Into the Fire: How to Avoid Getting Burned by the Same Mistakes Made Fighting Terrorism in Northern Ireland

Michael O'Connor, Phoenix School of Law
Celia M. Rumann, Phoenix School of Law

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INTO THE FIRE: HOW TO AVOID GETTING BURNED BY THE SAME MISTAKES MADE FIGHTING TERRORISM IN NORTHERN IRELAND

Michael P. O'Connor*
Celia M. Rumann**

If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to control the governed; and in the next place, oblige it to control itself.

—JAMES MADISON, THE FEDERALIST # 51

We are in a fight for our principles, and our first responsibility is to live by them. No one should be singled out for unfair treatment or unkind words because of their ethnic background or religious faith.

—President George W. Bush

INTRODUCTION

On September 11, 2001, the United States of America suffered the most deadly act of terrorism in its history and the most deadly foreign attack ever on U.S. soil. That day forever

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* Assistant Professor of Law, University of St. Thomas School of Law.
** Assistant Professor of Law, University of St. Thomas School of Law.
1 The title is derived from BRUCE SPRINGSTEEN, Into the Fire, on THE RISING (Columbia Records 2002).
3 The death toll from the September 11 attack was 3,044 (2,811 at the World Trade Center; 189 at the Pentagon; 44 in Pennsylvania); Giselle Goodman, “True hero” among victims from Maine, PORTLAND PRESS HERALD, Sept. 12, 2002, at 1, available at 2002 WL 23928546. See also Andy Newman, Zones of Devastation From 9/11: Mapping the Victims
changed the landscape of New York City. The aftermath of that attack has also fundamentally altered the legal landscape and the protection of civil liberties afforded to all people residing within our borders, including U.S. citizens and lawful resident aliens. Whether this latter alteration is permanent remains to be seen. If it is permanent, however, the terrorists who brought down the World Trade Center’s Twin Towers will have succeeded in undermining our nation far more dramatically than any foreign enemy in United States history. For, in the name of fighting terrorism, we have become more authoritarian and less free.

It is one thing to argue that the adoption and use of new powers by the government has made us less free. In a dangerous world freedom may be something our citizens are willing to trade in exchange for safety. We would be foolhardy, even immoral, if we did not respond to the terrorist attack on our soil. We have a right and an obligation to defend innocent lives. As citizens, we place a great trust in our elected leaders to ensure our safety. But, what if the measures taken will not make us more secure? If we have traded precious freedom for an empty promise, we dishonor those who have fought and died for our freedom during the past two hundred twenty-seven years. We owe it to them, to ourselves, and to future generations to ask whether the measures adopted and assumed by our government are necessary, and whether they will be effective.

We must ask ourselves these questions now, in large part, because they were not properly asked before. In the immediate


5 If President Bush is accurate, the United States was attacked on September 11, 2001 by people who hate us because they hate freedom. See September 20 Presidential Address, supra note 2 (“They hate our freedoms—our freedom of religion, our freedom of speech, our freedom to vote and assemble and disagree with each other.”). In short, freedom has been affected by the recent adoption of governmental powers. If the powers assumed by government since the attack remain in force, those who hate freedom may have already won.
aftermath of the World Trade Center and Pentagon attacks, a great outcry arose, demanding that our political leaders “do something.” This charge obviously weighed heavily on the President and Members of Congress. They initially responded with strong words of encouragement and vows to hunt down those responsible for the attack. Within weeks of September 11th, numerous bills were proposed to combat terrorism. In addition, the President and the Attorney General took various unilateral steps to investigate the crimes of September 11, 2001, and to try and thwart future terrorism. Through executive orders and directives to law enforcement personnel, new powers were assumed and exercised in the name of combating terror.

This series of events conformed to a pattern that has long held true in Northern Ireland, where anti-terrorist legislation has often been proposed and passed in the superheated environment immediately following a terrorist attack. U.S. citizens should also recognize this pattern. Following the bombing of the Edward P. Murrah building in Oklahoma City on April 19, 1995, anti-terrorism legislation was immediately proposed. That proposal passed in a modified form as the Antiterrorism and Effective Death Penalty Act of 1996.

Anti-terrorist legislation has also been passed when the country was outraged by the mere suspicion of terrorism. When TWA flight 800 went down off the coast of Long Island nearly everyone suspected that a terrorist bomb had brought it down. In

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6 Amidst the comforting promises were more alarming assertions that the attack had changed the world. See id. (“All of this was brought upon us in a single day—and night fell on a different world, a world where freedom itself is under attack.”).


8 For instance, following the infamous Birmingham bombing of November 21, 1974, in which 21 people died and 180 were wounded, the Prevention of Terrorism (Temporary Provisions) Act 1974 was passed on November 29, 1974—only eight days after the attack. See Prevention of Terrorism (Temporary Provisions) Act, 1974, ch. 56 (Eng.). Numerous other pieces of “Emergency Legislation” were passed in the aftermath of atrocities.


response to this, President Clinton called on Congress to agree on a legislative package that would provide "additional protections against terrorism." President Clinton also issued Executive Order 13015, establishing the White House Commission on Aviation Safety and Security. Feeling the need to "do something," Congress reacted by authorizing the Computer Assisted Passenger Pre-Screening program (CAPPS). In the agitated environment following this tragedy, no one bothered to wait to see if the plane crash was actually the result of a terrorist strike. Subsequently, government investigators concluded that the crash was the result of accidental causes.

Whenever legislation is passed during a time of national outrage and collective passion like that which naturally follows a terrorist attack, we dramatically increase the risk that our laws will be based upon false assumptions and incomplete understandings. In addition, the hasty consideration and shortened debate attending such legislation raises the probability that these laws will have unforeseen and unwanted effects.

This Article will explore the effects of executive actions and legislation designed to combat terrorism. We will first examine the powers used to combat terrorism in Northern Ireland, a land unfortunate enough to be very familiar with political violence and the governmental action designed to prevent such violence. We will use Northern Ireland as a case study for several reasons: 1) its history of combating political violence; 2) its legal traditions are

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After the TWA flight 800 crash in July 1996 and the initial suspicions that a bomb was involved, interest in passenger profiling generally, and CAPPS in particular, increased. Recommendation 3.19 of the Gore Commission recommended that automated passenger profiling be used to complement existing bomb detection technology. Also, section 307 of the Federal Aviation Reauthorization Act of 1996 (P.L. 104-264, 110 Stat. 3253) directed FAA to assist airlines in developing a computer-assisted passenger profiling system in conjunction with other security measures and technologies. Since 1998, CAPPS has been widely employed by the airlines.

16 See NAT'L TRANSP. SAFETY BD., AIRCRAFT ACCIDENT REPORT No. 00/03, INFLIGHT BREAKUP OVER THE ATLANTIC OCEAN TRANS WORLD AIRLINES FLIGHT 800 (1996). The National Transportation Safety Board determined that the probable cause of the TWA flight 800 accident was an explosion of the center wing fuel tank (CWT), resulting from ignition of the flammable fuel/air mixture in the tank. See id.
similar to ours, both having been derived from the English system of justice; and 3) the fact that there have been robust and repeated examinations of the efficacy of efforts to combat terrorism in Northern Ireland by a wealth of academics, government officials and human rights agencies.

This Article will examine the extent to which the efforts to combat terror in Northern Ireland were successful. To do this, we will look at the consequences, both intended and unintended, of these various efforts. In doing so, we will rely upon government statistics, raw data, and analyses conducted by government commissions and non-governmental organizations (NGOs). We will also draw upon a host of interviews conducted by the authors with academics, solicitors, barristers, government officials, human rights workers, employees of NGOs, and persons convicted of terrorist offenses.\(^{17}\) We will then examine the provisions of the USA PATRIOT Act and other legislative and executive efforts implemented in the aftermath of the September 11, 2001 terrorist attack. Finally, we will discuss the lessons that we may derive from the experiences of those in Northern Ireland and recommend directions for future action.\(^{18}\)

\(^{17}\) The data collection and interviews were conducted during a year spent in Ireland and Northern Ireland researching this Article. We are eternally grateful to many people who shared their time, thoughts, and contacts with us while in Ireland and Northern Ireland. The list of those who assisted us is too long to detail here. However, we are particularly indebted to Professor Colm Campbell, University of Ulster, formerly the Dean of Law at the National University of Ireland, Galway. Without Professor Campbell’s assistance and hospitality, this project would not have been possible. We also wish to thank the following: Mike Ritchie for his many contacts and the help he provided; Commissioner Brice Dickson for taking time from his vital work at the Northern Ireland Human Rights Commission; everyone at the Committee on the Administration of Justice for permitting us to occupy their space and copy much of their materials, and Paul Mageean, particularly, for his time and insight; Peter Madden and Barra McGrory for sharing their views and continuing to struggle bravely in the face of repeated threats; Kieran McEvoy for pleasant and informative discussions; Christine Bell, Danny McNamee, and Jim McVeigh for their time and candor; and Raymond Murphy for his good advice and friendship.

\(^{18}\) There are many things that this Article is not intended to do. This is a very fluid and fast-moving area of law. It is not our intent to detail every action taken by the government of Northern Ireland to combat terrorism up until the present moment. Instead, we have looked at those powers which have been used over a long enough period of time for us and others to have assessed the consequences of these powers. We also have not analyzed and do not intend for this Article to address some of the Constitutional issues and issues of international law that are raised by the actions taken by our government. We offer this Article as an aid to those considering the wisdom of such action and the actions which will undoubtedly be proposed in the near future.
I. THE EFFECTS OF ANTI-TERRORISM LEGISLATION IN NORTHERN IRELAND

There have been numerous laws enacted to combat terrorism in Northern Ireland. The details of some of these various legislative enactments are listed below. One goal behind each of these laws was to limit or eliminate acts of terrorism.\(^9\) This goal, however, was not always achieved. In fact, numerous analyses of the effects of legislation designed to curb political violence in Northern Ireland indicate that this purpose was frequently frustrated by the very means employed to achieve it.\(^0\) This conclusion was often echoed during a multitude of interviews conducted with a broad spectrum of individuals possessing extensive knowledge of the efforts to curb political violence in Northern Ireland. Some anti-terror tactics employed were even referred to as "the best recruiting tools the I.R.A. ever had."\(^2\) The reasons for this dissonance between purpose and effect will be explored in this section.

A. Brief Overview of the System of Laws Governing Northern Ireland

The statutory framework governing Northern Ireland can seem complex to an outsider. This is due in part to the province's history of alternating between being ruled by Westminster in London and the several attempts to devolve power to the seat of local legislative power, the Stormont Parliament in Belfast. In

\(^9\) In most cases, the elimination of terrorism was certainly the primary goal of the legislation. However, the re-enactment of much "Emergency Legislation" must be viewed with more care. In many instances, emergency laws were re-enacted in times which could not properly be called emergencies. See, e.g., GERARD HOGAN & CLIVE WALKER, POLITICAL VIOLENCE AND THE LAW IN IRELAND (1989). Over the course of the past thirty years, many emergency powers were used to arrest defendants for normal street crimes. See infra Part I.C.1.b.

\(^0\) See HOGAN & WALKER, supra note 19, at 16. In discussing laws against political violence from 1922-72, the authors "submitted that, on balance, coercion in the form and to the extent applied in Northern Ireland was counter-productive.... The point is not that violent conspiracies were to be ignored but that, by and large, the ordinary law could have coped." Id. See also LAURA K. DONOHUE, COUNTER-TERRORIST LAW AND EMERGENCY POWERS IN THE UNITED KINGDOM 1922-2000, at 354 (2001) [hereinafter DONOHUE, COUNTER-TERRORIST LAW] ("A... part of the reason for the instability and conflict revolved around the very measures implemented to secure the State.").

\(^2\) Interview with Jim McVeigh, Long Kesh, Maze Prison (Dec. 9, 1998) [hereinafter McVeigh Interview]. This sentiment was repeated in an interview conducted with Brice Dickson, Belfast (June 15, 1999) [hereinafter Dickson Interview].
addition, some confusion stems from the fact that not all legislation originating in Westminster applies generally to all of the provinces of the United Kingdom. Some United Kingdom Acts of Parliament and United Kingdom Statutory Instruments apply exclusively, or primarily, to Northern Ireland.

Until the early 1970s, the statutory basis for government in Northern Ireland was provided by the Government of Ireland Act, 1920. A local parliament was established in Belfast which exercised powers conferred upon it by the 1920 Act. This local parliament remained subservient to Westminster. In 1972, the British Government re-imposed direct rule from Westminster. The Northern Ireland (Temporary Provisions) Act of 1972 suspended the Stormont Parliament, and the Northern Ireland Constitution Act of 1973 abolished the Stormont Parliament. Direct rule ended in early 1974 when local rule was reinstated and the legislature of Northern Ireland sat for the first time with significant membership from both the majority and minority communities. This effort at devolution of power, however, was short lived due to a politically motivated strike in May 1974 which brought about the downfall of the parliament and a return to direct rule.

22 For example, the following pieces of legislation which directly concern the prevention of terrorism have different spheres of application—the Prevention of Terrorism (Temporary Provisions) Acts of 1974, 1976, and 1984 apply generally throughout the United Kingdom, while the Prevention of Terrorism (Supplemental Temporary Provisions) (Northern Ireland) Orders of 1976 and 1984 apply only to Northern Ireland.


24 See Northern Ireland (Temporary Provisions) Act, 1972, c. 22, § 1(3) (Eng.); Northern Ireland Constitution Act 1973, c. 36, § 31 (Eng.).

25 See REPORT OF A COMMITTEE TO CONSIDER, IN THE CONTEXT OF CIVIL LIBERTIES AND HUMAN RIGHTS, MEASURES TO DEAL WITH TERRORISM IN NORTHERN IRELAND, 1975, Cmnd. 5847 [hereinafter GARDINER REPORT].

26 This strike was by Unionists opposed to sharing power with Catholics and Nationalists. See Wars and Conflict: The Troubles—Power-sharing, BBC News, available at http://www.bbc.co.uk/history/war/troubles/powersharing/index.shtml (last visited Jan. 5, 2003) (explaining how a Loyalist strike brought the government down). Unionist or Loyalist organizations are those who prefer Northern Ireland to remain a part of the United Kingdom. Nationalist or Republican organizations are those organizations that favor a united Ireland. While there is some crossover between groups, Nationalists and Republicans are predominantly Catholic, while Unionists and Loyalists are predominantly Protestant. With the brief exception of a short period during 1974 and until the recent power sharing government brought into effect by the Good Friday Accords, the parliament in Belfast has been dominated by Protestant Unionists and Loyalists. See Belfast Accord, “New Beginning” Hailed, BOSTON GLOBE, Apr. 11, 1998, available at http://www.boston.com/globe/nation/packages/ireland/belfast_accord.htm. In 1934, the
During the next twenty-five years, attempts at devolution of power from London to Belfast continued. In the most recent attempt at devolution in 1999 to the New Northern Ireland Administration, many powers, including such things as law and order and criminal justice policy, were retained by the Secretary of State.\(^\text{27}\) To combat the political violence troubling the province, the power to legislate in the area of criminal justice has repeatedly been exercised through the use of emergency provisions. Under various emergency provisions, the Government of Northern Ireland assumed the following powers: internment (detention without charge for indefinite periods), special powers of arrest, interrogation and detention short of internment, limitations on the power to grant bail, suspension of the right to trial by jury for certain "scheduled offenses," limitations on the right to counsel, limitations on the right to remain silent, and alteration in the evidentiary standards necessary for conviction.

\section*{B. Security Legislation Used to Combat Political Violence in Northern Ireland}

Due to Northern Ireland's turbulent political history, there has been some form of security legislation almost from the inception of the province. The first significant piece of legislation of this kind was the Civil Authorities (Special Powers) Act (Northern Ireland) 1922.\(^\text{28}\) This Act was renewed annually until 1928, when it was given a five-year life span.\(^\text{29}\) In 1933, these...
"special powers" were made permanent.\textsuperscript{30}

This Act permitted the imposition of curfews, the banning of books and other printed materials and assemblies,\textsuperscript{31} and most importantly, detention without charge or trial, known as internment.\textsuperscript{32} In addition, the 1922 Act permitted the newly formed Royal Ulster Constabulary ("RUC")\textsuperscript{33} or Army personnel to enter any home believed to be used for illegal purposes. Moreover, there was a prohibition against holding inquests to examine sudden deaths.

The special powers granted under the 1922 Act, which remained in effect until the end of 1972,\textsuperscript{34} were frequently exercised. In particular, the power of internment periodically resulted in the jailing of hundreds of individuals who had neither been charged, nor tried.\textsuperscript{35} This Act, and its broad grant of power to the RUC,\textsuperscript{36} served as a model for subsequent legislation granting emergency powers.

The variety of Acts and Orders which have granted emergency powers to the RUC and the military have influenced the rights of all persons in Northern Ireland, not only those suspected of committing terrorist offenses.\textsuperscript{37} In addition to the 1922 Act, the principal Acts and Orders used to combat political violence in Northern Ireland were the following: the Northern

\textsuperscript{30} See Civil Authorities (Special Powers) Act (Northern Ireland), 1933, 23 & 24 Geo. 5, c.12 (N. Ir.).

\textsuperscript{31} See CAJ, No EMERGENCY, supra note 29, at 6.

\textsuperscript{32} See Civil Authorities (Special Powers) Act (Northern Ireland) 1922, 12 & 13 Geo. 6, c. 5, sched. 23 (N. Ir.). See NYC Bar Report, supra note 23, at 13-14. Some form of internment, however, has an even longer history in British laws governing Ireland. The Protection of Life and Property (Ireland) Act of 1871 allowed for detention without trial. See CAJ, No EMERGENCY, supra note 29, at 5.

\textsuperscript{33} The RUC recently was renamed the Police Service of Northern Ireland, pursuant to the recommendations of the Patten Commission. See Northern Ireland Office Online: Key Issues, available at http://www.nio.gov.uk/issues/policing.htm (last visited Mar. 12, 2003).

\textsuperscript{34} See Northern Ireland (Emergency Provisions) Act, 1973, c. 53 (Eng.).

\textsuperscript{35} See GARDINER REPORT, supra note 25.

\textsuperscript{36} This grant of power was actually to the Royal Irish Constabulary, the precursor to the RUC. Civil Authorities (Special Powers) Act (Northern Ireland), 1922, 12 & 13 Geo. 6, c. 5, § 8 (N. Ir.). The Act empowered the Minister for Home Affairs, or any designated member of the RUC, to "take all such steps and issue all such orders as may be necessary for preserving the peace and maintaining order. . . ." Id. § 1. See also NYC Bar Report, supra note 23, at 13-14.

\textsuperscript{37} Some form of "special powers" has existed in Northern Ireland since the birth of the province. In No Emergency, the Committee for the Administration of Justice, a non-partisan human rights group, called on the government to repeal all emergency legislation. It should also be noted that the Republic of Ireland also lived under a declared state of "emergency" from 1939 until February 7, 1995, despite long periods without political violence. See CAJ, No EMERGENCY, supra note 29, at 3.

1. The 1973 EPA

The Northern Ireland (Emergency Provisions) Act 1973 ("1973 EPA") came into effect on April 2, 1973. As with most pieces of "Emergency" legislation, the 1973 EPA followed a period of increased violence in Northern Ireland. It was also promulgated after the commission headed by Lord Diplock issued its report examining the province's efforts to combat political violence. The 1973 EPA dramatically increased the powers of the police and fundamentally altered the rights of the civilian population in Northern Ireland.

38 It is important to note that until the 2000 Act, each piece of legislation listed is entitled either an "Emergency Provision" or a "Temporary Provision," and, in sum, frequently are referred to as "special powers" legislation. These titles, while arguably misleading in that their provisions were often reenacted and therefore long-lived, nevertheless reflected an understanding that the powers exercised under them are themselves dangerous. In fact, the government's justification for the use of special powers rested upon the temporary nature of the encroachment upon civil liberties. That these powers were viewed as potentially injurious to democratic values, even by members of the governments enacting them, is made clear through the conclusions of the numerous studies commissioned by the government which have reported on the exercise of power under these Acts. In many instances, the recommendations of these committees later were incorporated into new legislation by the government. See, e.g., REPORT OF THE COMMISSION TO CONSIDER LEGAL PROCEDURES TO DEAL WITH TERRORIST ACTIVITIES IN NORTHERN IRELAND, 1972, Cmnd. 5185 [hereinafter DIPLOCK REPORT]; GARDINER REPORT, supra note 25. See also HOGAN & WALKER, supra note 19, ch. 1.


40 See Security Incidents in Northern Ireland, 1969 to 1998-99, in CAIN Web Service, Background Information on Northern Ireland Society—Security, at http://cain.ulst.ac.uk/ni/security.htm (last visited Mar. 12, 2003) [hereinafter Background Information on Security Incidents]. The total number of explosions in 1972 was 1,382, and the total number of shootings was 10,631. Id.

41 The Diplock Report was issued on December 20, 1972. See DIPLOCK REPORT, supra note 38.

a. Suspension of the Right to Trial by Jury

Perhaps the most important power granted to the government under the 1973 EPA was the power to try defendants accused of certain offenses before a judge sitting without a jury. The Act listed certain “scheduled” offenses which would trigger the provision revoking the right to trial by jury. The Secretary of State was given the power to amend the list of scheduled offenses triable before a judge. The use of these “Diplock courts,” as they are commonly known, is one of the most controversial weapons employed against terrorism in Northern Ireland.

The rationale asserted for abolishing the right to jury trial for those accused of scheduled offenses was the elimination of “perverse verdicts” caused by alleged juror intimidation. Interestingly, though this was the stated basis for the change, there is no evidence to support this conclusion. Instead, the Diplock Report refers to its similarly unsupported conclusion that witnesses have been “intimidated by terrorist organizations.”

This absence of confirmation was noted in the 1975 Gardiner Report which acknowledged that there was no evidence of perverse verdicts or of juror intimidation. Lord Gardiner, however, relied upon the purported failure of alleged witnesses to terrorist offenses to provide evidence against the perpetrators in supporting the continued use of Diplock courts.

The Diplock commission, in their Report, referred to the intimidation of jurors and to the danger of perverse acquittals by partisan juries. We are convinced on the evidence that we have received, that if juries were to be reintroduced for scheduled offences, their verdicts would still be subject to the

43 See id. § 2(1).
44 These offenses include the following: homicide, arson, serious offenses against persons and property, various explosives and firearms offenses, robbery and aggravated burglary using explosives, firearms, or offensive weapons, intimidation and blackmail, the use of petrol bombs, and membership in a proscribed organization. See Hogan & Walker, supra note 19, at 101-02.
46 See id. § 27(3).
47 The efficacy of using Diplock courts will be discussed infra Part I.C.1.f.
48 See generally Diplock Report, supra note 38.
49 “The main obstacle to dealing effectively with terrorist crime in the regular courts of justice is intimidation by terrorist organisations (sic) of those persons who would be able to give evidence for the prosecution if they dared.” Diplock Report, supra note 38, para. 7(a). See also Gardiner Report, supra note 25. The import of this conclusion is undermined by the lack of evidence and analysis to support even this more limited assertion.
influences of intimidation, or the fear of it. We have no evidence of this or of perversity in juries (since in the absence of jury trials it obviously cannot be available), but we were given details of 482 instances between 1st January 1972 and 31st August 1974 in which civilian witnesses to murder and other terrorist offences were either too afraid to make any statement at all, or, having made a statement implicating an individual, were so afraid that they refused in any circumstances to give evidence in court. It is reasonable to assume that juries would be equally open to intimidation. The Gardiner Report lamented the use of Diplock courts but, nevertheless, grudgingly recommended that their use continue.

b. Internment or Detention Without Charge or Trial

There are two powers of detention in Northern Ireland: 1) “detention upon arrest” arises out of the police powers to arrest; and 2) “deprivation of liberty as a result of an extra-judicial process,” or the various manifestations of internment which have been put in place over the years. The powers granted under the 1973 EPA included an alteration of the powers to detain persons without charge or trial. While the internment power existed under the 1922 Act, and had been renewed as recently as 1971, Lord Diplock recommended that the power be modified in 1972. The rationale behind Lord Diplock’s recommendation to alter the means of
Diplock recommended that the internment system then in use, which he described as "imprisonment at the arbitrary Diktat of the Executive Government," be replaced by a civilian system that would still lack judicial involvement, but would involve civilian authorities using a prescribed procedure. One of the principle problems with internment, as seen by Diplock, was the use of the military in civilian areas to seize and detain persons suspected of having involvement in terrorist activities. The 1973 EPA incorporated Diplock's recommendations concerning detention without charge or trial.

