Zealand, where the paucity of terrorist attacks suggested that terrorism was not a serious threat, terrorism was relevant only in isolated circumstances, which tended to reflect the tendency for threats to be international rather than domestic. But this account works imperfectly. The Oklahoma City bombing highlighted the fact that that it was not only foreigners who resorted to terror. The Air India bombing highlighted the fact that terrorist attacks could be arranged on Canadian soil. And while Australian law made no provision for terrorism, this was to some extent a matter of expression rather than substance. ASIO enjoyed considerable surveillance powers in relation to politically motivated violence, which largely subsumed terrorism.

The intensity of the US response to 9/11 is not surprising. The attack not only cost thousands of lives. It demonstrated the potential vulnerability of a country that had rightly come to think of itself as the world's sole superpower. It called not only for countermeasures but also for revenge. But while the United States waged both actual and symbolic war on terrorists, it was far more hesitant in seeking draconian legal powers to do so. While the government sought more powers than it probably needed, the legal outcome was one in which liberties were bruised rather than destroyed, and the Patriot Act even included a statement that the sense of Congress was that American Muslims were making a valuable contribution to the country, a sentiment not reflected in the government's response to the many Muslim non-Americans who, for reasons that had nothing to do with a desire to resort to terrorism, had allowed their visas to lapse. War reflected anger and humiliation (and the hope that it would transform Afghanistan for the better). Law seems to have been constrained by a degree of recognition of the instrumental and moral value of a proportional response to the threat and recognition that America's legitimacy derives partly from its being a country bound by law. What best reflects the enormity of the attack is not the legal response but the strain between temptation and law. Elsewhere, 9/11 was interpreted as calling for a response. In the United Kingdom, the response reflected a perception that the

new threat was to a considerable extent external. The Canadian, Australian, and New Zealand responses highlight the fact that one response to pressures to legislate quickly is to draw on "foreign" laws. The UK Terrorism Act 2000 provided an attractive precedent, having been designed for the kind of terrorist threats likely to face liberal democracies in the 21st century, and its definitions, proscription provisions, and crimes provided a basis for Canadian, Australian, and New Zealand law. Australia and, more particularly, New Zealand drew on Canadian law. But imitation goes only some way towards explaining their post 9/11 legislation.

During the 2000s UK law continued to develop, developments being prompted by further attacks; near attacks; the need to adapt the law to judicial rulings; and, recently, second thoughts about the need for wide-ranging laws. Australia, which was free from attacks on home soil, tended to follow UK innovations, while adding a few of its own. By contrast, after the initial response to the 9/11 attacks, Canadian and New Zealand law remained largely unchanged.

Australia's response is perhaps the hardest to understand. It may be explicable in terms of politics: unlike Canada and New Zealand, Australia was governed by a conservative coalition with a majority in the lower house, and—for three years—both houses. Expansion of the scope of counterterror laws largely ceased under Labor (from 2007 onwards). And while Australia was free of domestic terrorist attacks, Australians comprised more than 40 percent of the 202 people killed in the Bali bombings in October 2002. But the nexus between the attacks and later legislation is not apparent, and many of the more controversial pieces of legislation were enacted in 2004–5. Nor can the later legislation be explained in terms of Australia's lack of a constitutional bill of rights. On the whole the new powers are subject to sufficient constraints to ensure that they would probably survive constitutional challenge even if Australia were to adopt, say, the Canadian Charter. The legal basis (insofar as there is one) for the most vulnerable and draconian feature of Australian counterterror responses—indefinite immigration detention—predates the 9/11 attacks.

In short, national laws bear some relationship to national experiences of terrorism, but the relationship is tenuous. Laws may be transplants. They may reflect politics. And their worst features may not be a response to terrorism but a response to quite different problems, formulated in different times.

In one important respect, this analysis suggests that law will tend to restrain governments, first because legislators are rarely willing to give governments all the powers they would like and second because courts are sometimes unwilling to accept legislators' assumptions that laws are within their constitutional powers, or that the law and the facts are such as to warrant

particular executive responses to terrorism. Law may operate reactively. It may also influence choice. Lawmakers are likely to, and indeed may be required to, take account of whether proposed legislation is likely to survive constitutional scrutiny, and executive actors are clearly sensitive to the question of whether their conduct is lawful. Courts are in a slightly different position. Lower courts are likely to be constrained by the possible reaction of higher courts. But if law is what the highest court in the judicial hierarchy says it is, the judges of that court are potentially not restrained by law, and if the highest court's statements are not necessarily law, the rule of law is potentially capable of requiring noncompliance.

