

IN THE NAME OF NATIONAL SECURITY OR INSECURITY?: THE POTENTIAL INDEFINITE DETENTION  
OF NON-CITIZEN<sup>1</sup> CERTIFIED TERRORISTS IN THE UNITED STATES AND THE UNITED KINGDOM IN  
THE AFTERMATH OF SEPTEMBER 11, 2001

“Are all the laws, but one, to go unexecuted, and the government itself to go to pieces, lest that one be violated?”<sup>2</sup>

## INTRODUCTION

The horrific terrorist attacks of September 11, 2001 left millions of people, both in the United States and throughout the world, feeling vulnerable in a way that we have never felt before. The unprecedented acts of terror created a type of public fear that has not before been present with other national threats of security. The immeasurable damage of the events to the human spirit and our sense of security left many individuals searching for reassurance from their governments that these types of atrocities could never, and would never, transpire again.

Consequently, consistent with what has historically occurred immediately following most major

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<sup>1</sup> The Immigration and Nationality Act, 8 U.S.C. §§ 1101-1537 (2002), defines “aliens” as all people who are not nationals of the United States. It then uses the term “alien” throughout the Act consistently and frequently. Because the term “alien” connotes dehumanizing qualities of strangeness and inferiority, this Comment will use the term “non-citizen” rather than “alien.” This term conveys essentially the same technical meaning without the potentially offensive associations.

<sup>2</sup> See COLLECTED WORKS OF ABRAHAM LINCOLN 430 (Roy P. Basker ed., 1953). Abraham Lincoln was the first president to essentially ignore Congress’ power and freely direct the nation as a “dictator.” Faced with the emergency of the Civil War, Lincoln enlarged the Army and Navy beyond the authorization of Congress and spent money without Congressional approval. In addition, he suspended the writ of habeas corpus which enable the executive branch to arrest “disloyal” citizens and anyone who sympathized with the South without a trial. The Supreme Court justified President Lincoln’s extraordinary conception of executive power based upon the emergency circumstances. See Melissa K. Mathews, *Restoring the Imperial Presidency: An Examination of President Bush’s New Emergency Powers*, 23 HAMLINE J. PUB. L. & POL’Y 455, 465 (2002) (discussing the roles of different presidents in times of war and crisis).

terrorist events, legislatures around the world<sup>3</sup> embarked on the task of passing tougher anti-terrorism laws in a frenzy of activity.<sup>4</sup>

The governments of the United States and the United Kingdom, under the premise of national security, responded to the events of September 11, 2001 by immediately enacting comprehensive responsive and reactionary legislation. The measures adopted by the governments of these two nations, while allaying some of the fears of their citizens and possibly providing them with a greater sense of security without sacrificing their own liberty, have in turn sacrificed the liberty of non-citizens. Among other things, this trade-off has provided the United States and the United Kingdom with the discretion and the authority to indefinitely detain those non-citizens certified as terrorists under the new legislation.<sup>5</sup> This targeting of non-citizens

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<sup>3</sup> For example, several countries of the European Union, in addition to the United Kingdom which is at the focus of this Comment, passed anti-terrorism measures in the wake of September 11, 2001. France expanded the powers of police to search private property without a warrant and Germany engaged in religious profiling of suspected terrorists. *See* Jeffery Rosen, *Liberty is winning ...so far, Congress and courts are resisting the Bush administration's efforts to restrict civil liberties in the name of national security*, WASH. POST, Sept. 29, 2002.

<sup>4</sup> *See* Gregory C. Clark, *History Repeating Itself: The (D)evolution of Recent British and American Antiterrorist Legislation*, 27 FORDHAM URB. L.J. 247, 247- 48 (1999) (comparing the past efforts of the United States and the United Kingdom to combat terrorism). One of the memorable phrases that was coined during the troubles in Northern Ireland in the past is the “politics of the last atrocity.” It refers to people taking advantage of the last atrocity to push a political agency or to score political points. *See id.* Similarly, the following the Oklahoma City bombing in the United States the legislature passed the Anti-Terrorism and Effective Death Penalty Act with the goal of making the United States a no-support-for-terrorism zone. *See id.* *See also supra* note 40 (discussing terrorist events in the United States prior to September 11, 2001).

<sup>5</sup> “Certified” means that either the Attorney General in the United States or the Secretary of Labor of the United Kingdom has deemed a particular individual in their respective countries as a suspected terrorist. What is so striking about both the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 and Anti-terrorism, Crime and Security Act 2001 is the tremendous power each piece of legislation placed in the discretion of the government to certify an individual as a terrorist, which leads to automatic preventative detention. This certification does not require a court order and is permissible upon a reasonable belief held by the executive that the individual is a terrorist. The certification of suspected terrorists will be discussed further in Part III of this Comment.

through the use of anti-terrorism legislation by the governments of the United States and the United Kingdom, while not unprecedented or necessarily radical given the atrocities committed against the citizens of these nations,<sup>6</sup> does however raise serious concerns regarding exactly how far these nations can proceed in the name of national security.