Under the system recommended by Lord Diplock and codified under the 1973 EPA, detention of an alleged terrorist without formal charge or trial would be permitted under section 10 of the Act pursuant to certain procedures set out in the Act. To remove the appearance of arbitrariness, the 1973 EPA required that a prima facie case of involvement in terrorism and an ongoing danger to the community be made out to the Secretary of State before an interim custody order could issue. However, the determination of whether a prima facie case had been met was based upon summaries provided by police or armed forces personnel and not provided to the suspect for challenge. If the prima facie case was found, an interim custody order, permitting detention for up to twenty-eight days could be issued by the Secretary of State. Anyone detained pursuant to an interim custody order was required to be released at the end of this twenty-eight day period, unless the case was referred to a Commissioner "for determination." The referral had to be made by the Chief Constable of the RUC. Once a referral was made, however, the suspect could be detained until a determination had been made.

While the time between referral and determination might be lengthy, the suspect was afforded certain rights in the

detention without trial had to do with the complete absence of review of the military or executive's decision to intern an individual. See NYC Bar Report, supra note 23, at 29-30.

54 Id. at 29.

55 In Diplock's view, this procedure would be fair to the individual, even if it did not meet the requirements of international law. He described this "extra-judicial detention" as "a result of an investigation of the facts which inculpate the detainee by an impartial person or tribunal by making use of a procedure which, however fair to him, is inappropriate to a court of law because it does not comply with Article 6 of the European Convention." Id. at 29-30 (internal citation omitted).


57 See GARDINER REPORT, supra note 25, at 38.

58 See id. at 39.

59 The Gardiner Commission noted: "At present many months may elapse between the referral and determination of the case." Id.
determination process. At least one week prior to the
determination hearing, a suspect had to be informed of the nature
of the acts he was alleged to have committed. The suspect was
also provided counsel at the government's expense. The standard
of proof applied by the "commissioners" hearing detention cases,
however, was not fixed. As the Gardiner commission noted:
"[m]ost commissioners apply a standard of proof to be equated
with the phrase 'a very high degree of probability.'" If such a
standard was reached, they were "satisfied." Commissioners had
to be satisfied that: a) the suspected terrorist had been concerned
in the commission or attempted commission of any act of
terrorism, or the direction, organization or training of persons for
the purpose of terrorism; and b) his detention was necessary for
the protection of the public.

Although counsel was provided to the accused, these
detention proceedings bore scant resemblance to judicial
proceedings. For instance, evidence was frequently taken outside
the presence of the "respondent" (i.e., the accused) and his
counsel. If the accused or his lawyer was permitted to be present,
the witness testified from behind a screen, often using voice
scramblers. The name of the witnesses, almost exclusively
members of Special Branch, were not provided to the defense,
further handicapping any ability for cross-examination.

\[c. \text{ Powers to Stop and Arrest}\]

Generally, in Northern Ireland, the power to detain upon
arrest is normally limited to forty-eight hours, pursuant to the
Magistrates’ Courts (Northern Ireland) Order 1981. However, this
Order does not apply to arrests made under the Prevention of
Terrorism Acts. In fact, under section 12 of the Prevention of
Terrorism Act, the suspect may be held for up to seven days
without seeing a magistrate. The 1973 EPA also provided

\[60\] See id.
\[61\] See id. at 126, at 39.
\[62\] Id. para. 126, at 39.
\[63\] See id. para. 132, at 40.
\[64\] See id. para. 130, at 40.
\[65\] See NYC Bar Report, supra note 23. As the NYC Bar Report noted:
The significant feature of PTA §12, as it operates in Northern Ireland, is that a
person arrested under it can, and frequently does, face up to seven days
detention during which he or she is subjected to a regularized, efficient, and
intensive police interrogation process. Indeed, that is the very purpose of the
type of detention authorized by it. As the Bennett Report noted, "persistent,
forceful questioning may be needed," and that is the announced policy of the
expanded police powers to limit the freedom of the citizens of Northern Ireland in a manner which falls short of the indefinite detention without charge or trial outlined above. The Act permitted any member of the armed forces or the RUC to stop and question any individuals to ascertain their identity, their movements, or to inquire as to their knowledge concerning terrorist activity. Failure to stop and provide accurate information was itself a substantive offense. Members of the Armed Forces were granted permission to arrest without warrant and detain any individual suspected of involvement in, or planning, a terrorist offense. This same section of the Act permitted members of the Armed Forces to enter and search any place where they suspected a person involved in a terrorist offense could be found. Members of the RUC were also permitted to arrest suspects without warrant.

RUC “to arrest every terrorist suspect, even if caught in the act of committing a specific offence, under their powers either under section 11 of the 1978 Act (now repealed) or section 12 of the 1976 Act. One clear advantage to the police of doing so is to give them more time in which to carry out their investigation.”

Id. at 28-29.

66 See Northern Ireland (Emergency Provisions) Act, 1973, c. 53, § 16 (Eng.). In Northern Ireland, apart from the powers conferred by Emergency Powers, arrests normally must comply with various Acts and Orders in effect at the time, e.g., The Police and Criminal Evidence (Northern Ireland) Order 1989, and article 131 of The Magistrates’ Courts (Northern Ireland) Order 1981. Under the 1989 Order, a constable may arrest a person only with a warrant unless there is reasonable cause to suspect the person has committed, is committing or is about to commit “an arrestable offense” which is one punishable by imprisonment for five years or more. See Police and Criminal Evidence (Northern Ireland) Order, (1989) SI 1989/1341 (N.I. 12). Under the 1981 Order:

Where a person arrested without warrant is not, within twenty-four hours of his arrest, released from custody the member of the Royal Ulster Constabulary in charge of the police station where such person is in custody shall bring him or have him brought before a magistrates' court as soon as practicable thereafter but in any event not later than forty-eight hours after his arrest.


68 See Northern Ireland (Emergency Provisions) Act, 1973, c. 53, § 12 (Eng.). The detention by military authorities was only authorized for four hours. See id. After that period, the suspect would have to be handed over to civilian law enforcement authorities. See id.

69 See id.

70 See id. §§ 10, 11. Detention by the RUC was limited to seventy-two hours, after which the suspect was to be released or brought before a judicial officer. See id.
d. Admissibility of the Accused's Statements

Section 6 of the 1973 EPA expanded the conditions under which an accused's statements might be introduced into evidence against him. The common law traditionally excluded all out of court statements which were "the result of an inducement, a threat or... oppression,"71 amounting to a ban upon any involuntary statement.72 The 1973 EPA, in a significant divergence from the common law, limited suppression to situations where the defendant had been subjected to torture, or inhumane and degrading treatment.73 This means that involuntary statements were admissible, even when the product of physical maltreatment, so long as the maltreatment did not amount to torture, inhumane or degrading treatment.

e. Search and Seizure Provisions

Under the same provisions granting the RUC the power to arrest without warrant, they were also given the authority to conduct warrantless searches of premises or other places.74 Section 11 of the 1973 EPA permits members of the RUC to seize any

73 See Northern Ireland (Emergency Provisions) Act, 1973, c. 53, § 6(2) (Eng.). The section states:

If, in any such proceedings where the prosecution proposes to give in evidence a statement made by the accused, prima facie evidence is adduced that the accused was subjected to torture or to inhuman or degrading treatment in order to induce him to make the statement, the court shall, unless the prosecution satisfies them that the statement was not so obtained, exclude the statement or, if it has been received in evidence, shall either continue the trial disregarding the statement or direct that the trial shall be restarted before a differently constituted court (before whom the statement in question shall be inadmissible).

Id.
74 See id. §§ 13, 15. See also GARDINER REPORT, supra note 25, at 27-28:

[A] constable, with the authorisation of a police officer not below the rank of Chief Inspector, and a member of the armed forces on duty, with the authorisation of a commissioned officer, may enter any dwellinghouse in order to search for unlawful munitions or when it is believed that a person is unlawfully detained in such circumstances that his life is in danger. For such purpose and in such circumstances he may enter any other premises or place without authorisation. He may stop and search anybody in a public place for munitions, and also may search anybody suspected of unlawfully carrying munitions who is not in a public place.

Id.
property or other item suspected of having been used, or that is intended for use in any scheduled offense. The powers of the police and the armed forces to enter the homes of any citizen of Northern Ireland were expanded even greater under section 17 of the 1973 EPA. This provision permitted the Armed Forces or the RUC to enter any premises or other place “for the preservation of the peace.”

f. Additional Alterations in Criminal Procedures & Evidentiary Rights

The 1973 EPA also altered other aspects of the criminal process used in prosecuting scheduled offenses. One such change was that bail was limited to that granted by “a judge of the High court acting in that capacity.” Section 5 of the 1973 EPA permitted the prosecution to introduce statements of non-testifying witnesses if they were made and signed in the presence of a constable (i.e., police officer). Section 7 of the 1973 EPA created a rebuttable presumption that an accused person had knowing possession of a certain “proscribed article,” including explosive, firearm, or ammunition. This last section placed the burden of disproving knowing possession upon the defendant.


Additional Emergency Provisions were enacted in 1978, 1987, 1991, and 1996. Some of the significant changes in the

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75 Id. § 17(1)(a). This same section also permits, with the approval of the Secretary of State, any such person to take possession of land or other property, to detain, destroy, or move property. Id. § 17(2)(a), (c). Use of force to enter and move is also authorized. See GARDINER REPORT, supra note 25, at 28.

76 Northern Ireland (Emergency Provisions) Act, 1973, c. 53, § 3(1) (Eng.). Under these provisions, a High Court Judge must be convinced that a defendant would adhere to certain conditions (e.g., make appearances, not interfere with witnesses, not commit offenses on bail) before release could be ordered. Id. § 3(2)(a)-(c). No bail was permitted on appeal. See id. § 3(1). Section 3(5) of the 1973 EPA specifically exempts serving "members of any of Her Majesty's regular naval, military or air forces" from application of these bail provisions. Id. § 3(5). See also GARDINER REPORT, supra note 25, at 12.


78 Id. § 7(3).

79 Each Emergency Provisions Act succeeds the former, so the provisions of the earlier Acts were either renewed, superceded, or altered as the language of the newer Act will dictated. The same is true for successive Prevention of Terrorism Acts. For the purposes of this Article, we are concerned with the various powers that have been exercised, their effects on combating terrorism, and any collateral or unintended effects they may have.
Emergency Powers included the 1987 EPA's granting of the explicit right to have a friend or relative informed of a person's detention when requested.\(^8\) This request must be complied with as soon as is practicable, unless to do so is reasonably likely to interfere with gathering evidence of a terrorist offense. Section 15 of the 1987 EPA granted a right to have a detained person consult with a solicitor privately. The request for access to a solicitor must be permitted as soon as is practicable, except where a delay has been expressly authorized.\(^1\) Delay in complying with the request can be authorized where compliance will lead to interference with gathering information about the commission of acts of terrorism or alerting any person so that it will be more difficult to prevent terrorism or apprehend a person engaged in terrorism.\(^2\)

The 1987 EPA also significantly altered those powers of arrest and detention which had been granted under the 1978 EPA. Under section 11 of the 1978 EPA, the RUC could arrest without a warrant anyone "[suspected] of being a terrorist." Under section 13 of that Act, warrantless arrest and detention for seventy-two hours was permitted, based upon mere suspicion that either a scheduled or non-scheduled offense had been committed. When the 1987 EPA went into effect, the arrest power under section 11 was abolished since it did not comply with Article 5(c) of the European Convention for the Protection of Human Rights and
Fundamental Freedoms which required an arrest be “effected for the purpose of bringing [the arrestee] before the competent legal authority on reasonable suspicion of having committed an offence.”


In addition to “Emergency Powers” legislation, a series of “Temporary Provisions” to combat terror have been employed in Northern Ireland in the form the Prevention of Terrorism Acts. On November 29, 1974, the Prevention of Terrorism (Temporary Provisions) Act 1974 (“1974 PTA”) came into force. The 1974 PTA granted the RUC, with the agreement of the Secretary of State, the power to detain for up to seven days any person reasonably suspected of being a terrorist. The RUC was granted the power to arrest suspected terrorists and detain them for forty-eight hours on their own authority, with the possibility of an extension of detention for a further period of up to five days authorized by the Secretary of State.

83 Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol No. 11, Nov. 4, 1950, art. 5(1)(c), Europ. T.S. No. 5. See also NYC Bar Report, supra note 23, at 25. While section 13 is still in effect, it is now limited to those times when there is a reasonable suspicion that a scheduled or non-scheduled offense under the Act has been committed. The non-scheduled offenses under the Act are the following: failure to stop and answer questions, section 18(2); interference with the power to close roads, section 19(4); failing to stop a vessel, vehicle, or aircraft when required to do so, section 20(7); failure to disperse when required to do so, section 24(2); failure to comply with regulations established by the Secretary of State for preserving peace and order, section 27(2). Id.

84 Unlike the Emergency Powers legislation, the Prevention of Terrorism Acts apply throughout the United Kingdom.

85 Prevention of Terrorism (Temporary Provisions) Act, 1974, c. 56 (Eng.). This Act was enacted eight days after the notorious and atrocious Birmingham bombings in which 21 people died and 180 were wounded. This legislation was passed during a time of highly agitated passions throughout Great Britain. It is important to note that the six people convicted of the Birmingham bombing spree were shown to be innocent only after spending approximately two decades in prison. See UK: A Long Line of Miscarriages of Justice, BBC News, Dec. 17, 1998, available at http://news.bbc.co.uk/1/hi/uk/237296.stm.

86 See Prevention of Terrorism (Temporary Provisions) Act, 1974, c. 56, § 7 (Eng.); see also Gardiner Report, supra note 25, at 30. Only one extension was permitted to be granted by the Secretary of State under the 1974 PTA. It should be noted that this power was frequently delegated by the Secretary of State to lesser officials. This delegation of power was controversial enough to warrant a recommendation from Lord Gardiner that the Secretary alone be empowered to grant approval for such detention. See id.

The 1974 PTA also granted the government power to exclude from Great Britain, Northern Ireland, or the United Kingdom generally, any person involved in terrorism. The 1974 Act was replaced on March 25, 1976 by the Prevention of Terrorism (Temporary Provisions) Act 1976 (hereafter 1976 PTA). In addition to the powers granted under the 1974 PTA, the 1976 PTA also made it an offense to contribute or solicit contributions towards acts of terrorism or to withhold information relating to acts of terrorism or persons committing them. The 1984 PTA re-enacted the provisions of the 1976 Act, with some alterations, including one provision granting the Secretary of State the authority to extend an initial forty-eight hour detention by a period, or periods, not exceeding five days.

The 1989 PTA, pursuant to the recommendation of Lord Colville, required regular reviews of the accused and his detention during the first forty-eight hours of that detention. Finally, in 2000, the United Kingdom enacted the Terrorism Act 2000. This permanent legislation replaced the 1989 PTA and the 1996 EPA and is applied UK wide. The Terrorism Act 2000 changed the manner in which extensions of detention could be granted. Whereas under previous legislation, extensions of detention for scheduled offenses could be granted within the ministerial branch of government, now such extensions can only be approved by a judicial officer.

C. The Impact of Anti-Terror Legislation in Northern Ireland

Legislation in Northern Ireland placed in the hands of law...
enforcement and military personnel a host of weapons to combat political violence. The specific powers provided have been detailed above. Under any measure these powers fundamentally altered the rights and obligations of the civilian population of Northern Ireland in their interactions with the police and military. It is important to ascertain what balance was struck in enacting these provisions: i.e., what was gained and what was lost? If terrorism was thwarted and the civilian population merely inconvenienced, one would be hard pressed to argue against the efficacy of these initiatives. If, on the other hand, civil liberties were fundamentally altered while terrorism was not reduced, such legislation would have to be judged as a failure. In this section we will detail the results of the anti-terror efforts employed in Northern Ireland. Through an examination of official government statistics and publications of scholars and human rights groups in the region, supplemented by extensive interviews with a variety of individuals with intimate knowledge of the emergency laws and their application in Northern Ireland, we conclude that most of these provisions were ineffective or counterproductive in the effort to reduce terrorism. Moreover, these initiatives were counterproductive because of their deleterious effect on the civil liberties of the populace.

1. The Use of the Security Laws and the Impact Upon Civil Liberties

Security legislation had a dramatic effect on the civil liberties of citizens in Northern Ireland. This fact is particularly true within certain communities. Through the use of data compiled by human rights groups, and the government’s own statistics, it is evident that emergency powers were used to target particular communities, often without regard for individual culpability. These laws were more frequently used to combat normal street crime than to stymie terrorist offenses. And they alienated broad swaths of the Northern Irish community, thereby providing assistance to those paramilitary groups attempting to keep their activities from law enforcement and to attract new recruits. In the final analysis, many of the most heralded powers assumed by the government in Northern Ireland contributed to a climate which caused more political violence than it thwarted.

96 The impact has been most pronounced in Nationalist communities but, in the late 1970s, certain Loyalist communities also began to be targeted. See Interview with Kieran McEvoy, Belfast, Northern Ireland (Nov. 19, 1998) [hereinafter McEvoy Interview].
a. Targeted Internment

In a groundbreaking report issued in 1995, the Committee on the Administration of Justice (CAJ) detailed the misuse of the so-called “emergency laws,” and called for their repeal.\textsuperscript{77} The CAJ report noted the history of targeting particular communities within Northern Ireland with emergency laws. For instance, from 1922 through 1966 the only proscribed organizations (those banned by the emergency laws) were all Nationalist.\textsuperscript{98} Lord Gardiner recognized that proscription was still unevenly distributed when he examined the effectiveness of emergency legislation in 1975.

Since the IRA is proscribed both in Great Britain and the Republic of Ireland, it is appropriate and indeed necessary that the IRA should remain proscribed in Northern Ireland. But proscription is distinctly uneven in its application in Northern Ireland. There are terrorist organisations which are not proscribed, but whose members perpetrate intimidation, violence and sectarian murder.\textsuperscript{99}

Internment was tied directly to proscription because the government wanted to intern members of the same organizations it had banned. Internment, therefore, was similarly used to target the Catholic Nationalist community. Internment was reintroduced in Northern Ireland on August 9, 1971, and continued to be used until December 5, 1975.\textsuperscript{100} Of the 1,981 people detained without charge or trial during this period, 1,874 were Catholic Nationalists; only 107 of those interned were Protestant Loyalists.\textsuperscript{101}

While British authorities have long used internment in an attempt to stop political violence in Northern Ireland, it is almost universally recognized that this policy was an utter failure.\textsuperscript{102}

The word “internment” is of special significance in Northern Ireland given its infamous implementation in August 1971.

\textsuperscript{77} See generally CAJ, No Emergency, supra note 29.
\textsuperscript{98} Id. at 7.
\textsuperscript{99} Gardiner Report, supra note 25, at 24-25.
\textsuperscript{100} See John McGuffin, Internment (1973); see also Seamas O. Tuathail, They Came in the Morning: Internment, Monday, August 9, 1971: Torture and Brutality in the North (Dublin: Sinn Féin (Official), 1972).
\textsuperscript{101} CAIN Web Service, Internment—Summary of Main Events, at http://cain.ulst.ac.uk/events/intern/sum.htm (last visited Mar. 12, 2003). The first Loyalist interned was not taken into custody until February 2, 1973. Id.
\textsuperscript{102} Some form of internment has been used by the British in attempts to suppress Irish Nationalism for centuries. Detention without trial was used to suppress the United Irishmen in the 1790s. See CAJ, No Emergency, supra note 29, at 4. Throughout the nineteenth century, on four separate occasions, laws suspending the right to habeas corpus and permitting detention without charge were used against Irish Nationalists. Id.
under the Special Powers Act and the disastrous aftermath. Owing to poor intelligence the army detained many people in 1971 who had played no part in the violence or para-military activity. The police subjected detainees to interrogation often comprising the use of the “five techniques,” later branded as “torture” and “inhuman and degrading treatment” by the European Commission on Human Rights and Court respectively. Also all those initially detained were members of the nationalist community. For these reasons internment was resented as oppressive and discriminatory. It proved counterproductive both in the short term—23 people were killed in rioting and shooting during the 48 hours immediately following its introduction—and the long term as it alienated many and acted as a recruiting agent for paramilitary organisations both within the detention centres and without.103

Some who examined the system of internment, like Lord Diplock, recognized the negative consequences of the policy, yet thought that fine-tuning the process might mitigate its harm.104 Those in the British Army, more closely involved in the enforcement of internment, however, understood that this policy had a far more insidious and lasting effect.

The British army, as the instrument of internment has become the object of Catholic animosity. Since that day [when internment was reintroduced] the street battles, countless explosions, migrations from mixed areas and cold-blooded killings have done little to reassure us that internment would, by the removal of the gunner, provide a return to a semblance of law and order, a basis for a political solution to Ulster’s problems. Ironically, it appears to have produced the opposite effect. . . . It has, in fact, increased terrorist activity, perhaps boosted IRA recruitment, polarised further the Catholic and Protestant communities and reduced the ranks of the much needed Catholic moderates. In a worsening situation it is difficult to imagine a solution.105

103 Id. at 71.
104 To Lord Diplock, internment was imprisonment via executive fiat, whereas detention without charge was viewed more benignly as the “result of an investigation of the facts which inculpate the detainee by an impartial person or tribunal by making use of a procedure which, however fair to him, is inappropriate to a court of law because it does not comply with Article 6 of the European Convention.” NYC Bar Report, supra note 23, at 30 (internal citation omitted). Diplock was particularly disturbed by the use of the military to intern civilians. As previously detailed, the government adopted Lord Diplock’s recommendations to reform internment. The power to intern was moved from the military to civilian authorities, notice of the nature of the allegations was given to the accused, family members were informed of the detention, and counsel was provided at government expense.

105 DESMOND HAMILL, PIG IN THE MIDDLE: THE ARMY IN NORTHERN IRELAND (1985), quoted in CAIN Web Service, Remarks by Serving British Marines Officer
Most commentators also recognized internment as a debacle that was totally ineffective at reducing the levels of political violence.

While internment in itself provided limited, if any, security benefits the social and political reaction which internment created far outweighed this. As a result violence increased for the rest of the year and the SDLP, the only major Catholic political party in Northern Ireland, refused to become involved in political talks while internment continued. It is clear, however, that the main winners from the introduction of internment were the Provisional IRA . . . .