This conundrum does not cause major problems. While courts may not be constrained by law given the Holmesian definition, they are constrained to try to act as if they were, given that the legitimacy of their decisions is predicated on the assumption that they are indeed bound by law. If they want their decisions to become embedded in "the law," they must use justifications calculated to legitimate those decisions in the eyes of future judges whose perspectives may nonetheless differ from their own. But even if judges try to act according to "law," frequent judicial dissensus necessarily means that the relevant law is indeterminate and that judicial decisions are sometimes no more than selections from a range of defensible possibilities. And if law is indeterminate, judges must necessarily base their decisions either on guesswork or on extralegal criteria, including the overall rightness of a particular measure.

Indeterminacy does not mean that law will not constrain. Its effects will depend on the probability of different outcomes, their cost, and the risk aversiveness of the relevant political actor. Likely outcomes are capable of constraining behaviour, although not to the same extent as extremely likely outcomes. However, the impact of law may be seriously weakened by indeterminacy in conjunction with wishful thinking. The US Department of Justice's memoranda and other advice on the legality of the use of coercive interrogation techniques appear to provide an example. Law proved sufficiently ambiguous to enable its use as a form of delinquency neutralisation and a basis for securing the de facto protection of people who relied, in good faith, on the advice.

Law's future capacity to constrain will depend partly on the lessons to be learned from the response to executive deviance in the years following 9/11. For civil libertarians, there is an optimistic story to be told. The lesson of those years is that deviance is hard to conceal. Secrets will out. Those who thought they could safely violate human rights will find themselves enmeshed in litigation, and governments that countenance this will find themselves politically embarrassed and forced to pay millions of dollars in damages to those they implied were dangerous terrorists. Law is civilising war, and the costs of waging war will increasingly include the legal costs associated with the

infringements of rights that inevitably accompany this. This may yield benefits: Machiavelli notwithstanding, it may be better to be loved than feared. And even if the subjection of armed conflict to the rule of law means that war becomes harder to wage than was once the case, this may be no bad thing. On the whole, wars end in tears for those who initiate them. Even when wars are fought with the best intentions, the intended beneficiaries are rarely grateful. And balancing budgets requires that scarce resources be carefully husbanded, so wars should not be embarked upon lightly.

There is also a more pessimistic viewpoint. At least in the United States, deviance on behalf of one's country goes almost unpunished. (In this respect the torture memoranda were prescient, although to some extent self-fulfillingly so.) Wars are occasionally necessary or desirable, and law has a nasty habit of accommodating the exigencies involved in the waging of war. If law gets in the way of national security, laws will be changed, both by legislatures and by courts. While decisions such as *Boumediene* indicate a preparedness to regulate some aspects of the conduct of hostilities, the decisions of US courts suggest that they sometimes feel torn between the duty to protect constitutional rights and the duty to protect national security and national honour.

There is also an agnostic outlook. Terrorism tends to encourage "tough" measures, both legal and nonlegal, but in the absence of major attacks, governments are generally content to respond to the diffuse threat of terrorism by and within the law. If terrorist plots and attacks continue to be as rare as has been the case in Canada, Australia, and New Zealand it is likely that governments will gradually devote fewer resources to enforcement of counterterrorism laws and to related investigations. It is even possible that, like New Zealand, they will reassimilate some aspects of counterterrorism law to the general law. If, on the other hand, there were to be an upsurge in terrorist attacks, the experience of the five countries suggests the near certainty of governments seeking and gaining added powers and of courts doing their bit to ensure the punishment of probable terrorists and the control of others. Moreover while courts can currently devote months to the handling of terrorism cases, it is not so apparent that they could deal with the case loads generated in the event of a sharp increase in the number of people suspected of involvement in terrorism, nor that governments would tolerate the burdens associated with prosecutions and the defence of civil actions. Indeed the discovery burden in the *Al Rawi* litigation and its consequences have already encouraged the UK government to explore the feasibility of limiting the scope of the country's public interest immunity laws. It follows that insofar as people are committed civil libertarians, they should welcome measures that have the potential to reduce the terrorist threat or at least keep it at its current level.