The use of internment effectively alienated a sizeable minority of the population of Northern Ireland and made impossible any cooperation with authorities. Many of those interned had no previous involvement in paramilitary or terrorist activities.

The army quite often simply picked up the wrong people, a son for a father, the wrong “man with a beard living at no. 47” and so on. But by the time they were released, a number had suffered quite brutal treatment, as had those still detained . . . .

Internees were beaten with batons, kicked and forced to run the gauntlet between lines of club-wielding soldiers.

In interviews conducted for this article, the brutal internment of family members was frequently identified as critical to the decision to join outlawed paramilitary organizations.

Statistical evidence bears out the assertion that internment failed to reduce the level of violence in Northern Ireland. In 1972, the first full year after internment was reintroduced (August 1971), Northern Ireland experienced its most violent year. In 1972, there were 1,382 explosions and 10,628 shootings in Northern Ireland.

The use of internment was not intended to assist the IRA in their recruitment effectiveness, although it clearly had that effect. Another unintended effect of internment was that it brought into disrepute the entire system of justice in Northern Ireland. Because the judicial process and the protections it provides were


108 See McVeigh Interview, supra note 21. See also Brian Feeney, Sinn Féin: A Hundred Turbulent Years 60 (2002) (“Internment had produced intense rage and resentment among those affected, prisoners and extended families alike. It had brought together men from all parts of the country and bonded them, even those innocent of any involvement in political conspiracy, into an organic unit.”).

109 Gardiner Report, supra note 25, at 61. The level of violence began to drop in the next year with the advent of a new constitution and power sharing government.
unavailable to internees, who were overwhelmingly chosen from the minority community, the judicial process itself became tainted and compromised. This fact was acknowledged even by those who were strongly supportive of the government's actions. While defending the results of the internment procedure as "just... in the majority of cases," Lord Gardiner could not help but recognize how that process brought disrepute upon "British justice."

Although the quasi-judicial system of Commissioners' hearings and reviews operates with a scrupulous regard for the principles of justice, and produces just decisions in the majority of cases, it is not perceived as being just by members of the general public. Delays, the admission of hearsay evidence, the inability to cross-examine witnesses and the lowered standard of proof have provided much material for propaganda on the grounds that this is not "British justice," and the high regard for the law which is a feature of civilised societies is being used against authority rather than in support of it.¹¹⁰

b. Misuse of Arrest and Interrogation Powers

The use of emergency powers to arrest, detain and interrogate suspects has also been used against persons with no prior involvement in terrorist activity. In fact, the government's own statistics point out that the great majority of persons detained each year under emergency powers were never charged with any offense. Of those who were charged, the vast majority were not charged with offenses under the Prevention of Terrorism Acts. For example, between November 29, 1974 and February 18, 2001, a total of 22,282 persons were detained under the Prevention of Terrorism Acts.¹¹¹ Of those arrested under the Acts during this period, little more than 1 percent (262 persons) were charged with an offense under the Acts.¹¹² An additional 84 persons who were

¹¹⁰ Id. at 43.
¹¹² Id. at tbl. 1; see also id. tbl. 3. The total number of persons detained under the Acts is ascertained by totaling the detention statistics for each period listed in Table 1. The total number of these persons initially detained under the Prevention of Terrorism Acts who were eventually charged with offenses under the Acts is identified in the second note following Table 3. This total of 22,282 detained under the PTA provides only a partial picture of the extent to which the population of Northern Ireland was subjected to arrest. Under the EPA between 1975 and 1987, the Armed forces arrested 30,492 persons. Between 1978 and 1987, the RUC arrested 14,213 people under the EPA. Northern
not initially arrested under the Acts were subsequently charged with offenses under the Acts during this period. There were a total of 360 charges made under the Acts. Of these charges, 39 percent (140 charges) were for withholding information.\textsuperscript{113} An additional 96 charges were for contributing resources to a proscribed organization. Only 110 charges, or 30.5 percent of all charges brought under the PTA during the nearly 27 years of its operation, were for directly contributing to acts of terrorism.\textsuperscript{114} Given the level of terror-related violence in the province during this period, enforcement of the PTA can only be viewed as a failure.\textsuperscript{115}

The emergency powers were far more frequently used to combat offenses not listed under the Acts, i.e., “normal” street crime.\textsuperscript{116} Of the 22,282 persons detained under the PTA, 5,801 persons, or 26 percent of those who had originally been detained under the Acts, were charged with some offense other than those listed under the Acts.\textsuperscript{117} Seventy-three percent of the persons who were detained under the Acts during this more than twenty-six years of operation were charged under the Acts.\textsuperscript{118} Not only were these charges not for terror-related violence, but many of them were for offenses that had been created to counter other criminal conduct.


\textsuperscript{114} Id. The total of 110 charges is obtained by totaling those charges under section 11(1) of the 1976 Act, section 11(1) of the 1984 Act, and section 18 of the 1989 Act. See id.


\textsuperscript{116} This fact was frequently identified by academics who have studied the use of emergency powers in Northern Ireland. Kieran McEvoy, of Queens University, Belfast, stated that it was quite common for security forces to use emergency legislation to arrest individuals suspected of having committed normal street crime. The expanded powers of arrest and interrogation make the job of solving crime much easier. McEvoy noted that these powers initially had been used against the Catholic Nationalist population but have been used with increasing frequency to arrest Protestant Loyalists suspected of crimes such as burglary. McEvoy Interview, supra note 96.

\textsuperscript{117} Northern Ireland Office (NIO), Research & Statistical Bulletin, Statistics on the Operation of the Prevention of Terrorism Acts, Northern Ireland 2000. See supra note 111. A total of 10,852 charges were filed against 6,063 persons who were detained under the Acts. This number includes the 262 charged under the PTA. While there may be some overlap, that number would be statistically insignificant since only one percent of the total were charged under the PTA. See id.
year period were never charged with any offense.

The arrest, detention and interrogation powers were frequently used to convince innocent parties to act as informants against other members of their community. Interviews with solicitors in Northern Ireland confirmed this tactical use of the emergency powers. These interrogation sessions were also frequently used to mistreat the detainees and coerce the innocent and guilty alike into making incriminating statements.

A group of solicitors, stating to Amnesty International that between them they “probably do over 90% of all the cases which are giving rise to the present difficulties, and... come from all parts of Northern Ireland”’ approached the Secretary of State for Northern Ireland after a meeting held early in November. They stated their conviction that “ill-treatment of suspects by police officers, with the object of obtaining confessions, is now common practice,” and mentioned the denial of access of solicitors to their clients as one of three factors “of extreme importance.”

The mistreatment of suspects while in custody under emergency powers included use of methods that have been condemned by courts worldwide. These include intensive interrogations for extended periods, sleep deprivation, hooding of suspects, the use of white noise, forcing suspects to stand or kneel in uncomfortable positions for extended periods of time, threats and beatings of suspects, and standing on the backs of suspects’ legs, among others.

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118 The systematic use of informants peaked between 1981 and 1985 with the use of “supergrasses”—informants given large inducements to testify against alleged co-conspirators. See CAJ, NO EMERGENCY, supra note 29, at 67.

119 Solicitor Barra McGrory, described a typical scenario in which the RUC would conduct surveillance upon the friends, neighbors, or relatives of known figures in the Republican movement. The RUC would attempt to document embarrassing information, such as proof of an extra-marital affair, concerning these otherwise innocent persons. The RUC would then arrest the party under the special powers and blackmail them into serving as an informant against suspected Republican leaders. Interview with Barra McGrory, Belfast, Northern Ireland (Dec. 8, 1998) [hereinafter McGrory Interview].


121 See 1978 Amnesty International Report, supra note 120. The Amnesty Mission examined twenty-six cases of persons in detention for whom medical records were
Even government commissions, while attempting to minimize the allegations, have acknowledged that the government adopted abusive interrogations practices as a policy.

We acknowledge the need for firm and decisive action on the part of security forces; but violence has in the past provoked a violent response. The adoption of methods of interrogation “in depth,” which involved forms of ill-treatment that are described in the Compton Report (Cmnd 4823), did not last for long. Following the Report of the Parker Committee in 1972 (Cmnd 4901) these methods were declared unlawful and were stopped by the British Government; but the resentment caused was intense, widespread and persistent.\(^\text{1}\)

The fact that so many detainees were being mistreated during their interrogations casts doubt upon the charges brought against even the one percent of those detainees charged with terrorist-related offenses. Obviously, mistreatment during interrogation raises the probability that a detainee will falsely confess to a crime he did not commit. There is ample evidence that when these tactics were used against terror suspects, false convictions resulted.\(^\text{2}\)

While the unconscionable methods used to coerce suspects into confessing were not specifically authorized under the emergency powers legislation, it is widely accepted in Northern Ireland that investigators felt they had been given a “green light” to fight terrorism with any means they determined to be available. Amnesty was looking at medical records to see if they could confirm allegations of widespread abuse during interrogations:

From the medical reports available, there were signs in all cases except one. The most frequent physical signs were bruises, which were found in 17 of the 26 cases; then abrasions (8), tenderness of joints and muscles (7) and swelling of soft tissues and tenderness of palpation of abdomen (4). Four persons had a certain traumatic perforation of the eardrum and three of the cases had bone fracture. The signs of mental disturbances were most frequently anxiety (17) and states of nervous agitation (5). In two cases, there were signs of severe depression. In a number of cases, there was no information regarding the mental state of the patient in the medical report.

Id.\(^\text{2}\)

GARDINER REPORT, supra note 25, at 7.

\(^{122}\) Some of the most notorious terrorist incidents in recent British history illustrate this point. The following were released after evidence proving their innocence: Danny McNamee’s conviction for the 1982 Hyde Park bombing was overturned and he was freed after fourteen years in prison; the Guildford Four—Gerard Conlon, Paul Hill, Patrick Armstrong, and Carole Richardson—were freed after nearly two decades in prison for crimes they did not commit; the Birmingham Six—Paddy Joe Hill, Hugh Callaghan, Richard McIlkenny, Gerry Hunter, Billy Power, and Johnny Walker—were convicted of murdering twenty-two people in 1974 and were freed after more than sixteen years when it was proven that evidence had been fabricated in their cases. UK: A Long Line of Miscarriages of Justices, BBC NEWS, Dec. 17, 1998, available at http://news.bbc.co.uk/1/hi/uk/237296.stm.
Such comments were uniformly repeatedly in interviews conducted by the authors in researching this Article. It was believed that the continuing “state of emergency,” the frequently confirmed delegation of extraordinary powers to the RUC, and the failure of the courts and political leaders to take a forceful stand against police misconduct during interrogations, sent a strong signal to investigators that even unlawful conduct was appropriate in combating terrorism. This message has been particularly reinforced by the Independent Commission for Police Complaints (ICPC), which was created in 1987 to monitor complaints against the RUC. During the years 1993-96, there were 1,118 allegations of misconduct by RUC officers made by people arrested under the Acts. Three hundred and eighty-four of these allegations were of assaults occurring during police interrogations. There were an additional sixty-five assaults alleged to have occurred before the suspects arrived at the police station. Yet, the ICPC did not sustain a single one of these allegations. The failure of the ICPC to sustain any of these complaints is no doubt influenced by the fact that while the ICPC reviews complaints

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124 Interview with Professor Colm Campbell, Galway, Ireland (June 1999) [hereinafter Campbell Interview].
125 Id. See also Interview with Paul Mageean, Belfast, Northern Ireland (June 14, 1999) [hereinafter Mageean Interview]; McGrory Interview, supra note 119; Interview with Peter Madden, Belfast, Northern Ireland (Dec. 8, 1998) [hereinafter Madden Interview].
128 See id. Brice Dickson, the current Chief Commissioner of the Northern Ireland Human Rights Commission, describes this as “a fact difficult to believe.” Id.
against the RUC, “the complaints themselves are investigated by RUC officers.”

c. Interference with the Right of Access to Counsel

Threats against detainees—and maltreatment—have occurred with relative impunity in Northern Ireland because of the provisions of law outlined above which permit interrogations to proceed outside the presence of counsel, even where the detainee specifically requests access to a solicitor. In fact, there has been systematic denial of the right to counsel, even when the law specifically required the police to provide access to a solicitor upon request. Until the 1987 EPA came into effect, the EPA and PTA did not alter the requirement under law that a suspect be granted the right to speak with a solicitor upon request. This right was flagrantly and uniformly violated for many years. As even the Bennett Report made clear, “[s]olicitors are not in practice admitted to see terrorist suspects before they are charged.”

Even after the law was changed under the 1987 EPA, explicitly granting the right to counsel for persons detained under the Acts, albeit with some specific limitations, credible evidence indicates that the police have systematically attempted to interfere with the right to counsel. This was done in many ways, from delaying or denying the request to see a solicitor, to outright attempts at intimidating solicitors who represent persons charged under the Acts.


130 Preamble, 1964 Judges Rules. Although the Judges’ Rules themselves did not have the force of law, judicial decisions have given these provisions that authority. See, e.g., R. v. Lemsatef [1977] 2 All E.R. 835, 840 (“This court wishes to stress that it is not a good reason for refusing to allow a suspect, under arrest or detention, to see his solicitor, that he has not yet made any oral or written admission.”). See also 1978 Amnesty International Report, supra note 120.

131 BENNET REPORT, supra note 81, para. 123. A defendant is usually charged after “confessing.” Id. Numerous studies have shown that most confessions in Northern Ireland are obtained during the first forty-eight hours of detention. See HOGAN & WALKER, supra note 19, at 54, citing KEITH BOYLE ET AL., TEN YEARS ON IN NORTHERN IRELAND: THE LEGAL CONTROL OF POLITICAL VIOLENCE 42-47 (1980). See also JELLICOE REPORT, supra note 91, at 59.

132 The police may delay the request to see a solicitor for no more than forty-eight hours from the initial point of the detention and may do so only if this delay is authorized by an officer of at least the rank of a superintendent. See Jackson, supra note 67, at 70.

133 Because the EPA permits a delay of forty-eight hours before access to a solicitor must be granted, it is easy for the police to use the arrest and interrogation power to
Despite the legal requirements outlined above which entitle persons arrested under the PTA and EPA to access to counsel, this right was routinely denied until the mid-1990s. In fact, in every year from 1987 to 1991 in a majority of cases where a solicitor was requested, that request was denied. In 1992, this began to change and government statistics indicate that this right was granted in most instances. However, solicitors are granted access only once every forty-eight hours and cannot remain present during questioning.

There have also been persistent and credible allegations that the RUC has threatened solicitors representing persons charged with terror related offenses under the Acts:

The legal setting in Northern Ireland is one that fosters intimidation of defense lawyers. Together, the Emergency Powers Act and the Prevention of Terrorism Act operate to encourage the security forces to rely on custodial interrogation as the primary means of obtaining convictions. Practices and conditions within the detention centers facilitate this incentive. The overall approach the law establishes makes legal counsel more crucial and therefore more often subject to police hostility. Far from checking this hostility, the law encourages it, often in dangerous ways. Complaints procedures, which might provide a measure of redress, remain ineffectual, prompting the skepticism solicitors accord the complaints process and contributing to their tenuous position in the system itself.

The Lawyers Committee for Human Rights is not alone in reaching these conclusions. The U.N. Special Rapporteur on the Independence of Judges and Lawyers has repeatedly found that lawyers representing persons detained under the Acts are subject to harassment and intimidation:

harass individuals without them ever having access to counsel. Government statistics indicate that during 1996, 569 people were detained under the Acts. Of these, 521 were released in less than forty-eight hours. NIIS-PTA, 1996 Annual Statistics, supra note 126. On the surface, this might appear to be evidence that the police were merely doing their jobs in conducting an interview, ascertaining that the person had no involvement in crime and releasing them. However, it must be viewed in light of the provision which requires access to counsel be granted no later than forty-eight hours after detention has begun. These statistics merely provide evidence of a systematic effort to interrogate persons without having to grant them their right to counsel.


135 See McGrory Interview, supra note 119; Madden Interview, supra note 125. See also Jackson, supra note 67, at 70-72.

to intimidation, threats and violence. In a Report to the House of Representatives Subcommittee on International Relations and Human Rights, the Special Rapporteur detailed allegations of physical assaults committed by the RUC against lawyers representing suspected terrorists. The Special Rapporteur continued on to note the following:

The Special Rapporteur wishes to emphasize that he spoke to a large number of solicitors and barristers who have worked in terrorist related cases representing both Loyalist paramilitaries and Republican paramilitaries. All were able to provide testimony that corroborates the reports that the Special Rapporteur has been receiving for the past four years concerning the harassment and intimidation of defense solicitors. Many referred to the harassment and intimidation as an occupational hazard that they have come to expect and accept, noting that in the absence of audio-recording there is only hearsay evidence to prove the allegations, that is, the word of the client against that of the RUC officer. Therefore, most find it futile to file a complaint, particularly in lieu of the fact that any investigation will be carried out by the RUC itself and that they had no confidence in such investigation.

The intimidation of the defense lawyers often occurs during the interrogations of detainees. In haunting testimony just months before her own murder, Rosemary Nelson told the U.S. Congress how emergency powers enabled the RUC to repeatedly threaten to kill her.

I believe that one of the reasons that RUC officers have been able to indulge in such systematic abuse against me is that the conditions under which they interview clients detained under the emergency laws allow them to operate without sufficient scrutiny. My access to my clients can be deferred for periods of up to 48 hours. I am never allowed to be present while my clients are interviewed.

Solicitors reported to the authors of this article that their clients would be taunted during interrogations that the RUC

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139 Nelson Testimony, supra note 129.
would “pull a Finucane” on their solicitors. The reference was to Mr. Patrick Finucane, a solicitor murdered in front of his family while at home in Northern Ireland on February 12, 1989.

Numerous organizations that have examined the facts of Mr. Finucane’s murder have concluded that credible evidence exists indicating collusion between the murderers and members of the RUC and the British Army. These organizations include the United Nations, through the Special Rapporteur on the Independence of Judges and Lawyers, and the U.S. House of Representatives, as well as Amnesty International, British Irish Rights Watch, the Committee on the Administration of Justice, Human Rights Watch, the International Commission of Jurists, the International Federation of Human Rights, the Irish Council for Civil Liberties, the Lawyers Committee for Human Rights and the Scottish Human Rights Centre.

Equally or more disturbing than this evidence of collusion by security forces in Mr. Finucane’s murder, are the credible concerns raised about the Department of Public Prosecution’s (DPP) role in failing to bring the perpetrators of Mr. Finucane’s murder to justice. Both the U.N. Special Rapporteur and the Committee on the Administration of Justice (CAJ) have recently highlighted the DPP’s dismissal of valid charges against William Stobie, and Stobie’s subsequent murder under suspicious circumstances, as factors raising very troubling questions about what role was being played by the DPP in this case.

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140 See Madden Interview, supra note 125; McGrory Interview, supra note 119. Mr. Madden was the law partner of Mr. Finucane. The U.N. Special Rapporteur on the Independence of Judges and Lawyers has found that Mr. Finucane had received a series of death threats from the RUC; these threats were communicated to Mr. Finucane through his clients. See Dato’ Param Cumaraswamy, Statement from UN Special Rapporteur, in JUST NEWS: BULLETIN OF THE COMMITTEE ON THE ADMINISTRATION OF JUSTICE 5 (Feb. 2002), available at http://www.caj.org.uk.

141 See LCHR, Human Rights and Legal Defense in Northern Ireland, supra note 120, at 42-62. This book describes the horrific murder of Patrick Finucane while he was at home eating dinner with his wife and three children, aged nine, thirteen, and seventeen. Two masked gunmen broke down the home’s front door and killed Mr. Finucane as he tried to protect his family. He was shot fourteen times; approximately twelve shots were to the head and neck at close range while his family watched in horror. See id.

142 The Ulster Freedom Fighters (“UFF”) claimed responsibility for Mr. Finucane’s murder. See id. at 52-58.


144 See Press Release, United Nations, U.N. Expert on Independence of Judiciary Concerned About Killing of Key Witness in Northern Ireland Murder Inquiry (Dec. 14, 2001), at http://www.unhchr.ch/huricane/huricane.nsf/view01/68989DD0A8998E201256B220050AB61?opendocument (“It now appears that those responsible for the murder of William Stobie may have connections with the [sic] Patrick Finucane’s murder and the motive for the present murder may be to prevent him from assisting any eventual
Strong evidence also exists of the collusion of the Northern Ireland security forces in the death of another solicitor, Ms. Rosemary Nelson. Ms. Nelson was blown up by a car bomb in 1999 within yards of the school where her daughter was playing. CAJ has repeatedly called for investigations into the failure of the RUC to act upon threats made against Ms. Nelson months before her death.\textsuperscript{145} CAJ, itself, had passed on to the RUC credible information about threats against Ms. Nelson some seven months before she was killed.\textsuperscript{146}

The murders of Mr. Finucane and Ms. Nelson, both solicitors who represented Republicans charged with offenses under the Acts, occurred under circumstances which have led many to believe that some segment of the RUC was at least complicit in their deaths.\textsuperscript{147} Solicitor Peter Madden, partner of Mr. Finucane, confirmed for this article that threats purportedly emanating from the RUC had been made against the lives of Mr. Madden and Mr. Finucane in the weeks before Mr. Finucane's murder.\textsuperscript{148} Ms. Nelson reported similar threats against her life in testimony she gave before the U.S. Congress just weeks before her murder.\textsuperscript{149} It is not uncommon for solicitors who represent suspected terrorists in Northern Ireland to be threatened in this manner.\textsuperscript{150}

The system of emergency laws and the belief that anything was justifiable if it was done to prevent terrorism lie at the root of the official misconduct committed against detainees and lawyers. It must be remembered that only slightly more than one percent of all persons detained under the Acts between November 29, 1974 and February 18, 2001 were actually charged with an offense under the Acts.\textsuperscript{151} Nearly ninety-nine percent of all persons subjected to these conditions were never charged with an offense under the Acts, and seventy-two percent of these persons were never

\begin{itemize}
\item See also Cumaraswamy, \textit{supra} note 140, at 5 ("The subsequent collapse of the prosecution of William Stobie, and his murder on December 13, 2001 add more fuel to the collusion suspicion."); \textit{see also} Paul Mageean, \textit{The Role of the DPP in JUST NEWS: BULLETIN OF THE COMMITTEE ON THE ADMINISTRATION OF JUSTICE} 7 (Feb. 2002), available at http://www.caj.org.uk.
\item See id.
\item See Joint NGO Statement, \textit{supra} note 143, at 7.
\item See Madden Interview, \textit{supra} note 125.
\item See Nelson Testimony, \textit{supra} note 129. Ms. Nelson's murder occurred while the authors were in Ireland investigating this Article. The authors were to have interviewed Ms. Nelson the week after she was murdered.
\item See NOI-PTA, Annual Statistics for 2000, \textit{supra} note 111, at tbl. 1.
\end{itemize}
charged with any offense at all. These numbers indicate a systemic failure—the targeting of a community by casting a very broad net—without regard for who will be snared in it.

The harassment, intimidation and physical attacks on solicitors must be viewed in light of their relation to the isolation of persons arrested under the Acts from their legal counsel. It is this isolation which enables investigators to obtain “confessions” in many of these cases. When lengthy detentions without access to counsel are combined with recent changes in Northern Irish law permitting statements to be admitted into evidence even when coerced, and virtually eliminating the right to remain silent, miscarriages of justice are the all too frequent result.

Such general provisions include measures ensuring prolonged detention, easy admissibility of confessions and the effective elimination of the right to silence. The result is a system that gives the security forces every incentive to rely on confessions obtained in custody and, in turn, to impede solicitors who are often the only significant hurdle to safeguard against improper convictions. The result, not surprisingly, has been repeated miscarriages of justice, which in turn undermine public confidence in the justice system and lead to further erosion of the rule of law.

The lengthy interrogations without access to counsel have been condemned by the European Courts. One reason why such interrogation settings are condemned is that the statements they produce are inherently unreliable. The more you prolong such an interrogation, the more likely a defendant will “confess” just to stop the interrogation. The Special Rapporteur on the Independence of Judges and Lawyers stated in his Report that:

[I]t is desirable to have the presence of an attorney during police interrogations as an important safeguard to protect the rights of the accused. The absence of legal counsel gives rise to the potential for abuse, particularly in a state of emergency where more serious criminal acts are involved. In the case at hand, the harsh conditions found in the holding centres of Northern Ireland and the pressure exerted to extract confessions further dictate that the presence of a solicitor is

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152 Id. at tbl. 3.
153 Studies estimate that “confessions are the principal evidence in approximately 80 per cent of ‘Diplock’ cases . . .” Hogan & Walker, supra note 19, at 115.
154 Massimino Testimony, supra note 136.
155 In Murray v. United Kingdom, 22 Eur. Ct. H.R. 29 (1996), the European Court of Human Rights condemned the provisions denying counsel for forty-eight hours and eliminating the right to silence as a violation of Article 6 of the European Convention on Human Rights. See id.
imperative.\textsuperscript{156} The convictions resulting from such false confessions are miscarriages of justice which further alienate members of the community and cast disrepute upon the system used to administer justice.

d. Eliminating the Right to Remain Silent

The common law rule granting the right to remain silent was explained in \textit{Rice v. Connolly}.\textsuperscript{157} In \textit{Rice}, the court held that a person who refused to answer questions could not be charged with obstruction of justice. The second common law component to the right to remain silent was that neither the prosecutor nor the judge could ask the jury to draw an adverse inference from the accused's silence. The right to remain silent was considered sacrosanct under British law until a limitation appeared in the EPA. Under the EPA any person stopped by a constable must answer questions concerning their own identity, movements or knowledge concerning recent terrorist offenses or other offenses endangering life.\textsuperscript{158} Failure to answer questions to the best of one's ability was made a substantive offense.\textsuperscript{159} The abrogation of the right to remain silent was expanded greatly through passage of the Criminal Evidence (NI) Order 1988. This order permitted adverse inferences to be drawn from a suspect's silence in a number of circumstances.\textsuperscript{160} The circumstances include any time a defendant


\textsuperscript{157} 2 Q.B. 414 (1966).

\textsuperscript{158} \textit{See Northern Ireland (Emergency Provisions) Act, 1996, c. 22, § 25 (Eng.). There remain many unanswered questions about what is required of a person under section 25. For instance, the amount of detail necessary to be provided in answer to specific questions has not been determined. Nor has it been determined what time frame is encompassed in the term “recent.” See Brice Dickson, \textit{The Powers of the Police, in CIVIL LIBERTIES IN NORTHERN IRELAND, THE C.A.J. HANDBOOK: CIVIL LIBERTIES IN NORTHERN IRELAND} 27 (Brice Dickson ed., 1990) [hereinafter Dickson, \textit{The Powers of the Police}].}

\textsuperscript{159} \textit{There were other statutory provisions requiring a person to answer police questions under certain circumstances, such as the Official Secrets Act of 1939 and the Road Traffic (NI) Order of 1981. However, the provisions of the EPA expanded the circumstances under which a person could be questioned by making them answerable to any constable, and required the citizen to provide more information under penalty of law.}

\textsuperscript{160} \textit{There is an important difference between the law in the U.S. and the law in Northern Ireland that must be kept in mind when analyzing the effect of this law in an interrogation setting. In a criminal case in the U.S., once a defendant in custody invokes the rights to remain silent and to have counsel present during questioning, the interrogation must cease. This is not true in Northern Ireland, even where there is no statutory duty to answer questions. See Jackson, \textit{supra} note 67, at 72-73. One problematic development in our response to the events of September 11 is that many people in custody
INTO THE FIRE

relies upon a fact not mentioned to the police during questioning, the failure to account for the presence of objects, marks on one's body or clothing, and the failure to account for one's presence at a particular place.\textsuperscript{161}

Article 4 of the Criminal Evidence (NI) Order 1988 also permits an inference of guilt to be drawn from the defendant's refusal to testify at trial. In upholding this change to the common law, the House of Lords ruled that once a prosecutor made out a \textit{prima facie} case of guilt, a negative inference could be used against the defendant if he failed to testify and rebut the \textit{prima facie} case.\textsuperscript{162}

When considering the expanded powers to arrest and question granted under the Acts, the elimination of the right to remain silent has greatly altered the rights of civilians in Northern Ireland. It is the effect of this combination of powers that has earned condemnation by human rights groups and other commentators.\textsuperscript{163}

A recent article in the \textit{Columbia Human Rights Law Review} has found that these changes have not had the desired effect of increasing guilty pleas or rates of conviction after trial.\textsuperscript{164} For scheduled offenses, both rates remained constant for the five-year period immediately preceding the Order, through the five year period immediately following the Order. Surprisingly, the rate of conviction and the rate of guilty pleas for non-scheduled offenses actually dropped in the five years after the Order went into effect.\textsuperscript{165} Apparently, a right long-cherished as fundamental to British justice was discarded without any benefit being received in

\textsuperscript{161} See Criminal Evidence (Northern Ireland) Order 1988 (Eng.). Section 3 notes that an inference may be drawn from reliance upon facts not revealed during questioning, section 5 notes that an inference may be drawn from failure to explain objects, marks, etc. on the person or in the possession of the defendant, and section 6 notes that an inference may be drawn from failure to account for one's presence in a particular place. It should be noted that these three inferences may be drawn from the accused's silence before trial. \textit{See id.}

\textsuperscript{162} See Murray v. Dir. of Pub. Prosecutions, 7 W.L.R. 1 (1994). In effect, the \textit{Murray} case has also eliminated, or vastly changed, the burden of proof in a criminal case. The prosecution need only establish a \textit{prima facie} case to convict, since a negative inference drawn from silence can now substitute for positive evidence of guilt. \textit{See id.} This is particularly troubling in Northern Ireland where many Republicans traditionally have refused to recognize the authority of the British courts and, therefore, have refused to answer questions during trial. \textit{See HOGAN \& WALKER, supra note 19, at 123.}

\textsuperscript{163} \textit{See, e.g., Cumaraswamy Testimony, supra note 156.}

\textsuperscript{164} \textit{See Mark Berger, Reforming Confession Law British Style: A Decade of Experience with Adverse Inferences from Silence, 31 COLUM. HUM. RTS. L. REV. 243, 299-300 (2000).}

\textsuperscript{165} \textit{See id.}
e. Abuse of the Search and Seizure Provisions

Both the Army and the RUC have the power to enter homes and other buildings to conduct searches. The authority to conduct these searches emanates from different provisions. The Army is granted the power to search homes and other premises under the EPA. A member of the armed forces may enter a home and search it if 1) a person suspected of any offense is to be found on the premises; or 2) it is reasonably suspected that a person who has committed a terrorist offense is to be found on the premises. There is a much broader power granted to the Army to search for munitions or explosives. So long as a commissioned officer authorizes the search, Army personnel may search any building they reasonably believe will contain munitions.

The authority for police searches is found under separate provisions of the EPA. Any police officer has the authority to search any person in a public place for the purposes of discovering firearms, ammunition or wireless transmitters. Under the provisions of ordinary law, the police have no general right to enter and search homes or other premises. The EPA, however, grants broad authority to the police to enter any home or other place (including vehicles) to search for and arrest suspected terrorists, or persons guilty of offenses under the EPA, to search for explosives or firearms or to look for people who have been kidnapped.

Strict rules are supposed to govern these searches to ensure that they are not conducted to abuse or harass the subjects of the

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166 See Northern Ireland (Emergency Provisions) Act, 1996, c. 22 (Eng.). Section 21(1) authorizes a member of the armed forces to enter any premises if he or she believes it to be necessary for the preservation of peace, the maintenance of order, or if authorized by the Secretary of State. See id. § 21(1). See Steven Greer, The Powers of the Army, in THE C.A.J. HANDBOOK: CIVIL LIBERTIES IN NORTHERN IRELAND 53 (Brice Dickson ed., 1990).

167 See id. The power to enter and search for a particular suspect is broader depending upon whether the suspect is actually to be found on the premises.


169 See Northern Ireland (Emergency Provisions) Act, 1996, c. 22, § 20(6) (Eng.). The search provisions are limited to the items identified above. See Carlisle v. Chief Constable, Royal Ulster Constabulary (1988) N. Ir. L.R. 307. Any such items found, of course, may be seized pursuant to this same provision. See Dickson, The Powers of the Police, supra note 158, at 34.

170 See Dickson, The Powers of the Police, supra note 158, at 38.

171 See id. at 39. The police may detain anyone found in the premises for up to four hours while they search the premises.
search. For example, a person whose premises are being searched is entitled to a detailed accounting of the search.\textsuperscript{172} These safeguards, however, do not appear to work very well. There is ample evidence, derived from the government’s own statistics, that police and army units are being abusive and unnecessarily destructive when conducting these searches. The amount paid out in damage awards to persons whose premises were searched increased dramatically over the first twenty years for which statistics were made available.\textsuperscript{173} In fiscal year 1974-75, a total of £27,848 was paid out for damages caused by Security Forces. This number escalated steadily until 1992-93 when £2,809,373 was paid.\textsuperscript{174} The following year, payments dipped slightly, costing the Crown £2,600,591 to pay for damages caused by the Security Forces during searches and patrols.\textsuperscript{175} These statistics are particularly striking when one considers the size of Northern Ireland and its population. The entire province of Northern Ireland has slightly more than 1.5 million people.\textsuperscript{176} While the payments made during a fiscal year do not correlate to the searches conducted during any particular calendar year, some perspective may be gained from looking at annual figures detailing the number of searches conducted by Security Forces pursuant to the EPA.\textsuperscript{177} In 1986, the Army conducted a total of 344 searches of premises in Northern Ireland, while the RUC conducted and additional 1,474, for a total of 1,818 searches.\textsuperscript{178} In 1988, the Army

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  \item \textsuperscript{172} See Greer, supra note 67, at 52. The occupant of the premises is supposed to walk through the premises with one of the officers conducting the search to itemize pre-existing damage.
  \item \textsuperscript{174} Id.
  \item \textsuperscript{175} Compensation payments dipped below the 2 million pound mark over the next several years (1994-95 through 1997-98) only to rise dramatically again from 1998-99 through 2000-01 (although the 2000-01 statistics were incomplete). In 1998-99, compensation payments of £2,076,308 were made, rising to £3,148,402 in 1999-2000. Finally, for the incomplete year from April 1, 2000 through February 18, 2001, payments reached a staggering £3,519,007. Northern Ireland Office (NIO), Research & Statistical Bulletin, Statistics on the Operation of the Prevention of Terrorism Acts, Northern Ireland 2000 tbl.9, supra note 111.
  \item \textsuperscript{176} The overall population of Northern Ireland has remained relatively unchanged since 1971. The total population in 1971 was 1,519,640. In 1981, it had dropped to 1,481,959, recovering to 1,577,836 by 1991. Northern Ireland Statistics and Research Agency, Census Statistics, are reported at http://www.nisra.gov.uk/census/censusstatistics/index.html.
  \item \textsuperscript{177} These searches were conducted pursuant to a grant of authority found in section 19 of the 1991 EPA, which supplanted section 15 of the 1978 EPA.
  \item \textsuperscript{178} Northern Ireland Office (NIO), Research & Statistical Bulletin, Annual Statistics on
conducted 1,307 searches of premises, while the RUC conducted an additional 2,829 for a total of 4,136 searches.179

The sheer number of searches in a province whose population is roughly equivalent to that of the city of Philadelphia180 is staggering. Security forces in Northern Ireland conducted approximately 11.33 searches under the EPA per day, every day, during 1988.181 When one considers that these searches were concentrated in particular neighborhoods within Northern Ireland, it is easy to understand the gap in trust between the Security Forces and the citizens they were searching.182

the Operation of the Northern Ireland (Emergency Provisions) Act 1996 as Maintained by Schedule 1 to the Terrorism Act 2000 tbl.8. See supra note 112. “The majority of [the Army] searches are conducted in conjunction with the Royal Ulster Constabulary . . . .” Id. at n.2. However, since it is merely “the majority” of searches that are conducted in this manner, we cannot be sure of the exact number of searches conducted by the Army without the RUC present.

179 Id. This figure represents the highest number of searches conducted in any single year between 1985 and February 18, 2001. As stated above, it is impossible to correlate any one year’s statistics with compensation payments made some years later on account of the varying time lag in processing claims and the imprecise fit between fiscal years and calendar years. However, if we use this highest number of searches as a benchmark and correlate it to the greatest amount of compensation paid in any fiscal year within a five-year period, it provides a troubling illustration of the destructive nature of the searches conducted by security forces in Northern Ireland. Assume for the sake of illustration that all 4,136 premises searched during 1988 were damaged and the owners of these premises were all entitled to compensation. If all of these claims were paid out of the compensation payments made in 1992-93, each premises searched by security forces in 1988 would have sustained £679 worth of damages. Obviously, it is unlikely that all of the premises searched were damaged, and even more unlikely that all owners of property would be entitled to compensation, given that compensation cannot lawfully be made to anyone committing an offense at the time such damage is sustained. See Greer, supra note 166, at 59. Therefore, the average amount of compensation per premises actually is significantly higher than this illustration suggests. This conclusion is further supported by the astronomical compensation statistics from 1999-2001. Northern Ireland Office (NIO), Research & Statistical Bulletin, Annual Statistics on the Operation of the Northern Ireland (Emergency Provisions) Act 1996 as Maintained by Schedule 1 to the Terrorism Act 2000 tbl.9. See supra note 112.


182 That gap of trust is exacerbated by the fact that those searching generally did not come from the neighborhood being searched. Obviously, British military units would not be local, and the RUC was not representative of the neighborhoods it policed. The RUC was approximately 92.5% Protestant in a province that in 1991 was identified as 42.8% Protestant and 38.4% Catholic. Marie Smyth, Population Movement: The Statistics, in CAIN Web Service, Aspects of Sectarian Division in Derry Londonderry—Third Public Discussion: The Changing Population Balance and Protestant Drift, available at http://cain.ulst.ac.uk/issues/segregat/temple/discus3.htm, Table 1 (showing religions of the
The old adage, "[a] man's home is his castle," is certainly anachronistic in its use of gender terms and feudal imagery. However, the contemporary notion of a home remains that of a private sanctuary where one should be free from unwanted searches by agents of the state. Few things have created more hostility toward the Security Forces in Northern Ireland than did the searches conducted pursuant to powers granted under the EPA. The destructive nature of these searches only caused further irritation to already aroused animosities. It was particularly galling to many that these searches were so often conducted by the Army.

f. Diplock Courts

It is difficult to measure the effect of having eliminated the right to trial by jury. In part, the effect of this measure will depend on whether one judges this success in terms of conviction rates or levels of violence. These "Diplock trials," held before a judge sitting without a jury, appear to have increased the rate of convictions on scheduled offenses. This rise in conviction rate cannot be conclusively attributed to trial without jury because other alterations in the process, such as limitations on the rights to silence and counsel, and the use of "supergrass" informants are likely to have contributed to this trend. In addition, the "case-hardening" of Diplock judges has often been identified as a possible source of rising conviction rates. Case-hardening, as the name suggests, is the process through which judges become more cynical of defense claims of innocence and more prosecution prone in their decisions. If one is only concerned with conviction rates, then Diplock courts would be deemed a success regardless of the role case-hardening has played in this increased rate. However, when viewed in a larger context, the efficacy of Diplock courts seems far less certain.

From before the inception of Diplock courts, the effect of eliminating jury trials has concerned even the most ardent population from 1861 to 1991). See JOHN McGARRY & BRENDAN O'LEARY, POLICING NORTHERN IRELAND: PROPOSALS FOR A NEW START 8 (1999).

183 See HOGAN & WALKER, supra note 19, at 103-04.

184 "Supergrass" is the term used to refer to the former para-military informants given inducements to testify against alleged co-conspirators. CAJ, NO EMERGENCY, supra note 29, at 67.

185 Id. at 66. See also HOGAN & WALKER, supra note 19, at 103.

186 The percentage of persons pleading not guilty who were found not guilty by a Diplock court declined from 53 percent in 1984 to 29 percent in 1993. CAJ, NO EMERGENCY, supra note 29, at 66 tbl.4.
proponents of the idea. Lord Diplock, himself, expressed concern about whether the move to eliminate juries could bring disrepute upon the judiciary:

We regard it as of paramount importance that the criminal courts of law and judges and resident magistrates who preside in them should continue to retain... respect and trust throughout the emergency and after the emergency has come to an end. If anything were done which weakened it, it might take generations to rebuild it, for in Northern Ireland memories are very long.187

As Hogan and Walker point out, however, less than five years into the use of Diplock courts, eighty-two percent of the population of Northern Ireland advocated a return to jury trials.188

This widespread perception of illegitimacy was fed by the use of supergrass informants and the coerced confessions which played a role in so many Diplock court convictions. Studies indicate that confessions were the principal evidence in as many as eighty percent of the cases tried before the Diplock courts.189 Coercion of suspects with the aim of making them confess has been a persistent and widespread problem during the interrogation of persons suspected of committing terrorist offenses.190 The use of supergrass informants resulted in so many miscarriages of justice that each conviction obtained through the uncorroborated testimony of a supergrass informant was subsequently overturned on appeal.191

These factors leading to an unacceptable rate of miscarriages of justice diminished respect for the courts, generally, and certainly did not move the society toward the goal of eliminating political violence. In fact, "the damage to the legal system inflicted by non-jury trials may weigh almost as heavily as the gains of an increased conviction rate and speedier process. Consequently, the reinstatement of juries has been advocated as not only desirable (which is officially undisputed) but also as 'entirely practicable.'"192

187 HOGAN & WALKER, supra note 19, at 105 (quoting REPORT OF THE COMMISSION TO CONSIDER LEGAL PROCEDURES TO DEAL WITH TERRORIST ACTIVITIES IN NORTHERN IRELAND [DIPLOCK REPORT], 1972, Cmd. 5185, at para. 13).
188 See HOGAN & WALKER, supra note 19, at 105.
190 See 1978 Amnesty International Report, supra note 120.
191 See CAJ, NO EMERGENCY, supra note 29, at 67. Supergrass informants were used between 1981 and 1985. See id.
192 HOGAN & WALKER, supra note 19, at 105 (citation omitted).
In addition to being damaging to the fabric of Northern Irish society, the Diplock courts did not reduce violence. From 1987 to 1991 Labour consistently voiced its concerns over the retention of powers of detention, lengthy remands, the Diplock court system and incursions into a suspect’s right to silence. However, Parliament annually renewed the statute in the face of Labour opposition, through 1990. During this time, violence in the North remained largely constant.\(^{193}\)

The elimination of jury trials, coupled with the systematic use of informants and coerced confessions undermined confidence in the justice system without reducing violence. Ultimately, these policies were a dramatic failure.

D. **Tools Proven Effective at Fighting Terrorism in Northern Ireland**

It is almost uniformly recognized among those who have studied the Emergency Provisions in Northern Ireland that they proved ineffective at combating political violence.\(^{194}\) Some have argued that these measures did reduce violence immediately following their introduction.\(^{195}\) While condemning the use of these emergency powers,\(^{196}\) Laura Donohue describes their “perceived effectiveness,” and posits this as one reason for the retention of emergency powers during periods without an emergency.\(^{197}\) Donohue goes on to list several factors other than emergency legislation which might explain a decrease in violence during the mid-1970s, including I.R.A. cease-fires, better policing and a growing rejection of terrorism by the communities in Northern Ireland, before concluding that it is “most likely” that emergency powers led to this decrease.\(^{198}\)

While Donohue’s work is insightful and helpful to those studying the use of emergency powers, her hypothesis that these powers caused the noted reductions of violence in Northern Ireland requires examination.\(^{199}\) Donohue’s final conclusion mirrors that of other commentators cited in this Article, i.e., that the use of emergency powers inflicted unimaginable damage to the social and political dynamics of the conflict. See id. at 354.

\(^{193}\) **DONOHUE, COUNTER-TELESTOR LAW, supra** note 20, at 194.

\(^{194}\) See, e.g., **HOGAN & WALKER, supra** note 19, at 63 (concluding that the resentment caused by special police powers makes policing more difficult). See also Roberta Smith, **America Tries to Come to Terms with Terrorism: The United States Anti-Terrorism and Effective Death Penalty Act of 1996 v. British Anti-Terrorism Law and International Response**, 5 CARDozo J. INT’L & COMP. L. 249, 278 (1997).

\(^{195}\) See, e.g., **DONOHUE, COUNTER-TELESTOR LAW, supra** note 20, at 322-23.

\(^{196}\) Donohue’s final conclusion mirrors that of other commentators cited in this Article, i.e., that the use of emergency powers inflicted unimaginable damage to the social and political dynamics of the conflict. See id. at 354.

\(^{197}\) Id. at 322-23.

\(^{198}\) Id. at 323.
Ireland does not bear up under closer scrutiny. First, the most draconian use of government power during the last thirty-five years in Northern Ireland occurred in 1971, which was followed by an intense increase in violence the following year. Second, the decrease in violence in 1974-75 is more likely attributable to the perception of political progress and the creation of a parliament that had, for the first time, significant representation of both communities. Third, "a series of contacts [between the British government and] the IRA Army Council throughout 1974 culminated in a cease-fire in 1975." Finally, internment, which played a critical role in triggering the explosion of violence in 1972, began declining in June of 1974 and was phased out by the end of 1975. These factors, some of which are identified by Donohue, explain the decrease in violence in 1974 and 1975. With the collapse of the Constitutional Convention and the end of the I.R.A. cease-fire, explosions doubled between 1975 and 1976. Over the next twenty-five years, violence ebbed and flowed with political progress, not the enforcement of emergency powers.

Even the commissioners of government studies, while often supporting the use of such powers, grudgingly acknowledged that these measures were counterproductive.

The continued existence of emergency powers should be limited both in scope and duration. Though there are times when they are necessary for the preservation of human life, they can, if prolonged, damage the fabric of the community, and they do

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199 That the perception of political progress had a greater effect on the level of violence is shown by the analysis of government's statistics, supra notes 109-81 and accompanying text. The most striking evidence of this truth, however, is provided by the following facts. In 1970, the year before internment was reintroduced, there were 213 shootings and 153 bombings in Northern Ireland. In 1972, the first full year after internment began, there were 10,631 shootings and 1,382 bombings. The level of violence would not recede to the 1970 levels until 1985 (238 shootings and 148 bombings), the year of the Anglo-Irish Agreement. The level of violence would not fall below the 1970 level until the political progress of the mid-1990s and the accompanying cease-fire by the I.R.A. See Background Information on Security Incidents, supra note 40. The use of these emergency provisions increased violence. The fact that in subsequent years there was some movement toward the status quo ante is not evidence that these measures had the overall effect of reducing violence.

200 FEENEY, supra note 108, at 274.

201 The increase in violence cannot be blamed on those released from internment, as only five percent of detainees were subsequently convicted of a crime. See HOGAN & WALKER, supra note 19, at 93-94.

202 While political violence increased around times of political stagnation, it should be noted that emergency powers remained in force this entire period. During the more than thirty years of emergency powers being exercised since the early 1970s, there has been a consistent level of violence that Northern Ireland has had to endure. Our research and interviews support the notion that the emergency powers, coupled with a lack of real political progress until the mid-1990s, has sustained the level of violence by replenishing the ranks of paramilitary organizations.
not provide lasting solutions. A solution to the problems of Northern Ireland should be worked out in political terms, and must include further measures to promote social justice between classes and communities . . . . Measures of social reform may not produce immediate results in the reduction of violence. In Northern Ireland memories are long, and past oppression serves to colour present experience; but a more united community is the only real answer to the dilemma of maintaining peace while preserving liberty.203

The sentiment that emergency powers in Northern Ireland “damage[d] the fabric of the community,” and did “not provide lasting solutions” has been echoed by numerous academics and human rights groups.204 It is identified as true by solicitors, barristers and individuals convicted of terrorist offenses, the innocent and guilty alike. It is even proven by the government’s own statistics.

The statistics showing a spike in violence following reintroduction of internment in 1971 undoubtedly influenced Lord Diplock’s assessment of internment. Diplock’s main criticism centered around the lack of procedure for internment and the use of the military in detaining people without trial. He called for some procedure to accompany internment and an abolition of the military’s role in it.205 Diplock’s recommendations were based upon his assessment of the appearance of impropriety involved where citizens were detained by the military without any use of judicial process at all. Diplock recognized that such procedures “could never appear to be as complete as the safeguards which are provided by a public trial in a court of law.”

Lord Gardiner, writing three years after Diplock, recognized that Lord Diplock’s alterations in the system of internment did not lessen the deleterious effect its use had on society.206 Gardiner went on to note the adverse effects caused when security forces became too aggressive. “We acknowledge the need for firm and decisive action on the part of security forces; but violence has in the past provoked a violent response.”207

Undoubtedly, Lord Gardiner was correct in his assessment that respect for the law was lost and the fabric of the community was damaged by the use of emergency powers. But as damaging as the loss of faith in the judicial system can be, what is worse is the fact that this loss of faith occurred without lessening the amount of

203 GARDINER REPORT, supra note 25, at 7-8 (emphases omitted).
204 See, e.g., DONOHUE, COUNTER-TERRORIST LAW, supra note 20, at 354.
205 See DIPLOCK REPORT, supra note 38.
206 See GARDINER REPORT, supra note 25, at 43.
207 Id. at 7.
political violence. Interviews with people with intimate knowledge of the use of emergency powers, confirmed the validity of these statistics. Barra McGrory, a Belfast solicitor who has represented many individuals charged with offenses under the Acts, has concluded that the use of emergency powers in Northern Ireland has encouraged violence.208 Mr. McGrory stated that while the rate of convictions has increased with the use of emergency powers, divisions within society have deepened due to their use. In turn, this increased the rate at which people joined paramilitary groups, feeding and sustaining the overall level of violence in Northern Ireland.209

Kieran McEvoy, of Queens University—Belfast, who has studied the use of emergency legislation in Northern Ireland, has identified spikes in violence surrounding the use of emergency powers to target the Catholic Republican community.210 Initially, some of the measures used had the effect of suppressing violence. But the manner in which the powers were used—disproportionately against the Republican community and with unchecked aggression by security forces—led to explosions in violence.211

The Chief Commissioner of the Northern Ireland Human Rights Commission (NIHRC), Brice Dickson, spoke in these same terms during an interview with the authors of this article.212 His Commission repeated this conclusion in the NIHRC Response to the White Paper Legislation Against Terrorism, April 1999: “The Commission would add that some of the proposals, but especially internment without trial, would serve as effective recruitment propaganda for paramilitary organisations.”213 The Commander of the IRA in the Maze Prison, Jim McVeigh called the emergency provisions “the best recruiting tools the IRA ever had.”214

It was not just internment that proved unsuccessful at reducing the levels of political violence in Northern Ireland. Comparing the statistics on levels of violence with those on numbers of searches shows how little effect these tactics had on reducing shootings and bombings. It is clear from the statistics over this thirty-year period that years with intensive searches did

208 See McGrory Interview, supra note 119.
210 McEvoy Interview, supra note 96.
211 For a discussion, see the text and accompanying footnotes of the section on Targeted Internment, supra Part I.C.1.a.
212 Dickson Interview, supra note 21.
213 NIHRC Response, § 7.2 to the White Paper Legislation Against Terrorism, April 1999.
214 McVeigh Interview, supra note 21.
not reduce violence that year or the next. Political progress, however, did have this result.

For example, while 1988 was the peak year for searches, with 4,136 conducted by the Army and the RUC combined, this did not correspond to a discernable trend in the level of political violence that year.\footnote{215 See NIIS-PTA, Annual Statistics for 1994, tbl. 8; Background Information on Security Incidents, \textit{supra} note 40 (citing the Royal Ulster Constabulary Chief Constable's Annual Report, 2001).} If any trend is indicated at all by these statistics it is that violence rose as the number of searches increased. In 1986, there were 1,818 searches conducted by security forces.\footnote{216 During the first ten-year period for which statistics on searches of premises were available (from 1985 through 1994), 1986 saw the fewest number of searches conducted. Northern Ireland Information Service (NIIS), Prevention of Terrorism (Temporary Provisions) Acts 1974, 1976, 1984 and 1989—Annual Statistics for 1994, tbl. 8 (on file with Cardozo Law Review). Following the political progress made in the early 1990s and the declaration of a ceasefire by the I.R.A. in 1994, searches decreased to 331 in 1995—the lowest total for any year for which statistics are available. Northern Ireland Office (NIO), Research & Statistical Bulletin, Statistics on the Operation of the Prevention of Terrorism Acts, Northern Ireland 2000 tbl. 8. See \textit{supra} note 111.} That same year there were 392 shootings and 172 bombings reported. The following year as the number of searches rose to 2,474, violence increased with 674 shootings and 236 bombings reported. The dramatic increase in searches in 1988 (to 4,136)\footnote{217 In 1989, searches dipped to 3,027 with ambiguous results. There were twenty-nine fewer bombings but twenty-eight more shootings reported. \textit{Id.} See also Background Information on Security Incidents, \textit{supra} note 40.} correlated with another jump in bombings to 253.\footnote{218 There is also a correlation between the decrease in violence from 1995 to 1996 (as a result of the political process) and a decrease in the number of searches. The year with the fewest searches also was the year with the fewest bombings and shootings in the thirty-year period between 1969 and 1999. \textit{See Background Information on Security Incidents, \textit{supra} note 40.}}

While identifying the emergency powers as counterproductive in stopping violence, government officials, community organizers, human rights workers and academics have been unanimous in their assessment of what is effective at reducing violence: increased social justice with political dialogue and cooperation among all segments of society. For example, in 1973, following much inter-communal dialogue, a new constitution based upon the principle of "power sharing" was agreed upon. On January 1, 1974, a government containing Catholic Republicans and Protestant Loyalists came into effect for the first time in Northern Ireland. During 1973 and 1974, violence dropped in the province.\footnote{219 For a discussion of factors effecting violence, see \textit{supra} Part I.C.1.} Following the demise of this effort at joint governance, violence again rose in the province.\footnote{220 The number of explosions nearly doubled from 399 in 1975 to 766 in 1976.} These events
were no doubt on Lord Gardiner’s mind in 1975 when he concluded:

Terrorism and subversion in Northern Ireland can only be defeated, or guarded against, by the energetic pursuit of measures against them by the Government, and—equally important—of continued, parallel progress in other fields of social, political and economic activity, especially of community relations as a whole.221

Politically motivated bombings and shootings in Northern Ireland dipped again when political progress was made. Prior to the mid-1990s, when the recent and dramatic political movement toward reconciliation was begun, the single year with the fewest shootings and bombings reported by the RUC was 1985, the year the Anglo-Irish Agreement was signed.222 The most dramatic decrease in political violence, of course, corresponds directly to the political progress made in the mid-1990s. In 1995, following a declared cease-fire by the IRA, reported shootings reached their modern all-time low of fifty, and only a single bombing incident was reported.223 When political progress stalled during the subsequent years, violence rose again.224

II. AMERICAN EFFORTS

United States efforts to combat terrorism did not begin on September 11, 2001. Indeed, for the last four decades, “the United States introduced a plethora of counter-terrorist measures.”225 These efforts ranged from international diplomacy and coercion to

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221 GARDINER REPORT, supra note 25, at 6.
222 In 1985, there were 238 shootings and 148 bombings reported. Background Information on Security Incidents, supra note 40. This represented a 28.7 percent decrease in shootings and a 23.3 percent decrease in bombings from the previous year. See id.
223 See Background Information on Security Incidents, supra note 40; supra note 199. The IRA declared a ceasefire on August 31, 1994, following a complex series of secret talks involving themselves, the British government, the Irish government in Dublin, and President Clinton. See FEENEY, supra note 108, at 402-07.
224 In 1998, the RUC began keeping statistics based upon the fiscal year, April 1 through March 31. In 1999, progress on implementing the Good Friday Agreements was stalling, and this led to an increase in violence. During that fiscal year, 187 shootings and 107 bombings were reported. Background Information on Security Incidents, supra note 40.
changes in domestic criminal law. However, in the days and months following September 11, 2001 the speed, volume and nature of these counter-terrorist measures have significantly changed. We do not intend to catalogue every change that has occurred since September 11, 2001. Given that the legal landscape in this area is changing almost daily, that would be impossible. What we are trying to capture here are some of the more significant changes and events that have occurred up to the date of the submission of this article, as well as those that appear to have a corollary exercise of power in Northern Ireland for comparison purposes. In this section, we discuss some of the more startling changes to law since the attacks.

A. Legislative Changes

1. The USA PATRIOT Act

The USA PATRIOT Act was the major piece of legislation passed in the wake of the WTC attacks. It was passed after a very brief congressional debate and while both houses of Congress were out of their offices due to anthrax tainted letters found in Congressional offices. As with much of the anti-terrorism legislation passed over the years in Northern Ireland, it was enacted in the supercharged time period immediately following a terrorist attack. In his address to Congress on September 20, 2001, President Bush urged Congress to act quickly on anti-terrorism legislation. Attorney General John Ashcroft, in introducing legislation that ultimately became the Act, echoed this sentiment, encouraging Congress to act quickly, stating that “the American
people do not have the luxury of unlimited time in erecting the necessary defenses to future terrorist acts.\textsuperscript{231}

This massive and complicated document\textsuperscript{232} was identified by its opponents as a “wish list” of powers previously sought by law enforcement and rejected by Congress as too invasive.\textsuperscript{233} Some of these opponents asserted that passage of so many significant changes to law was unjustified because no one had “made an adequate case that our intelligence agencies failed to detect the Sept. 11 plot because we lacked surveillance power.”\textsuperscript{234} Proponents of the legislation contended that the legislation served three purposes: to strengthen and streamline the government’s ability to gather information to “disrupt, weaken, and eliminate the infrastructure of terrorist organizations,”\textsuperscript{235} to “make fighting terrorism a national priority in our criminal justice system,”\textsuperscript{236} and “to enhance the authority of the Immigration and Naturalization Service to detain or remove suspected alien terrorists.”\textsuperscript{237}


\textsuperscript{232} The Act spans over 100 pages and contains almost twice as many changes to law. See USA PATRIOT Act.

\textsuperscript{233} See U.S. Senator Russ Feingold, Statement on the Anti-Terrorism Bill from the Senate Floor (Oct. 25, 2001) (“The Administration’s proposed bill contained vast new powers for law enforcement, some seemingly drafted in haste and others that came from the FBI’s wish list that Congress has rejected in the past.”), available at http://feingold.senate.gov/releases/01/10/102501at.html [hereinafter Feingold Statement]. See also Jennifer C. Evans, Comment, Hijacking Civil Liberties: The USA Patriot ACT of 2001, 33 Loy. U. Chi. L.J. 933, 967 (2002); John Lancaster & Walter Pincus, Proposed Anti-Terrorism Laws Draw Tough Questions: Lawmakers Express Concerns to Ashcroft, Other Justice Officials About Civil Liberties, WASH. POST, Sept. 25, 2001, available at http://www.washingtonpost.com/wp-dyn/articles/A19559-2001Sept24.htm. On questioning why there was a rush to pass this legislation, Representative Robert L. Barr, Jr. asked, “Does it have anything to do with the fact that the department has sought many of these authorities on numerous other occasions, has been unsuccessful in obtaining them, and now seeks to take advantage of what is obviously an emergency situation to obtain authorities that it has been unable to obtain previously?” Id.


\textsuperscript{235} Ashcroft Testimony, supra note 231, at 3.

\textsuperscript{236} Id.

\textsuperscript{237} Id. at 4.
Whatever the intent of its proponents, on its face, the purposes of the Act are very broad, not confined to combating terrorism, but also including "enhancement [of] law enforcement investigatory tools, and for other purposes." Thus, even at the time of its enactment, the government acknowledged the potential use of these provisions, though passed as tools for combating terrorism, in investigating and prosecuting offenses that had no tie to terrorism. In fact, general law enforcement investigatory tools and "other purposes" often seem to dominate the Act. Furthermore, some investigatory and detention powers already given to law enforcement officials were expanded in other ways after this legislation because those powers were applied to a broader array of situations.

This expansion of police powers into other areas of law enforcement apart from terrorism offenses mirrors the expansion of law enforcement powers that occurred over time with the legislative efforts to combat terrorism in Northern Ireland.

a. National Counter-terrorism and Homeland Security Strategy

One of the most important systemic changes contained in the Act is found in section 101(d)(2), which called for the development of the National Counter-terrorism and Homeland Security Strategy. This section led to the development of the Office of Homeland Security, and eventually to the proposed legislation calling for a reorganization of the government and the creation of a new Department of Homeland Security. In many ways, this proposed change to the structure of the government, by adding a new department for the first time in over a decade, is one of the most fundamental legal changes to occur in the wake of the WTC attack. The bill proposing the creation of a Department of Homeland Security calls for many governmental functions, such as those covered by the Federal Emergency Management Act (FEMA) to be transferred to the control of the Department of Homeland Security.

238 USA PATRIOT Act, Introduction.
239 See, e.g., USA PATRIOT Act § 204.
240 See, e.g., supra Part I.B.1.d., pertaining to the encroachment on the right to remain silent in Northern Ireland.
241 USA PATRIOT Act § 101(d)(2).
The envisioned mission of this Department is quite broad and includes reduction of vulnerability to and prevention of terrorist attacks, as well as assisting recovery and minimizing damage from terrorist attacks that do occur within the United States. One of the critical functions of this Department will be information analysis. In this role, the Department is envisioned to act as an umbrella to manage the government’s receipt and processing of information relating to the threat of terrorism.

b. Detention Powers

The expansion of detention powers after September 11, 2001, both in the Act and as assumed by the executive branch has changed the legal landscape fundamentally. Interestingly, by September 24, 2001, the date the legislation was introduced to Congress, the FBI and INS had “arrested or detained 352 individuals” who the government believed had information that “could be helpful to the investigation.” By October 25, 2001, before the Act was signed into law by President Bush, the government had arrested “nearly 1,000 individuals as part of the September 11 terrorism investigation.” Within days of the passage of the legislation, the number of those detained surpassed 1,000, reaching 1,017. Four days later, the number of those detained rose to 1,147. Of these, only a very small percentage

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245 Id. § 101(b)(1)(A-C).
246 Id. § 201.
248 See infra Part II.B.2.
249 Ashcroft Testimony, supra note 231.
252 A Deliberate Strategy of Disruption: Massive, Secretive Detention Effort Aimed Mainly at Preventing More Terror, WASH. POST, Nov. 4, 2001, at A1. The study reported in this article analyzed the cases of 235 of these detainees. In none of the cases analyzed were the detainees charged in the WTC plot or with other acts of terrorism. A small “as-yet-unknown number” were being held as material witnesses. “Another small number—perhaps 10—[were] believed to lie at the center of the investigation.” Id. Three-fifths of the detainees were being held on immigration charges. Id. “Of the 235 detainees who could be identified in the United States, only 10 are known to have any kind of link to the hijackers. Most of those known links are intriguing but ambiguous.” Id.
were charged in connection with the WTC attacks. Most, if not all, of those so detained were immigrants. The only person to be charged specifically with involvement in these attacks is Zacharias Moussaoui, who was in custody since August 2001.

Concurrent with this use of previously existing detention power was an unprecedented expansion of power to detain under the Act, especially the power to detain immigrants. Indeed the provisions relating to changes in immigration law are some of the most ripe for abuse. For example, section 412 of the Act allows for indefinite detention of aliens whom the Attorney General believes are terrorists. Initial detention under the Act is authorized for seven days. However, if ordered deported and the Attorney General continues to have suspicions about a detainee, the alien can remain in detention indefinitely, with review of his or her case every six months. Continued detention is permissible and in fact required as long as the Attorney General remains suspicious.

These changes are particularly troubling given subsequent changes in the law, specifically the November 13 Order and the arrest and detention of American citizens as enemy combatants, both discussed below.

c. Investigatory Powers

At the time the Act was introduced, September 24, 2001, the government’s investigation into the events of September 11th had already “yielded 324 searches, 103 court orders, [and] 3410 subpoenas . . . .” There had been no complaints that the government’s ability to investigate these offenses had been hampered by lack of sufficient powers. However, the Act proposed several changes to law enhancing investigatory powers.

The Act not only increased the application of existing powers to additional offenses and expanded the powers available for investigating certain offenses, it also lowered the threshold for use of many of these powers. For example, section 202 expanded the

\[253\] See id.
\[254\] The German government has charged Mounir El Motassadeq “in 'connection with his connection to the terror attacks on the United States.'” 
\[255\] USA PATRIOT Act § 412(a).
\[256\] Id.
\[257\] Id.
\[258\] See infra Part II.B.2.b.
\[259\] See infra Part II.B.2.a.
\[260\] Ashcroft Testimony, supra note 231.
crimes to which the increased investigatory surveillance powers would apply to include felony violations of 18 U.S.C. § 1030 for computer fraud and abuse.\textsuperscript{261} While undoubtedly some forms of computer fraud and abuse could rise to the level of terrorism, the Act did not limit this increased investigatory powers to those offenses. Instead the investigatory powers listed are broad enough to apply to any "protected computer," which under the Act includes any computer with an internet connection.\textsuperscript{262}

Investigatory powers of the government with respect to certain types of criminal warrants were also enhanced. For example, section 209 allows the government for the first time to access voice mail, with probable cause, in much the same way as previously it could obtain access to e-mail.\textsuperscript{263} Section 216 significantly expands police investigatory power of internet and e-mail.\textsuperscript{264} To obtain a warrant under this new section, the government need only show that the information to be obtained is "relevant to an ongoing criminal investigation."\textsuperscript{265} This standard is much lower than the "probable cause" requirement for other types of criminal search warrants.

The Act not only expands the types of warrants available but also the manner of executing search warrants. Section 213 changes Fourth Amendment law, which has historically and constitutionally required the element of notice to the owner of a property prior to search.\textsuperscript{266} As amended in the Act, this section gives the police the authority to delay notice of the execution of a warrant.\textsuperscript{267} It applies not only to investigations of terrorism, but in every federal criminal investigation.\textsuperscript{268} This change is a significant expansion in the application of so-called "sneak and peek" searches. Sneak and peek searches are searches of homes and offices conducted without notifying the owner prior to the search. Under the newly enacted provisions, the government can delay any notice regarding the execution of a search warrant if a judge

\textsuperscript{261} See USA PATRIOT Act § 202.
\textsuperscript{262} See 18 U.S.C. § 1030(e)(2)(B) (the term "protected computer" means a computer ... 'which is used in interstate or foreign commerce or communication,' including a computer located outside the United States which is used in a manner that affects interstate or foreign commerce or communications of the United States"). See also John Podesta, The Good, the Bad, and the Sunset, 29-WTR Hum. Rts. 3, 6 (2002) (defining a "computer trespasser" as "anyone who accesses a protected computer (which includes any computer connected to the Internet)").
\textsuperscript{263} See USA PATRIOT Act § 209.
\textsuperscript{264} See id. § 216.
\textsuperscript{265} Id. § 216(b)(1).
\textsuperscript{266} See id. § 216(b)(1).
\textsuperscript{267} See id. § 216(b)(1).
finds the possibility of "an adverse result" from requiring such notice. An adverse result is defined as endangering a life or physical safety of a person, flight from prosecution, evidence tampering, witness intimidation or "seriously jeopardizing an investigation or unduly delaying a trial." In such circumstances, notice may be delayed for a reasonable period of time, and beyond that, if good cause is shown.

In addition to changes in investigatory powers in the general criminal law, significant changes were made to the provisions of law dealing with the Foreign Intelligence Surveillance Act of 1978, ("FISA"). Generally speaking, FISA applies to national security investigations as opposed to criminal investigations. Warrant requests under FISA are made ex parte, to the specially constituted FISA court, with no required showing of relevance. Historically, the lower standard of protection and judicial oversight for FISA investigations was justified because of the different objective in the investigation. Given the blurring of this line caused by terrorism, this may turn out to be a distinction without a difference.

Under section 218 of the Act, Congress lowered the standards for surveillance warrants obtained under FISA. Under FISA, prior to passage of the Act, intelligence gathering had to be "the purpose" of the surveillance before a FISA warrant could be obtained. After the Act, intelligence need not be "the purpose," nor the primary purpose; it need only be a "significant purpose" of the surveillance. The Foreign Intelligence Surveillance Court of Review ("FISCR") recently held that based on these changes in the Act, "FISA authorizes electronic surveillances and physical searches primarily for law enforcement purposes so long as the Government also has 'a significant' foreign intelligence purpose [for conducting the surveillance or search]."

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269 Id.
271 USA PATRIOT Act § 213(2) ("With respect to the issuance of any warrant or court order under this section, ... any notice required ... may be delayed if ... (3) the warrant provides for the giving of such notice within a reasonable period of its execution, which period may be extended by the court for good cause shown.").
273 This distinction has been significantly eroded by the recent decision of the Foreign Intelligence Surveillance Court of Review, which held that criminal investigation could be the primary objective of a surveillance authorized under FISA so long as the Attorney General affirms that a significant purpose is also foreign intelligence gathering. In re Sealed Case, 310 F.3d 717 (Foreign Intel. Surv. Ct. of Rev. 2002).
274 USA PATRIOT Act § 218.
275 Id.
276 Id.
277 In Re All Matters Submitted to the Foreign Intelligence Surveillance Court, 218 F. Supp. 2d 611, 614 n.1 (F.I.S. Ct. 2002). In the en banc decision by the Foreign Intelligence
Under the newly amended section 215, also relating to FISA, the government may compel production of "any tangible things" from any business regarding any person, "for an investigation to protect against international terrorism or clandestine intelligence activities . . . ."\textsuperscript{278} The Act prevents application of this section to the investigation of a United States citizen if her activity in question is protected by the first amendment to the Constitution.\textsuperscript{279} However, it allows the government access to any records about anyone "who worked with, or lived next door to, or went to school with, or sat on an airplane with, or has been seen in the company of, or whose phone number was called by"\textsuperscript{280} any target of an investigation involving international terrorism.

d. Newly Enacted Offenses

Section 802 of the Act creates the new crime of "domestic terrorism."\textsuperscript{278}\textsuperscript{1} This new crime significantly expands those offenses that would be considered terrorism. This expansion is particularly important to consider because it allows the federal government to apply the enhanced investigatory and detention powers to a much broader range of actions. It also changes offenses that previously would only violate state law, into federal terrorism offenses. This new crime applies to any person within the United States who engages

in activities that involves acts dangerous to human life that violate the laws of the United States or any State and appear to be intended: (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion, or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping.\textsuperscript{282}

As with other changes, it is difficult to see the need for this new crime. There were many federal statutes that were violated by the WTC attack.\textsuperscript{283}

\textsuperscript{278} USA PATRIOT Act § 215.
\textsuperscript{279} Id.
\textsuperscript{280} Feingold Statement, supra note 233.
\textsuperscript{281} USA PATRIOT Act § 802.
\textsuperscript{283} One need only look at the indictment filed in the Moussaoui case to get a sense of
2. Authorization to Use Force

The Joint Resolution from Congress authorizing the use of force was passed on September 18, 2001. This resolution was a specific statutory authorization pursuant to the War Powers Resolution of 1974. It was not a declaration of war. Although, various members of Congress did introduce a number of formal declarations of war... the Administration did not want to dignify the perpetrators of the September 11 attacks with a formal declaration of war, and indicated that the legal implications of a declaration of war were unnecessary and even undesirable.

The debatable question of whether the United States is truly "at war" is ignored in the rhetoric of the administration which declared that the war on terrorism would not end until "every terrorist group of global reach has been found, stopped and defeated." It is the seemingly eternal quality to the present war and the concurrent use of domestic power by the executive under the label of war that are some of the most controversial aspects of the new efforts to combat terrorism.

Though not strictly a legislative change combating terrorism, it is this document that the executive branch relied on in issuing the November 13 Order authorizing the use of military trials. It is upon this document, and the "war" it purports to authorize, that some of the possible charges that could be brought. See, e.g., Conspiracy to Commit Acts of Terrorism Transcending National Boundaries, 18 U.S.C. § 2332b(a)(2) & (c); Conspiracy to Commit Aircraft Piracy, 18 U.S.C. § 46502(a)(1)(A) and (a)(2)(B); Conspiracy to Destroy Aircraft, 18 U.S.C. §§ 32(a)(7), 34; Conspiracy to Use Weapons of Mass Destruction, 18 U.S.C. § 2332(a); Conspiracy to Murder United States Employees, 18 U.S.C. § 1114; Conspiracy to Destroy Property, 18 U.S.C. § 844(f), (I), (n).

286 See Evans, Terrorism on Trial, supra note 3, at 1838 ("Congress never formally declared war with regard to the Bush administration’s military action in Afghanistan; and because the September 11 attacks are believed to have been committed by terrorist organizations without state sponsorship, it is unclear whether the attacks constitute war crimes.") (citation omitted).
288 Evans, Terrorism on Trial, supra note 3, at 1839.
289 September 20 Presidential Address, supra note 2 (emphasis added).
the executive branch has relied upon in adopting many of its most questionable new powers.

B. Executive Branch Changes

After September 11, 2001, the executive branch issued a number of orders that assumed to itself increased power vis-a-vis the other two branches of government.292

1. State of Emergency

President George W. Bush signed a Declaration of a National Emergency by Reason of Certain Terrorist Attacks on September 14, 2001.293 This declaration was issued pursuant to the National Emergencies Act (50 U.S.C. 1601 et seq.). On its face, this declaration was limited in scope, stating the executive’s intent to invoke certain statutory powers relating to the armed services.294 However, Congress relied upon this Declaration in authorizing the use of force, which the President, in turn, specifically referred to in the November 13 Order Relating to Military Tribunals.

2. Detentions and “Voluntary” Interviews

The Administration has taken a number of steps that are not directly authorized by law, but which resemble methods used to combat political violence elsewhere, including in Northern Ireland. Some of the most critical and controversial of these steps have been the indefinite detention of American citizens as “enemy combatants,” the setting up of military tribunals to try non-citizens as enemy combatants and the large-scale efforts to interview all foreign nationals from certain countries.

292 Neal K. Katyal & Laurence H. Tribe, Waging War, Deciding Guilt: Trying the Military Tribunals, 111 YALE L.J. 1259 (2002). As with the legislative initiatives, these enactments were similar to measures attempted at various times by the British in their efforts to combat terrorism in Northern Ireland.


294 See id.
a. Indefinite Detention of American Citizens as “Enemy Combatants”

In addition to the detention provisions in the Act and the November 13 order relating to military tribunals discussed below, in mid-2002, the United States arrested two United States citizens and continues to hold them as alleged “enemy combatants.” It appears that the government intends to hold them as long as the “war on terrorism” lasts.

The first of these two cases was brought against a man, Yaser Esam Hamdi, who was arrested in Afghanistan during the ongoing military operations. While being held at Guantanamo Bay, his identity as a United States citizen was discovered. He was transferred to, and is being held prisoner at a military base within the United States. The second case was brought against Jose Padilla, a man originally arrested on a material witness warrant. After dropping the material witness warrant against him, the government transferred Mr. Padilla into military custody as an enemy combatant.

In both of these cases, the men are being held by the military. It appears that both men are being held incommunicado. The government has argued that the detainees should have no access to counsel. The government asserts that neither have a right to any judicial determination of whether they were truly “unlawful...
In Mr. Padilla's case, government officials have refused to even allow counsel filing on his behalf to see the document that designates him an enemy combatant. Interestingly, in both cases, the government has made statements that it is holding them for interrogation and intelligence gathering.

While some might argue that the arrest of two United States citizens may be no cause for alarm, given statements by the Attorney General Ashcroft to Congress about "sleeper" cells of terrorists within the United States and his assertion that those foreign terrorists "are not entitled to, do not deserve the protections of the American Constitution," there may be cause for concern that these detentions are merely the beginning of a broader policy. The numbers of people in whom the government is likely to be "interested in" is significantly more than the two in custody. Indeed, President Bush has stated that "[t]housands of dangerous killers, schooled in the methods of murder, often supported by outlaw regimes, are now spread throughout the world like ticking time bombs, set to go off without warning." Such an assertion is contrary to the authority upon with the executive branch relies for the power to detain such unlawful combatants. See Laurence H. Tribe, Citizens, Combatants and the Constitution, N.Y. TIMES, June 16, 2002, at D13 (noting that to authorize such a power "does not imply unchecked presidential power; to accept such an interpretation would be to abandon the Constitution's system of checks and balances for nothing more than the promise of presidential wisdom and self-restraint"). See also Ex parte Quirin, 317 U.S. 1, 35 (1942).

"Believing that Hamdi's detention is necessary for intelligence gathering efforts, the United States has determined that Hamdi should continue to be detained as an enemy combatant in accordance with the laws and customs of war." Hamdi, 296 F.3d at 280. With respect to Mr. Padilla, Donald Rumsfeld stated that the government was holding him because it is "interested in finding out what in the world he knows." Plea to Free "Dirty Bomb" Suspect, BBC NEWS, June 13, 2002, available at http://news.bbc.co.uk/1/hi/world/americas/2042438.stm. "Respondent Rumsfeld has stated publicly that it is the Government's intention to detain Mr. Padilla indefinitely to interrogate him." Padilla, Amended Petition, supra note 295, at 7.

Josh Meyer & Eric Lichtblau, Terror Cells Active in U.S., L.A. TIMES, July 12, 2002, at A1. Initial reports stated that the estimated number of people in such cells was 5,000. A day later, that number was reported as 500. See id. See also Full Text of FBI Agent's Letter to Director Mueller, N.Y. TIMES, March 5, 2003, available at http://foi.missouri.edu/whistleblowing/fullexfb.html.


b. November 13 Order Relating to Military Tribunals

On November 13, 2001, “[w]ithout advance notice to either the congressional leadership or the public,” President Bush signed an “order giving him the option of trying non-U.S. citizens suspected of terrorism before a special military commission as opposed to trying them in open, civilian courts.”

Under section 4(a) of the Order:

Any individual subject to this order shall, when tried, be tried by military commission for any and all offenses triable by military commission that such individual is alleged to have committed, and may be punished in accordance with the penalties provided under applicable law, including life imprisonment or death.

There can be no appeal to the civilian courts from convictions and sentencing in these tribunals, which have the authority to sentence to death. These tribunals apply to a broad range of individuals, including anyone who “is or was a member” of Al Qaeda, who has “engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefor” or has harbored any such person. This broad category of persons subjected to these tribunals is not the more limited class of “unlawful enemy belligerents” for whom the Supreme Court had allowed such tribunals, when appropriately fashioned, to apply...
in the past.\footnote{See \textit{Ex parte} Quirin, 317 U.S. 1, 35 (1942).}

The procedure to be followed by these military tribunals was unspecified in the order, with the only limitation that they provide "a full and fair trial."\footnote{November 13 Military Order, supra note 291, § 4(c)(2).} The Secretary of Defense later provided the specifics.\footnote{\textit{Id.} § 4(c)(2), (3).} In March 2002, the Department of Defense announced the procedures for trial in this tribunal.\footnote{Department of Defense, Military Commission Order No. 1 (Mar. 21, 2002), available at http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf.} The announced procedures are significantly different than those of a criminal trial. Although there is a presumption of innocence\footnote{See supra note 291 § 5(B).} and guilt can only be established if a commission "member is convinced beyond a reasonable doubt,"\footnote{\textit{Id.} § 5(C).} there is no right to confront your accusers\footnote{See \textit{id.} § 6(D)(3).} and secret evidence is admissible.\footnote{See \textit{id.} § 6(B)(3).}

Numerous justifications have been offered for these tribunals. "Judges, lawyers and jurors would be at risk of reprisal; the government would not be able to introduce classified evidence without compromising secret ‘sources and methods’ of gaining intelligence; highly publicized trials could drag on and become circuses."\footnote{Evan Thomas \& Michael Isikoff, \textit{Justice Kept In the Dark}, NEWSWEEK, Dec. 10, 2001, at 38.} These reasons, however, have not stemmed the tide of criticism from many sources, including academics\footnote{See Pam Belluck, \textit{Civil Liberties: Hue and Murmur Over Curbed Rights}, N.Y. TIMES, Nov. 17, 2001, at B8. Professor Philip B. Heymann of Harvard Law School stated: “I think it’s the most reckless, unpatriotic indifference to a source of American pride that I can imagine.” \textit{Id.}} and civil liberties groups.\footnote{See, e.g., Press Release, Human Rights Watch, The Proposed U.S. Military Commissions, \textit{available at} http://www.hrw.org/campaigns/september11/tribunals.htm (last visited Oct. 10, 2002). The ACLU, in response to this order, called on Congress “to exercise its oversight powers before the Bill of Rights in America is distorted beyond recognition.” Press Release, American Civil Liberties Union, Freedom Network, Bush Order on Military Tribunals is Further Evidence That Government is Abandoning Democracy’s Checks and Balances (Nov. 14, 2001) (statement of Laura W. Murphy, Director, ACLU Washington National Office), \textit{available at} http://www.aclu.org/news/2001/n111401b.html.} As the ACLU noted,

It is difficult to understand how the Administration can justify the use of a tribunal when the United States has successfully tried in our courts non-citizens accused of terrorist acts, organized crime, and others in situations where the safety of jurors and the disclosure of government intelligence methods

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were at issue.\textsuperscript{325} One critic of these tribunals has been Professor David Cole of Georgetown Law Center, who noted the "wholly unprecedented" nature of the order.\textsuperscript{326} He based this comment on the fact that military tribunals have only been permitted in the past "with respect to enemy aliens, people who are involved in fighting against us in a declared war on behalf of a nation with which we're at war."\textsuperscript{327} These criticisms were echoed by civil libertarians, who called the order "breathtakingly broad."\textsuperscript{328} The ACLU noted that the order "could, at the stroke of a pen, be expanded to include United States citizens."\textsuperscript{329} This criticism proved prescient when, months later, the government began detaining United States citizens as "enemy combatants," but with no evident intent to try them as such.\textsuperscript{330}

Even supporters of the use of military tribunals have raised concerns about how those tribunals are being proposed to be used under the November 13 order. When criticized about the decision to prosecute the alleged twentieth hijacker Zacharias Moussaoui in federal district court, rather than before a military tribunal, Vice President Dick Cheney explained that the decision was "primarily based on an assessment of the case against Moussaoui, and that it can be handled through the normal criminal justice system without compromising sources or methods of intelligence . . . . [a]nd there's a good, strong case against him."\textsuperscript{331} Those who have argued in favor of military tribunals recognize that their use should be based on the type of crime alleged—whether it is a war crime—and not the quality of the evidence against the accused.\textsuperscript{332}
c. "Voluntary" Interviews

One measure, which the Justice Department pursued in the months following September 11, 2001, was to have the FBI "request" interviews of 5,000 men, mostly from the Middle East. On November 13, 2001, the Justice Department announced its intent to begin these so-called voluntary interviews. Because these interviews were not custodial interrogations, law enforcement were advised that there was "no need to seek a waiver of Miranda rights."

These interviews were criticized on a number of bases, including the "racial [and] ethnic profiling" attached to such mass interviews. The police force of Portland, Oregon initially refused to cooperate with the FBI in these interviews because of a prohibition against their questioning of immigrants who are not suspected of crime. Despite these concerns, in December the Department of Justice announced the success of the program stating that the interviews had proceeded "smoothly," and the interviews of "5,146 males, ages 18-33, who have passports from countries which intelligence indicates Al Qaeda terrorist presence or activity," were substantially completed. According to the DOJ report, "several leads were generated" and information was gathered that would "be helpful more generally in the country's anti-terrorism efforts."


335 By definition, a voluntary interview is not a custodial interrogation. See Miranda v. Arizona, 384 U.S. 436 (1966).

336 Memorandum from the Deputy Attorney General, to all United States Attorneys and all members of the Anti-Terrorism Task Forces, Guidelines for the Interviews Regarding International Terrorism (Nov. 9, 2001), available at http://www.usdoj.gov/04foia/readingrooms/terrorism2.html.


339 DOJ, 5000 Interviews Status Report, supra note 334.

340 Id.
In March 2002, the Department of Justice announced plans to interview an additional 3,000 men. Like the first round of interviews, Attorney General John Ashcroft said the 3000 additional prospective interviewees were “‘selected for interview because they fit criteria designed to identify persons who might have knowledge of foreign-based terrorists.’” At the time of this announcement, the DOJ released its redacted report on the prior interviews. It was reported that the government was able to locate approximately half of those they sought to interview. Of those, approximately ninety percent agreed to be interviewed. Of those interviewed, twenty people were arrested.

3. Actions Interfering With the Attorney-Client Relationship

a. Administrative Order Allowing Eavesdropping on Attorney-Client Calls

In October, 2001, the Bureau of Prisons adopted a regulation that allows the monitoring of conversations between inmates and their attorneys. This “unprecedented power” was adopted “[w]ithout observing the legally mandated period of public review and comment.” It applies equally to both telephonic and written communications. Except in cases where the government does not want to notify the monitored parties, no judicial involvement precedes or checks the appropriateness of the monitoring.

As with many of the post-September 11, 2001 changes to law, this provision has been criticized as over-reaching by its opponents and praised as necessary by supporters. It has been criticized for

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341 U.S. Department of State, International Information Programs, Interviews Sought on Terrorism with Foreign Nationals, Mar. 20, 2002, available at http://usinfo.state.gov/topical/pol/terror/02032002.htm. Attorney General John Ashcroft, in announcing this later round of mass questioning, stated: We believe that these individuals might either wittingly or unwittingly be in the same circles, communities, or social groups as those engaged in terrorist activities. The individuals to be interviewed are not suspected of any criminal activity. We are merely seeking to solicit their assistance to obtain any information they may have regarding possible terrorists or potential terrorist acts. Id.

342 Id.
343 28 C.F.R. pts. 500, 501 (2001). Originally, this rule allowed monitoring without notification to the parties. It was later changed to require such notice.
345 See id.
the procedure through which it was implemented and for the substantive change to law it brought. It has also been criticized as violating the Sixth Amendment Right to Counsel and the Fourth Amendment prohibition against “unreasonable” government intrusions.

b. Charging Lawyers

On April 9, 2002, Lynne Stewart, the lawyer who represented Sheik Abdel-Rahman, was arrested on a federal indictment for conspiring to provide material support or resources to a designated foreign terrorist organization. Sheik Abdel-Rahman was convicted of conspiring to assassinate Egyptian President Hosni Mubarak and to bomb New York City landmarks. According to the government Ms. Stewart brought Sheik Rahman messages and “allowed him to communicate messages out through her [while] using a translator.”

This development is of note for a couple of reasons. First, according to Attorney General Ashcroft, Sheik Rahman was the first inmate in the country whose attorney-client communications were monitored, an expansive new power discussed above. In fact, it was a three year investigation of Ms. Stewart that “inspired the Justice Department to assert new powers to monitor lawyers and their clients when the attorney general suspects doing so could

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348 See Leahy Letter, supra note 346.

349 See Amar & Amar, New Regulation, supra note 347.


351 United States v. Abdel Sattar, No. 02Cr.395(JGK), 2002 WL 1836755 (S.D.N.Y. August 12, 2002). Others, including an interpreter, were also arrested and charged.

352 See United States v. Rahman, 183 F.3d 88 (2d Cir. 1999).


deter terrorism." Second, a group of attorneys who have filed an affidavit supporting Ms. Stewart noted that "this kind of case could really chill their advocacy of all cases but particularly the terrorist cases." While the government's allegations against Ms. Stewart are troubling, the defense bar has raised specific concerns about whether the case was filed to intimidate them from defending people like Sheik Rahman.

C. Judicial Changes

Two changes to court rules governing federal grand jury secrecy and issuance of warrants were promulgated after passage of the Act, and made necessary by the Act. The import of these rules changes lies in the way they alter the administration of criminal law by the courts. For example, the changes relating to grand jury secrecy alter long standing limitations on release of information by a criminal grand jury. The traditional secrecy requirement was necessary to protect people under investigation from having unproven information released about them to others. This new provision for release of information permits dissemination without any judicial oversight to ensure that it is being done appropriately.

D. Other Developments

The items discussed below are either practices not done pursuant to law, changes to administrative law or proposed changes to other areas of law that have been considered but have not yet been codified.

1. Torture

In the wake of the WTC attack, there have been public discussions about whether the FBI and Justice Department investigators may need to cast aside "traditional civil liberties" to...
"extract information" from terrorist suspects. Among the options discussed have been the use of drugs or pressure tactics, extraditing suspects to allied countries who "employ threats to family members or resort to torture" or changing the law to allow torture in this country under certain circumstances.

To date, no such formal changes to law have been enacted. However, there have been allegations of mistreatment and badgering at the hands of the FBI in its interrogation of suspected terrorists. Given the incommunicado, indefinite detention of those from whom the government hopes to extract information, the allegations of John Walker Lindh about his treatment at the hands of his captors, and the opposition by the United States government to the widely supported Optional Protocol to the Convention Against Torture, there is cause for continuing concern that such ideas are gaining credibility.

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363 See supra Part II.B.2.a.

364 See Defendant's Notice of Motion and Motion to Suppress Involuntary Statements, United States v. Lindh (E.D. Va. 2002) (No. 02-37-A), available at http://news.findlaw.com/legalnews/us/terrorism/cases/index.html, alleging "incommunicado detention, food, sleep and sensory deprivation, denial of a timely presentment before a magistrate; denial of clothing and proper medical care; humiliation; and failure to inform Mr. Lindh of his rights, to name just a few." Id. See also Andrew Cohen, Photos Complicate Lindh Prosecution, Apr. 12, 2002, at http://www.cbsnews.com/stories/2002/03/21/news/opinion/courtwatch/main504297.shtml. Cohen, a legal consultant, reported on photographs showing U.S. Special Forces soldiers "posing with a blindfolded and handcuffed Lindh." On the front of the blindfold was "a humiliating obscenity." But see Plea Agreement, United States v. Lindh (E.D. Va. 2002) (No. 02-37-A), available at http://news.findlaw.com/hdocs/docs/lindh/uslindh71502pleaag.pdf, wherein Mr. Lindh "agrees that this agreement puts to rest his claims of mistreatment by the United States military, and all claims of mistreatment are withdrawn." In this plea agreement, Mr. Lindh was required to acknowledged "that he was not intentionally mistreated by the U.S. military." Id.

2. Shifting Law Enforcement Priorities from General Crime to Terrorism

In June of 2002, the Justice Department announced a change in focus for the FBI. The focus changed from general federal criminal law enforcement to one focused primarily on combating terrorism. Indeed, the "Attorney General and the Director of the FBI have established the FBI's top priority as preventing terrorist attacks." To accomplish this plan, the FBI engaged in a massive restructuring, shifting "hundreds of field agents from criminal investigations to counterterrorism investigations and activities." This change in focus occurred at a time when Justice Department statistics showed general crime is increasing.

This refocusing on terrorism coincided with a new zeal within the Department of Justice to use "aggressive arrest and detention tactics in the war on terror." In announcing this policy, Attorney General John Ashcroft likened this commitment to that of the Kennedy Justice Department's dedication to arrest mobsters for "spitting on the sidewalk." As Mr. Ashcroft explained, the government intended to use "every prosecutorial advantage" available to them. Toward that end, Mr. Ashcroft warned those "terrorists among us" that the government would be using "every available statute" to arrest and detain "as long as possible." Mr.

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368 See id.
370 Id. at 27. At the same time this restructuring was occurring, Robert Mueller assured Congress that the FBI would "continue to pursue and combat international and national organized crime groups and enterprises, civil rights violations, major white-collar crime, and serious violent crime consistent with the available resources and the capabilities of, and in consultation with, our federal, state, and municipal partners." Robert S. Mueller, III, Director, Federal Bureau of Investigation, Statement for the Record on FBI Reorganization before the Senate Committee on the Judiciary (May 8, 2002), available at http://www.fbi.gov/congress/congress02/mueller050802.htm.
372 Ashcroft Remarks, supra note 250.
373 Id. Ironically, this plan to use any means available, as was done to fight organized crime, comes at a time when the extent of abuse by the government in its fight against organized crime is coming to light. See J.M. Lawrence, FBI Chief Admits Blunders in Salvati Case, BOSTON HERALD, May 17, 2001, at 5.
374 See Ashcroft Remarks, supra note 250.
Ashcroft has been true to his word. For the most part, the “terrorist” arrests since September 11, 2001 have been for such things as immigration violations and making false statements to the FBI.  

3. Reconsideration of the Role of Military in Civilian Affairs

In the summer of 2002, the Bush administration began “studying whether to ask Congress to loosen the 124-year-old ban on soldiers doing law enforcement work inside the United States.” This ban, codified in the 1878 Posse Comitatus Act, states:

Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined [under this title] or imprisoned not more than two years, or both.

Although on its face the Act applies to only the Army and the Air Force, “the Department of Defense has extended it by regulatory fiat to the Navy and Marine Corps.”

This call by the White House and the Office of Homeland Security was initially not supported by Pentagon officials, who stated it was unclear that there needed to be changes to the Posse Comitatus Act. Later reports indicated that supporters included senior Pentagon officials and some members of Congress. Though at this time, these discussions generally only call for a

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378 Id.


380 See Will Military Play Greater Role, supra note 376.

review of these powers by the military, it is unclear why the actions of the military in the Padilla case do not already violate this act.382

4. Civilian Corps

The Civilian Corps was developed in response to the WTC attack. Its stated objective is to “prevent and respond to the threats of terrorism, crime, or any kind of disaster.” This program consists of several components, utilizing citizen volunteers in several different areas including Neighborhood Watch programs to incorporate terrorism prevention into their general crime prevention mission and the most controversial, “Operation TIPS.”

Operation TIPS, for the Terrorism Information and Prevention System, was originally envisioned to “be a nationwide program providing millions of workers who, by the nature of their jobs, are well-positioned to recognize unusual events with [training, materials, and] a formalized way to report suspicious activity to the nearest FBI field office.” Simply put, the program was designed to have workers, such as delivery people and cable company employees, who, by virtue of their jobs, could gain access to peoples homes, act as trained informants and report to the FBI on what they observed in the course of their jobs.

As with many of the initiatives taken by the administration since the WTC attack, this program was sharply criticized. Unlike many of the measures ultimately adopted, this program

382 See Padilla, Amended Petition, supra note 295, at 6. But see Padilla Case Reply, supra note 299, at 33-35, in which the government contradicts this assertion because the Posse Comitatus Act (PCA) is limited to civilian law enforcement and Mr. Padilla’s military detention is as an enemy combatant in a time of “armed conflict.” Further, the government argues that Mr. Padilla’s case falls in the exceptions contained in the PCA as expressly authorized by the Constitution because his detention was at the direction of the President under his Article II authority as commander in chief and by “Act of Congress” pursuant to the Authorization to use Military Force and through its appropriation of funding for the “detention of ‘prisoners of war’ and persons ‘similar to prisoners of war.’”


384 Id.

385 At a meeting of the American Bar Association, James Brosnahan, who represents John Walker Lindh, was critical of the TIPS program. He told Michael Chertoff, an administration anti-terrorism lawyer: “You can make a telephone call about somebody you don’t like and maybe they’ll be declared an enemy combatant with no rights even though they’re a U.S. citizen.” He called the TIPS program “as sinister as anything [he’d] ever heard of.” Gina Holland, Justice Officials Defend Operation TIPS to Lawyers Group, Softcom Internet Communications (Aug. 10, 2002), at http://www.nandotimes.com/politics/story/495206p-3949172c.html.
was outlawed by Congress in the Homeland Security Act.\textsuperscript{386} The decision to specifically prohibit this program was in response to criticism such as that from the ACLU, who "questioned the prudence" of the proposal, saying it would encourage "government-sanctioned peeping toms."\textsuperscript{387} Because of these criticisms, in August, the Justice Department scaled back and delayed implementation of the program until Congress could be consulted.\textsuperscript{388} Ultimately, such a program was legislatively outlawed.

### III. WHAT WE SHOULD LEARN FROM NORTHERN IRELAND

If we are to learn lessons from Northern Ireland's experience with combating terror, we must first acknowledge the differences between their society and ours. Northern Ireland has a total population of less than two million people.\textsuperscript{389} The U.S. has over 280 million.\textsuperscript{390} The non-governmental political violence in Northern Ireland has been perpetrated by groups with competing views of nationalism vying for recognition in the same land.\textsuperscript{391} For the most part, terrorism in the U.S. has been of a different nature. Finally, there is an Armed Force deployed throughout Northern Ireland which is viewed by a significant minority as an occupying force.

Yet, there are numerous similarities in our institutions and traditions. Northern Ireland is part of the United Kingdom, the country most closely identified with the U.S. We, like Ireland, were once colonies of Britain. Our system of government and tradition of rights have roots in the British system. Both nations are democracies which value freedom. We have similar capitalist economies which rely upon free trade. More to the point, perhaps, our government has begun using many of the same tactics to fight terrorism.


\textsuperscript{389} The population of the province in 1991 stood at 1,577,836. Smyth, supra note 182, at tbl. 1.

\textsuperscript{390} The population of the United States as of April 1, 2000 was 281,421,906. U.S. Census 2000, supra note 180, at 2.

\textsuperscript{391} Certainly, much of the violence suffered at the hands of security forces in Northern Ireland is political. Depending upon the definition of terrorism, this type of political violence could also be described as terrorist.
terrorism that were used in Northern Ireland. The systems used to implement these measures, and those most directly affected by them, would be familiar to most Americans. There are significant reasons to believe the lessons from Northern Ireland are transferable. Mistakes made there should not be repeated here, but the lessons of what worked there could be used in our nation to fight domestic terrorism or that imported from abroad.

Much of what we have discussed in this Article concerns the wisdom of choices made to combat terrorism. We have discussed the civil liberties implications of many efforts to combat terrorism only insofar as they inform us about whether their denial led to disillusionment, resentment and more violence. The practical concern of safety motivates many people in Northern Ireland who have lived their entire lives under various emergency laws attempting to eliminate political violence. To them, whether a power assumed will work to reduce violence is more than just a theoretical discussion.

In concert with this practical motivation, the Northern Ireland Human Rights Commission (NIHRC) has proposed that the Government be required to meet a two-part test before assuming any power to combat terrorism: “A) that existing provisions of the criminal law are ineffective in preventing and/or (as the case may be) investigating ‘terrorist’ activity; and B) that the proposed legislation will be effective in preventing and/or investigating ‘terrorist’ activity.”

We believe that this test provides a helpful framework to assess anti-terrorism proposals, and will use it to analyze the wisdom of the efforts currently being made to combat terrorism in the U.S. “Otherwise the Government risks introducing laws merely to give the impression that it is doing something about terrorism, when in fact what really needs to be achieved is better enforcement of existing criminal laws.”

As NIHRC has pointed out, the British government rarely examined the question of whether additional emergency powers were necessary before passing them into law. Rather, the government frequently assessed only the risk of further terrorist activity, then assumed that more powers were necessary. Given the longstanding existence of emergency powers in Northern Ireland, the continuing threat of terrorism should have at least raised a red flag about whether emergency powers were proving

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392 NIHRC Response, supra note 213. The Commission uses quotation marks around the word “terrorism” because it advocates eliminating this word from all legislation due to the difficulty in defining the term. Id. Its position did not prevail, and the Terrorism Act of 2000 was passed.
393 Id. § 2.2.
effective at reducing terrorism. This issue, however, was not addressed by the British government. The consequence of this failure to assess the need for emergency powers was that the government consistently adopted additional, and often unnecessary, powers. Given the consequent resentment and alienation, as well as the reduction of confidence in governmental institutions and the administration of justice that have been caused by the exercise of these powers, and the fact that violence did not decrease from their adoption, we should be loathe to make these same mistakes. Unfortunately, our government has begun racing down a treacherous path, exercising dramatic new powers without any examination of whether they were needed or likely to succeed. We will assess the need for these powers and their likely effects below, before concluding with suggestions about how those methods that were successful in Northern Ireland might be translated into effective policy in the U.S. "war on terrorism."

A. The Powers Being Exercised by the U.S. Government Were Probably Not Necessary to Stop the September 11, 2001 Attack

Our government made no attempt to justify the assumption of powers in the aftermath of the September 11, 2001 attacks. The only "analysis" used in advocating for these dramatic new powers was an assessment that future acts of terrorism were likely. That conclusion seemed obvious after the attacks on the World Trade Center and the Pentagon. In recent months, it has been revealed that the threat of the specific kind of attack we suffered was already clear to some members of our intelligence and law enforcement services prior to September 11, 2001. This information suggests that the law enforcement powers in existence prior to the attacks were probably sufficient to prevent those attacks. If so, then the governmental action taken since September 11, 2001 fails the first part of our test in that it cannot show that existing law enforcement capabilities were insufficient to stop terrorist attacks.

An FBI agent in Phoenix warned his superiors in Washington, D.C. that he had noticed a pattern of Al Qaeda operatives who were learning to fly commercial airliners for terrorist purposes. See September 20 Presidential Address, supra note 2. The President spoke of the continuing threat to the nation while stressing that new powers were needed. See id.
This memo was written on July 10, 2001. In the memo, Agent Williams stated that the FBI had been investigating Middle-Eastern students at flight schools since April, 2000. Within weeks of the Phoenix memorandum, and unaware of that memo's existence, FBI agents in Minneapolis identified Zacharias Moussaoui as a potential terrorist who was taking flying lessons in Minnesota. Moussaoui was subsequently arrested on an INS violation and the FBI in Minneapolis sought a warrant to search his premises and laptop computer. Coleen M. Rowley, Special Agent and Minneapolis Chief Division Counsel, has publicly complained that "HQ [headquarters] personnel never disclosed to the Minneapolis agents that the Phoenix Division had, only approximately three weeks earlier, warned of Al Qaeda operatives in flight schools seeking flight training for terrorist purposes!" Agent Rowley has asserted that FBI headquarters in Washington "deliberately sabotage[d]" Minneapolis agents' efforts to obtain a search warrant.

In response to these revelations, President Bush and others have argued that it was impossible for anyone to have concluded that we were in danger of suffering an attack like the one which occurred on September 11, 2001. This argument apparently is contradicted by a Senate report on intelligence failures before September 11. Though not yet made public, that report by the Senate Judiciary Committee is said to have found that "FBI counterterrorism specialists and the bureau's lawyers were so ignorant of federal surveillance laws that they did not understand that they had ample evidence to press for a warrant to search" Mr. Moussaoui's computer. The information on that computer,
"coupled with other information in the hands of the same FBI counterterrorism supervisors last summer," would have provided a "veritable blueprint for 9/11," according to the report's author, Senator Arlen Specter.403

Special Agent Rowley strongly agreed with that assessment. [T]his is not a case of everyone in the FBI failing to appreciate the potential consequences. It is obvious, from my firsthand knowledge of the events and the detailed documentation that exists, that the agents in Minneapolis who were closest to the action and in the best position to gauge the situation locally, did fully appreciate the terrorist risk/danger posed by Moussaoui and his possible co-conspirators even prior to September 11th. Even without knowledge of the Phoenix communication (and any number of other additional intelligence communications that FBIHQ personnel were privy to in their central coordination roles), the Minneapolis agents appreciated the risk.404

Agent Rowley's arguments suggesting that the terrorist strike against the World Trade Towers and the Pentagon may have been preventable are supported by additional facts uncovered through the work of investigative journalists. The PBS show Frontline has revealed a number of disturbing lapses in U.S. security and law enforcement that directly contributed to the success of the terrorist strike on September 11, 2001.405 These lapses include failing three times to block Mohamed Atta, the purported ringleader of the attack, from entering the U.S., despite knowing that he had an expired visa and knowing that he had violated its terms by taking flight lessons.406 In addition, the FAA failed to investigate Atta and Marwan al-Shehhi, another of the eventual hijackers, when they abandoned a plane on a Miami airport taxi strip in December 2000. There was a further failure to investigate Atta, after he and another of the hijackers, Ziad Jarrah, attempted to get a friend from Yemen into the U.S. to attend a flight school, a move which was prevented by federal authorities. The CIA also failed to put Khalid al-Midhar on a terrorist watch list until August, 2001, even though he had been filmed meeting to plot the bombing of the USS Cole in October, 2000.407

403 Id.
404 Rowley Memo, supra note 398, § 3. This conclusion is shared by others in the intelligence community. See, e.g., Hedrick Smith, Inside the Terror Network: "Should We Have Spotted the Conspiracy?", FRONTLINE, available at http://www.pbs.org/wgbh/pages/frontline/shows/network/should/shouldwe.html (last visited Oct. 8, 2002).
405 See Smith, supra note 404.
406 See id.
407 See id. Khalid al-Midhar would also become one of the September 11, 2001 hijackers.
These failures, of course, were compounded by the failure of the FBI Headquarters to follow up on the leads first identified by the Minnesota flight school where Moussaoui had sought training. One of the most troubling aspects of this failure was that the information passed on to the FBI Headquarters specifically mentioned the use of a fully fueled airliner as a weapon of mass destruction. This warning was not the product of guesswork. In 1995, Philippine authorities warned the U.S. about the confession of an Al Qaeda terrorist named Abdul Hakim Murad. Murad was arrested in 1995 and confessed that he had planned to fly a plane into CIA headquarters; he had trained to become a pilot at a U.S. flight school. Moreover, FBI counter-terrorism experts knew that Al Qaeda and Osama bin Laden were “obsessed” with bringing down the World Trade Towers. These factors could easily have been used to discern that a plot like that which was hatched against the U.S. in 2001 was pending. As Agent Rowley has stated:

It’s quite conceivable that many of the HQ personnel who so vigorously disputed Moussaoui’s ability/predisposition to fly a plane into a building were simply unaware of all the various incidents and reports worldwide of Al Qaeda terrorists attempting or plotting to do so.

Clearly, some of our intelligence agents were capable of figuring out what was happening in their locality and the threat it posed to our national security. Agent Williams in Phoenix and what appears to be the entire Minneapolis field office were strongly advocating action that might have prevented this attack. Moreover, numerous opportunities to arrest Mohamed Atta on legitimate charges were inexplicably missed, while other investigative leads were similarly abandoned.

Given these facts, it seems like the failure to prevent the WTC attack lay within the command and communications structures of our intelligence agencies. Thus, arguably, the failure was not in the provisions of criminal law, but rather with the investigative bureaucracy that enforces those laws. It is certain that there was a failure within our intelligence and law enforcement agencies to

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408 See id. Not only did this warning suggest the use of a fully fueled plane against ground targets, but it specifically mentioned the possibility of Moussaoui flying a plane into a building.
409 See id.
410 Id.
411 Rowley Memo, supra note 398, at n.5. These reports included one from French authorities concerning a plot to fly a plane into the Eiffel Tower.
412 This raises the issue of what type of reorganization might be effective which we will discuss, infra Part III.C, concerning Actions Which Might Reduce the Risk of Terrorism.
share information and pursue leads that some agents had identified as obvious. A strong argument can be made that both intra-agency and inter-agency command and communications systems need a complete review and restructuring. Legislation designed to do this may prove helpful. Most of the powers adopted by our government following these attacks, however, have not been shown to be necessary. Our analysis indicates that they are also likely to be ineffective at reducing violence.

B. *Many of the New Powers are Highly Unlikely to Reduce Terrorism*

In addition to the evidence suggesting that most powers adopted by our government were unnecessary to prevent the terrorist attacks in September 2001, a comparison of the powers adopted with those used in Northern Ireland suggests that these powers may prove counter-productive, and therefore ineffective.

1. Detention Powers

The detention powers exercised by the U.S. government since September 11, 2001, fall into two categories: 1) American citizens detained as “enemy combatants;” and 2) aliens residing in this country detained under unknown authority and circumstances, who could be subjected to military tribunals in the future.

As is noted in Part II(B)(2)(a), two American citizens are being detained without counsel, notice of charges, or any meaningful judicial process. They are apparently being held for the purpose of gaining information from them. One of the

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413 This does not include those foreign nationals taken into custody in Afghanistan and detained at Guantanamo Bay. The treatment of foreign nationals arrested on the battlefield is beyond the scope of this Article.

414 There have been attempts to invoke the rights to counsel and judicial review of the detention decision which have been thwarted by the government in a variety of ways. One detainee, Padilla, has been moved from New York to South Carolina, enabling the government to argue that the court hearing a petition to grant counsel lacked jurisdiction over the case. See Padilla, Amended Petition, supra note 295. In addition, in the case of Mr. Hamdi, the government has taken the position that the courts should not review decisions of the executive to classify a detainee as an enemy combatant. The Fourth Circuit has held that because Hamdi was designated an enemy combatant and “it is undisputed that he was captured in a zone of active combat operations abroad, further judicial inquiry [into the bases for detaining him] is unwarranted when the government has set forth factual assertions which would establish a legally valid basis for the petitioner’s detention.” Hamdi v. Rumsfeld, 316 F.3d 450, 476 (4th Cir. 2003).

415 See supra note 303.
concerns with the incommunicado nature of their detention revolves around the recently raised specter of employing coercive interrogation techniques and torture. Because there is no way to monitor the treatment these citizens are receiving, there is no way to ensure that talk has not turned into improper action in this area. In Northern Ireland, the rules permitting detention and denial of counsel led to flagrant abuse by the police force. Studies on this issue in Northern Ireland have concluded that “[a]n essential safeguard in preventing the use of torture of persons in detention is for lawyers to have immediate access to their client, including during any period of interrogation.” There is nothing to suggest this safeguard is any less essential in the United States.

The two American citizens being held as enemy combatants stand in much the same position as did internees in Northern Ireland. These citizens are detained by the military, without charge, without counsel and without meaningful judicial review of their detention. They are being held at “the arbitrary Diktat of the executive.” The American Bar Association Task Force on the Treatment of Enemy Combatants has condemned the failure to provide counsel to American citizens held under this rubric, as well as the failure to permit judicial review of these detentions.

Obviously, the detention without charge of two citizens is a far cry from the internment of hundreds in Northern Ireland. However, we may be glimpsing the tip of an iceberg with these two detentions. FBI Director Robert Mueller has stated that he believes there are many individuals who are members of “sleeper cells” residing within the United States. These alleged members

416 See supra Part II.D.1.
418 Here, we refer to the internees under the system in effect before the modifications proposed by the Diplock Commission took effect.
419 As the lawyer attempting to help Mr. Hamdi stated: “This is the model we fear or should fear . . . the executive branch can arrest an American citizen here and then declare him an enemy combatant and put him outside the courts. They can keep him indefinitely without charging him or giving him access to a lawyer or presenting any evidence.” See After September 11, a Legal Battle on the Limits of Civil Liberty, N.Y. TIMES, Aug. 4, 2002, National Section at 16 [hereinafter Legal Battle on the Limits of Civil Liberty]
420 See News Release, American Bar Association, ABA Task Force on Treatment of Enemy Combatants Says U.S. Citizen Detainees Should Have Access to Courts, Counsel (Aug. 9, 2002), available at http://www.abanet.org/media/aug02/enemy_combatants.html. This report has just recently been released and has not yet been voted on by the House of Delegates or Board of Governors of the American Bar Association; it is not, therefore, the official policy of the American Bar Association. However, the President of the ABA has endorsed the conclusions of this report.
of terror cells, even U.S. citizens not proven to have committed any crime, would also risk indefinite detention as enemy combatants.

It is not just American citizens, however, who are being detained. In a system largely resembling internment after the Diplock revisions, many aliens lawfully in this country are being detained without charge or trial. The government has strongly resisted the release of any information about these detainees, citing such things as “privacy” to support its policy. The ABA has also condemned the secrecy surrounding the detention of these immigrants as material witnesses or under the authority of the INS.

To date, no one has been arrested under the November 13 Order relating to military tribunals. However, as federal district court Judge William Young noted, “the very establishment of those tribunals, ‘has the effect of diminishing the American jury, once the central feature of American justice.’” It remains unclear how many aliens have been detained under the enhanced powers contained in the USA PATRIOT Act. We know that alien detainees are being held in custody, but because of the secrecy of the government has insisted on in these cases, we know little else about the nature of their detention.

Civil liberties groups have roundly condemned these

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See U.S. Dept. of Justice, Office of Legis. Affairs, Letter & Enclosure to Representative John Conyers from Assistant Attorney General Daniel Bryant (July 26, 2002). Interestingly, though new powers to detain immigrants were sought and obtained in the USA PATRIOT Act, as of July 2002, the Department of Justice reported that it has been unnecessary to use the new certification procedures added in Section 412 of the Act because traditional administrative bond proceedings have been sufficient to detain individuals who the government believes have violated immigration law and present national security risks. See USA PATRIOT Act § 412. Because the government refuses to release identifying information about those people it is holding, there is no way to confirm this.


Because no military tribunals have been convened, the only information available for analysis are the proposed procedures for them. As discussed supra in Part II.B.2.b, these procedures raise a host of issues.

Legal Battle on the Limits of Civil Liberty, supra note 419.
detentions without counsel, charge, trial or review. Human Rights Watch has concluded that since September 11, 2001 "the Department of Justice has subjected [non-citizens] to arbitrary detention, violated due process in legal proceedings against them, and run roughshod over the presumption of innocence." There is good reason to condemn these actions as violations of civil liberties and the rule of law. However, on a more practical level, the experience in Northern Ireland teaches us that this form of detention is also likely to be counter-productive.

The biggest eruption of violence in Northern Ireland occurred in 1972, the first full year after internment was reinstated in August 1971. As even government analyses have concluded, that spike in violence occurred because of community resentment against the unfair application of these extraordinary powers. Virtually no one in Catholic Republican communities would cooperate in any way with governmental authorities at this time, including groups such as the SDLP who were absolutely opposed to the use of violence.

It is essential that this lesson not be lost on us at a time when we need the cooperation of our Arab and Muslim citizens in fighting a threat that may include infiltration of the United States by Arab or Muslim terrorists. No matter how loudly we protest that our war is not against Arabs or Muslims, if we target these communities within our society, and deny to their members any process or communication, we will alienate law-abiding citizens who would otherwise prove helpful.

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428 Id. at 3.
429 See GARDINER REPORT, supra note 25, at 43. See also BEW & GILLESPIE, supra note 106.
430 See BEW & GILLESPIE, supra note 106.
432 In an interview with attorney Carol Khawly of the American-Arab Anti-Discrimination Committee (ADC) on August 14, 2002, she stated that many members of Arab-American communities were seeking to be helpful in the government's fight against terrorism, but were fearful about what their interactions with government officials might bring. Telephone Interview with Carol Khawly, Attorney, American-Arab Anti-Discrimination Committee (ADC) (Aug. 14, 2002). Large numbers of Arabs and Muslims
One of the primary concerns with this part of the legislation is that it is susceptible to the same type of abuse found in the enforcement of anti-terrorism measures in Northern Ireland. Namely, its use is primarily focused on groups perceived by law enforcement to be involved in terrorist activity, whether they are or not. These concerns were raised to Congress in the testimony of academics and civil liberties organizations. Both pointed out the danger that these new powers were most likely to be invoked in proceedings relating to Arab and Muslim immigrants. To support this proposition, these opponents noted that earlier procedural changes allowing the use of secret evidence in immigration proceedings "were directed almost exclusively against persons of Arab or Muslim background.

Compounding these concerns is the fact that the government has steadfastly refused to release even the names of those detained. The fear of racial profiling with respect to these arrests appears to have some validity in that "the vast majority of those detained appear to be [of] Middle Eastern, Muslim, or South Asian" origin. There is a particular danger of creating animosity in the Arab-American and Muslim communities in this instance, given the secrecy surrounding the current detentions. If there is no external oversight of military and law enforcement personnel actions in detaining and questioning suspects, there is a greater likelihood that abusive conditions will prevail during interrogations and detention. This is particularly true in a climate

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435 See Cole Testimony, supra note 433; Edgar Testimony, supra note 434.
436 Edgar Testimony, supra note 434.
437 The government has cited many reasons for this policy, ranging from the privacy rights of those detained, see Dan Eggen, Ashcroft Defends Not Listing Detainees: Privacy Rights at Issue, He Says, June 27, 2001, available at 2001 WL 30328360, to the assertion that release of the names "could enable terrorist groups to map its investigation." Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice, 215 F. Supp. 2d 94, 103 (2002). The district court recently has held that the government is required to release the names of those detained under the Freedom of Information Act. See id. The Government is appealing this decision.
in which we hear people discuss the “need” to torture suspects in the “war on terror.”

As numerous human rights lawyers and academics in Northern Ireland have noted, the language of “emergency” contributed to the belief among those doing the interrogating that abusive practices would be tolerated.

These lessons from the use of similar powers in Northern Ireland teach us that it is unlikely that enhanced detention powers will prove effective at preventing terrorism and may hamper the investigation of these offenses.

2. Investigatory and Search Powers

Greatly expanded powers to search, both physically and electronically, have been adopted in the aftermath of the September 11, 2001 attacks. Some of these expansions apply only to FISA warrants, some apply more broadly to general criminal warrants. As discussed in detail in Part II(A)(1)(c), sneak and peak warrants, computer surveillance and other forms of wiretapping have all become significantly easier for the government to employ. There has been no showing that any of these powers were necessary to combat the terrorist attack on the WTC and Pentagon attack. At the time the USA PATRIOT Act was introduced, only thirteen days after the September 11, 2001 attacks, the government’s investigation into the events was reported to be running along smoothly. The government has not complained of any warrants they were unable to obtain during this period, nor has anyone presented credible evidence of being hampered by pre-existing law.

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439 See Dershowitz, Commentary, supra note 362.
440 See Campbell Interview, supra note 124; Mageean Interview, supra note 125.
441 However, given the ruling of the Foreign Intelligence Surveillance Court of Review that FISA applies to surveillance and searches conducted “primarily for law enforcement” purposes, so long as the government also has a significant foreign intelligence purpose, this appears to be a distinction with no difference. See In Re Sealed Case, 310 F.3d. 717 (Foreign Intel. Serv. Ct. Rev. 2002).
442 See Ashcroft Testimony, supra note 231.
443 In fact, just four days after the WTC attacks and before the USA PATRIOT Act was even introduced, General Ashcroft painted a picture of an efficient and effective investigative effort:

The FBI, together with very cooperative local and state officials and law enforcement agencies has processed thousands of leads. We are making the kinds of contacts and developing the information that allow us to describe this as proceeding with reasonable success. We believe that the picture is developing a kind of clarity that's appropriate. We have named 19 individuals that we have high levels of confidence were the hijackers. And we are further refining our understanding of the ways in which this terrible crime was developed. I might
To the contrary, as Agent Coleen Rowley has pointed out, sufficient probable cause existed under the law to justify a search warrant for Zacharias Moussaoui's computer prior to September 11, 2001. Agent Rowley has clearly identified her superiors' actions as the reason why Moussaoui's computer and belongings were not searched prior to the attacks. Despite this, the USA PATRIOT Act has significantly lowered the standard necessary to obtain warrants and has eliminated much judicial involvement in that process. For instance, under section 216, which applies to internet and e-mail warrants, it appears that

[T]he judge must grant the order upon receiving the certification. Even if the judge disagrees, and believes that law enforcement officers are on a fishing expedition that will yield up no relevant information, the judge must issue the order. The judge is therefore not positioned to protect the privacy of a person's telephone communications; he wields a rubber stamp.

These provisions will almost certainly result in an increased number of searches, of homes, computers, e-mails and the wiretapping of other communications. This is true because of

add that we have put in place very serious measures that we believe will provide greater security and provide a basis for our country returning to the kind of freedom and business and conduct that is characteristic of this great nation.


444 The French authorities had provided evidence to the FBI concerning Moussaoui's involvement with known terrorist groups, including Al Qaeda. Agent Rowley's letter to FBI Director Robert Mueller spells out in detail the sufficient probable cause which existed to grant a warrant under FISA. See Rowley Memo, supra note 398.


447 The authors attempted to determine how many warrant applications were sought under section 402 of the FISA Act. The USA PATRIOT Act requires that the Attorney General report the total number of applications sought and the orders granted, modified, or denied under this section. See USA PATRIOT Act § 214. According to Keith Ausbrook, Committee Chief Counsel for Oversight and Investigations at the House Judiciary Committee, the Attorney General filed a report as statutorily required in December 2001, however, that report and any subsequent reports are “classified” and thus could not be obtained even with a FOIA request. A report to the House Committee on the Judiciary confirmed that the number of times the FISA provisions have been used since amended is classified. See U.S. Dept. of Justice, Office of Legis. Affairs, Letter & Enclosure to Representative John Conyers, Jr. from Assistant Attorney General Daniel Bryant (July 26, 2002). However, recent reports indicate that the government has “stepped up” the use of these warrants. See Dan Eggen & Robert O'Harrow, Jr., U.S. Steps up Secret Surveillance: FBI, Justice Dept. Increase Use of Wiretaps, Records Searches, WASH. POST, Mar. 24, 2003, at A1 (“Attorney General John D. Ashcroft has also
the expanded class of people subject to surveillance and the expanded ways to engage in the surveillance under these sections. For example, the new legislation permits FISA warrants to be granted against people with no demonstrated involvement in criminal activity. Additionally, the court has ruled that the FISA search and surveillance powers now can be used primarily for law enforcement purposes. In large part because of the changes to FISA under the Act, the government argued that procedures used by the FISA court should be changed significantly. This view, though rejected by the FISA court, was ultimately adopted by the FISCR. In In Re All Matters, the government asked the FISA court to rescind the “wall” the court has required to control the acquisition, retention and dissemination of information between foreign intelligence and law enforcement officials. In ruling on this request, the unanimous FISA court listed the many ways in which its present procedures allow for sharing of FISA information in criminal investigations, with appropriate supervision by the court to ensure the statutory purpose of the court is not eroded. The court also noted the “broad array of contemporaneous electronic surveillance techniques” available under the FISA Act. Additionally, the court listed a number of troubling instances in which it had been mislead by the government in FISA pleadings.

The court observed that the proposed procedural changes appeared to “be designed to amend the law and substitute the FISA for Title III electronic surveillances and Rule 41 searches.” The court hypothesized that this request had been made because the government lacked “probable cause for a Title III electronic surveillance” or were “unable to meet the substantive requirements of these law enforcement tools, or because their administrative burdens are too onerous.” The FISA court ultimately denied the government’s request. The FISCR reversed personally signed more than 170 ‘emergency foreign intelligence warrants’ three times the number authorized in the preceding 23 years . . . .”).

448 USA PATRIOT Act § 218.
451 See In Re All Matters Submitted to the Foreign Intelligence Surveillance Court, 218 F. Supp. 2d 611 (Foreign Intel. Surv. Ct. 2002).
452 See In Re Sealed Case, 310 F:3d at 732-36.
453 In Re all Matters, 218 F. Supp. 2d at 613.
454 Id. at 623.
455 Id. at 616.
456 Id. at 620-621. The court went so far as to bar one unnamed FBI agent from appearing before the court as a FISA affiant because of these concerns.
457 Id. at 624.
These developments are important because they are part of a trend in the law since September 11, 2001 to limit the judicial oversight of the government's investigatory powers. This type of government intrusion into the lives of many innocent civilians will only serve to raise the level of distrust between the government and those governed. It will certainly make us less free and secure within our homes. Maybe this will result in more terrorist prosecutions, but there is no evidence to justify that conclusion. We know from Northern Ireland that government intrusion and searches are greatly resented. Nothing suggests that they will be resented any less here. Due to this increased resentment, particularly among the targeted communities, these expanded powers are not likely to enhance the government's ability to prevent terrorism.

3. Other Powers Adopted

a. Attorney-Client Relations

As discussed in Part II(B)(3)(a), the administration has changed and limited the privileged nature of the attorney-client relationship in the wake of the WTC attack. These changes include denial of access to counsel for certain prisoners, investigating, surveilling, and ultimately arresting an attorney who has represented convicted terrorists, and enacting rules to monitor attorney-client conversations for certain detained people. There has been no showing that the existing rules governing the attorney-client relationship were insufficient to protect us against terrorism. There is also little reason to believe these steps will be effective at preventing future terrorist strikes.

Though clearly not rising to the level of interference and


459 See supra Part II.B.2a.

460 See supra Part II.B.3b (detailing the prosecution of attorney Lynne Stewart). One troubling aspect of this development is that the government now refuses to state whether it is engaging in the same surveillance of the interaction between Ms. Stewart and her present counsel. See United States v. Abdel Sattar, No. 02 Cr. 395, 2002 WL 1836755, at *2 (S.D.N.Y. Aug. 12, 2002). The authors are not suggesting it is inappropriate for the government to investigate and charge those who engage in criminal conduct, irrespective of whether they are attorneys. However, given the cumulative effect of recent events in this area, there is the perception that the government's motivations are to deter zealous representation rather than terrorism.

461 See supra Part II.B.3.a.
ultimately violence against attorneys that eventually occurred in Northern Ireland, these encroachments are not insignificant. There is some belief that they arise from the same motivation that being to chill the zealousness of those representing people charged with terrorist offenses. Whether that belief is well-founded or not, the perception of this motivation is important in that it undermines the administration of justice. Any moves which could impact on the effective representation of counsel should be re-examined and undertaken with only the most stringent safeguards.

One such possible safeguard could be the use of Special Masters, appointed by the FISA court, to monitor the information obtained under these warrants. A request for use of a Special Master to act in this role was rejected by the district court in Lynne Stewart's case. However, if such enhanced protections were built into the FISA warrant system, whenever a warrant is sought against someone acting in their role as a criminal defense lawyer, there would be at least some protection against potential abuse of the system. Any such protections enhance the effectiveness of the provisions implemented. Without them, the potential for abuse is unchecked.

b. The Use of the Military

Of all of the changes, proposed and adopted, the option of using the military to enforce domestic law is one of the most troubling. There has certainly been no showing that this tactic is necessary or that it would be effective if enacted. Based on the discussions to date, it is unclear what proposals are being considered. However, the experience in Northern Ireland shows the disastrous consequences that can occur by using the military as a security force. The role of the military in Northern Ireland was formalized in the various Emergency Provisions Acts. The military has played this role in Northern Ireland for more than thirty years. Studies of the problems in Northern Ireland routinely

462 See supra Part I.C.1.c. See also Howard J. Russell, Recent Development, New Death Breathes Life Into Old Fears: The Murder of Rosemary Nelson and the Importance of Reforming the Police in Northern Ireland, 28 GA. J. INT'L & COMP. L. 199, 203 (1999) ("The UN found that Patrick Finucane had been the recipient of death threats by the RUC and that his murder had sent a chilling effect throughout the criminal defense community in Northern Ireland.").

463 See Abdel, 2002 WL 1836755, at *7.


465 See supra Part I.B.1.c.
cite the use of the military as causing some of the most intractable problems facing the province.\textsuperscript{466}

Certainly, the use of the military has been one of the largest points of contention and greatest causes of violence during the past thirty years in Northern Ireland. The military has played a dramatic role there, arresting 30,492 people under the EPA between 1975 and June 1987 alone.\textsuperscript{467} As described in greater detail in Part I(C)(1)(e), the military was also heavily involved in the searches of thousands of people’s premises during this same period. These efforts to reduce violence in the province were most resented by law-abiding people and ultimately proved disastrous. Though empowered under the guise of emergency provisions, the presence of the military in Northern Ireland has been greatly resented for decades and it has proven to be counter-productive.

We have a long tradition of prohibiting the military from engaging in civilian law enforcement activities. That tradition has served us well for more than 120 years. Before empowering the United States military to act in traditionally civilian areas, even in the cause of the present emergency, the US should understand that the military compounded the problems in Northern Ireland and did not prevent terrorist violence.

C. Actions that Might Reduce the Risk of Terrorism

1. Increased Sharing of Information: Department of Homeland Security and the Limitation of Grand Jury Secrecy

   a. Homeland Security

   The government should do everything that it can consistent with our constitution to reduce the threat of terrorism. The creation of the Office of Homeland Security, now the Department of Homeland Security,\textsuperscript{468} has the potential for meeting the two part test of being both necessary and effective. However, if it is to achieve this goal, its actions must be subject to strict judicial oversight and be “bound to follow transparent, politically

\textsuperscript{466}See e.g., ROBBIE McVEIGH, “IT’S PART OF LIFE HERE…”: THE SECURITY FORCES AND HARASSMENT IN NORTHERN IRELAND (Committee on the Administration of Justice, Belfast 1994). See also CAJ, NO EMERGENCY, supra note 29, at 31.


\textsuperscript{468}See supra Part II.A.1.a.
approved rules of procedure during times of crisis."

One purpose behind the creation of this Department was to coordinate communications between agencies to ensure that information is properly assessed and acted upon. There has been a demonstrated deficiency in this area. Of course, there is merit to the argument that existing laws were sufficient to allow proper communication of information and coordination of efforts among intelligence and law enforcement agencies. However, there are also long-running turf battles that might not be overcome without legislative initiative and organizational restructuring. Given the threat that exists, and the demonstrated failure in this area, it is reasonable to conclude that reform is needed.

The more difficult question is whether the current plan is a feasible approach to solving organizational problems and making communications more efficient. If it does not accomplish these two goals it cannot be said to be addressing any failure under pre-existing law. This will not be an easy task. Part of the issue in making communications more efficient involves the effective use of the intelligence we are already gathering worldwide. U.S. intelligence currently monitors millions of conversations and e-mail exchanges conducted in a great variety of languages throughout the world. Some of the conversations we are most interested in deciphering are conducted in languages, like Arabic, for which we have a dearth of translators. If the new Department cannot actively recruit competent Arabic translators and use them efficiently, the office will have failed to correct some of the problems existing in communication and coordination among agencies.

Other problems with communication and coordination are highlighted by the Moussaoui case and the Phoenix memo. Clearly, sufficient information was available to raise very serious and specific concerns in the minds FBI agents in Phoenix and Minneapolis. The fact that the Phoenix memo was not distributed and, particularly, was not connected with the request for a search warrant in the Moussaoui case underlines a dramatic failure in the communication of information and coordination of investigative

470 See Rowley Memo, supra note 398.
efforts in response to that information. The Department of Homeland Security must be able to correct these types of deficiencies or it will be ineffective.

In short, if the new Department of Homeland Security does not make it more likely that information will be shared and acted upon in a way that stops future acts of terrorism, then the creation of the Department of Homeland Security is unjustified. Joining parts of numerous agencies, with their attendant bureaucracies, under one umbrella may only serve to add a layer of bureaucracy and cause further inefficiency. Care must be taken to ensure that the transmittal of information becomes more efficient, as must the decision to act upon the information once it is in the hands of the various intelligence and law enforcement agencies. Whether the obstacle of inefficiency can be overcome remains to be seen.


The new grand jury provisions call for increased sharing throughout the law enforcement community of information learned and obtained by the grand jury. Once again, there has been no showing that the existing laws in any way hampered the investigation of terrorism.

Though arguably motivated by the desire for more efficient transmittal of information, the recent alterations pose great potential for abuse. Primarily these concerns have to do with the fair and impartial administration of justice. Sharing information learned during grand jury proceedings could prove useful to those investigating acts of terrorism. Properly controlled by judges, this power could permit dissemination of valuable information about potential acts of terrorism. However, if prosecutorial power is unfettered, this process could prove terribly unfair.

Before the USA PATRIOT Act, release of information from any grand jury was very limited. The scope of these exceptions from the general rule of secrecy had been narrowly construed. "The exceptions have... been consistent in their use of judicial

473 Agent Rowley's memo identifies a similar potential for inefficiency within the FBI itself. She criticized Director Mueller's plan to have teams of agents travel from terrorist event to terrorist event, rather than using local agents. Rowley clearly viewed this plan as inefficient and likely to result in more failures to energetically pursue lawful avenues of investigation. See Rowley Memo, supra note 398.

474 See supra Part II.C. As of July 26, 2002, the government had reportedly used this power on "approximately 40 occasions." U.S. Dept. of Justice, Office of Legis. Affairs, Letter & Enclosure to Representative John Conyers from Assistant Attorney General Daniel Bryant (July 26, 2002).
supervision to insure that disclosures are limited to circumstances that present a specific need that outweighs the need for secrecy.\textsuperscript{475} Secrecy maintains the effectiveness of the grand jury, while also serving "to minimize the harm that may be caused by grand jury investigations."\textsuperscript{476}

Given the purposes served by maintaining the secrecy of the grand jury, it is difficult to understand why the change eliminated any judicial involvement in the decision to release information. When considering the impact of this change, one must recognize the manner in which grand juries function and the enormous power they wield. Federal grand juries are conducted in secret under the guidance of an Assistant United States Attorney. The grand jury has the power to subpoena both testimony and records.\textsuperscript{477} The only limit on this power is contained in Federal Rule of Criminal Procedure 17(c), which allows such warrants to be quashed if "compliance would be unreasonable or oppressive." Thus, the grand jury can obtain information that the government may encounter difficulty in obtaining through court channels.

Without the powers of the grand jury, the government could only obtain documents through normal search warrant powers, limited by the Fourth Amendment. However, via the grand jury, the government can by-pass any judicial limitation on the power to obtain documents, and can simply ask the grand jury to seek a warrant. By further limiting the role of the judiciary in how the government uses this enormous power, the potential for abuse increases. Historically, the judiciary has performed its role in checking such abuses well. Discerning how the prevention of terrorism was served by altering this balance is difficult. This is particularly true given the lessons we can learn from Northern Ireland on limiting judicial oversight.

This trend toward limiting the role of the judiciary is the reverse of what has occurred in the most recent anti-terrorism legislation in the United Kingdom, which amended its provisions to require judicial approval of their detention extensions.\textsuperscript{478} Though in a different realm, the addition of this judicial check on governmental power in a country with such a history fighting terrorism should caution the United States against enacting


\textsuperscript{476} \textit{Id.}

\textsuperscript{477} \textit{See Fed. R. CRIM. P. 17(c); See also United States v. R. Enterprises, Inc., 498 U.S. 292 (1991).}

provisions that loosen such controls.

2. Voluntary Interviews

Voluntary interviews with people who have relevant information about the threat of terrorism have the potential to be very beneficial in the prevention and investigation of terrorism. However, whether the administration's attempts to interview some 8000 men between the ages of 18 and 46 who "have passports from countries which intelligence indicates Al Qaeda . . . presence or activity,"479 have been truly voluntary or productive is questionable. Given that the FBI identifies Al Qaeda as having a "presence in the United States,"480  

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\[479\] See DOJ, 5000 Interviews Status Report, supra note 334.

\[480\] See Federal Bureau of Investigation, The 28 Groups on the U.S. State Department’s Designated Foreign Terrorist Organization List, available at http://www.fbi.gov/terrorinfo/ftolist.htm (last visited Oct. 14, 2002). This website lists 28 groups as designated foreign terrorist organizations. See id. Of these 28, five are listed as having a presence in the United States. See id. Four of these five are listed as in some way “Islamic.” Id.

\[481\] Khawly Interview, supra note 432.

\[482\] In an interview conducted by the Authors with Mohamed Adnan Bhutta on August 14, 2002, the authors were given a first-hand account of what it was like to be arrested on suspicion of having committed the WTC attacks. Telephone Interview with Mohamed Adnan Bhutta, (Aug. 14, 2002). Mr. Bhutta told a harrowing tale of mental, emotional and physical abuse while in custody. See id. While his stories were anecdotal, his fear and resentment were palpable, and are shared by many others. See id.

\[483\] Good will currently exists in the Arab-American and Muslim-American communities. That good will can be turned to positive

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cooperation in stopping terrorism. Now is the time to build relationships that will pay off in future savings of life and property.

3. Isolating Terrorists Through Community-Building

Terrorism exists only when there is some base of support for it within a community. This is true whether we are speaking about a small insular community like Northern Ireland, or in a society as large as the U.S. A community such as Northern Ireland reduced terrorism through political dialogue and a redress of grievances. The more a community feels voiceless, unable to address the injustice in their lives, the more tolerant of violence they become, particularly when it is aimed at the perceived source of injustice. This fact was demonstrated numerous times in Northern Ireland when violence rose in response to failed political efforts. As political progress was made, however, the natural abhorrence for terrorism grew and the level of violence declined.

As we have seen all too closely in this past year, terrorism is a global phenomenon. Conceivably, terrorists could infiltrate our borders and conduct an immediate attack against vital U.S. interests. However, as the events of September 11, 2001 make clear, it is more likely that terrorists who plan an attack on a U.S. vital interest would enter the country and remain here for some time before putting their plan into action. Currently, our nation feels most threatened by terrorists who are Arab or Muslim. If it is true that Arabs or Muslims from abroad represent the greatest threat to our domestic security, the actions our government takes against members of the Arab-American or Muslim-American communities must be carefully assessed. It is within these communities that Arabs or Muslims from other countries are most likely to mingle. It is members of these communities who are most likely to act.

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483 Frequently, this tolerance is just that a bare toleration of something otherwise found to be repugnant. This was repeatedly seen in Ireland where people who were staunchly opposed to violence would nonetheless refuse to cooperate with British authorities or the RUC because they perceived them to be the source of great injustice.

484 This type of attack must be defended against through thorough intelligence and the efficient response of the forces guarding our coast and borders. Part of the job of the Department of Homeland Security will be to effectively coordinate the activities of these various agencies and permit them to respond in a timely manner.

485 Certainly, this was not always the case. Following the Oklahoma City bombing, domestic militias were seen to be the major terrorist threat.

486 While it seems clear that Arabs and Muslims carried out the attacks on September 11, 2001, and that threats from Al Qaeda have been made to launch further attacks against the U.S., the authors of this article do not advocate the position that Muslims or Arabs are more likely to commit acts of terrorism than members of other creeds or ethnic groups.
likely to notice something amiss about such a person's behavior. Large-scale interrogations of Arab-Americans and Muslim-Americans, combined with incommunicado indefinite detentions of other members of their communities can only arouse fear and a sense of injustice in those communities.\textsuperscript{487}

The Arab-American and Muslim-American communities are strong, law abiding communities in the U.S. They desire the same things that all Americans desire. They are cooperative partners in the struggle to keep this nation safe from terrorist attacks. Targeting them in the manner that we have been since September 11, 2001 is counter-productive. We need to hear the concerns of these communities and work with them to eliminate the risk of terrorism from our midst. Like all citizens, they are concerned about governmental actions that single them out for suspicion and identify them as potential terrorists. Addressing their concerns will include scaling back some of the actions we have taken to detain without charge, counsel or trial. It will necessitate foregoing the massive and indiscriminate use of new powers to search. It will involve interviewing those people who may actually have leads into terrorist activity, not just those who share the ethnicity or faith tradition of those we suspect. It will involve working cooperatively with Arab-American leaders and building on the consensus that exists to eliminate terrorism.

CONCLUSION

The powers assumed by our government in the aftermath of the September 11, 2001 terrorist attack, and the manner in which we have exercised those powers, are leading us down the same troubled road that Northern Ireland traveled over the past three-quarters of a century. We need to more closely examine the mistakes made there, so that we do not destine ourselves to repeat them. Great Britain, one of the world's mightiest economic and military powers, tried everything within its control to eliminate terrorism in Northern Ireland, a region approximately the size of Connecticut.\textsuperscript{488} Almost every conceivable form of emergency power was tried, retooled and enhanced, up to and including a more than thirty year military occupation with massive detentions.

\textsuperscript{487} Such fears are being aroused in these communities already. Khawly Interview, \textit{supra} note 432.

without charge or trial, abusive searches and tens of thousands of arrests for questioning. These methods were unsuccessful. Dialogue, cooperation and attention to civil liberties were the necessary and effective elements in the strategy to eliminate terrorism. This must be our strategy, or we are destined to be burned by the same mistakes made fighting terrorism in Northern Ireland.