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<sup>6</sup> Historically, the governments of both the United States and the United Kingdom have curtailed civil liberties in times of national emergency, finding the state interest in national security to be paramount to competing interests. During World War I, the Supreme Court upheld the conviction of Eugene Debs for expressing his opposition to the war, refusing to recognize his violent anti-war advocacy as speech protected by the First Amendment. *See Debs v. United States*, 249 U.S. 211 (1919). *See also Schenk v. United States*, 249 U.S. 47 (1919) (upholding conviction of an individual for distributing anti-war circulars). Likewise, during World War II following the bombing of Pearl Harbor, the Supreme Court upheld an Executive Order mandating the internment of more than 100,000 Japanese immigrants based on their ancestry, refusing to recognize their preventive detention as a violation of the Equal Protection Clause. *See Korematsu v. United States*, 323 U.S. 214 (1945). And during the Cold War, the United States was quick to target anyone suspected of being associated with the Communist Party. *See Dennis v. United States*, 341 U.S. 494 (1951).

Similarly, the United Kingdom has been quick to ignore and suspend civil liberties during periods of crisis. During World War II, almost 2,000 persons, both citizens and non-citizens alike, were interned in the United Kingdom without formal charges and without trial. PADDY HILLYARD, *SUSPECT COMMUNITY, PEOPLE'S EXPERIENCE OF THE PREVENTION OF TERRORISM ACTS IN BRITAIN* 45 (1993). Furthermore, the United Kingdom's ongoing struggle with terrorism in Northern Ireland has often resulted in the suspension of civil liberties during particularly unstable periods. *See generally id.* (providing a history of the United Kingdom's response to terrorism in Northern Ireland and discussing how these responses have resulted in the erosion of civil liberties); DONALD W. JACKSON, *THE UNITED KINGDOM CONFRONTS THE EUROPEAN CONVENTION ON HUMAN RIGHTS* (1997) (studying the legal conflicts and transitions between the United Kingdom and the European Court of Human Rights). For example, during the infamous "Bloody Sunday," British paratroopers killed innocent and unarmed protesters in Northern Ireland who were participating in a civil rights demonstration. *See* LAURA K. DONAHUE, *COUNTER-TERRORIST LAW AND EMERGENCY POWERS IN THE UNITED KINGDOM 1922-2000* 121 (2000); Clark, *supra* note 4, at 253. After this horrific event, Ireland erupted in violence and chaos. In response, the United Kingdom suspended the Parliament of Northern Ireland and resorted to direct control of the province. *See id.* at 253-54. In addition, the United Kingdom passed two important pieces of legislation, the Emergency Powers Act and the Prevention of Terrorism Act. These Acts and their effect on civil liberties will be discussed in more detail in Part II of this Comment.

An in-depth examination of the curtailment of civil liberties of both the United States and the United Kingdom during times of crisis is well-beyond the scope of this Comment. This issue has, however, been addressed by numerous other scholars. For more information, see generally Mathews, *supra* note 2 (comparing the recent curtailment of civil liberties by President Bush

An in-depth complete analysis and summary of the extensive anti-terrorism legislation enacted in the United States and the United Kingdom after September 11, 2001 is well beyond the scope of this Comment and has been extensively discussed elsewhere.<sup>7</sup> These legislative acts, while undoubtedly sudden responses of both governments to the terrorist attacks, served as catchalls for many initiatives, a majority of which are non-controversial. This Comment will examine a select few of those sections of the United States United and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001<sup>8</sup> (Patriot

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with the past policies of notable United States Presidents); David Cole, *Enemy Aliens*, 54 STAN. L.J. 953 (2002) (addressing the United States treatment of non-citizens during times of crisis, both past and present); JACKSON, *supra* (studying violations by the United Kingdom of the European Convention for the Protection of Human Rights and Fundamental Freedoms); HILLYARD, *supra* (exploring the powers of the United Kingdom during times of crisis and describing how the entire Northern Ireland community has been targeted and criminalized by these powers).

<sup>7</sup> For a discussion of the Patriot Act in its entirety see generally Jennifer C. Evans, *Hijacking Civil Liberties: The USA Patriot Act of 2001*, 33 LOY. U. CHI. L.J. 933 (2002) (discussing the various provisions of the Patriot Act and their potential consequences for civil liberties); Amnesty International, *United States of America, Amnesty International's Concerns Regarding Post September 11 Detentions in the USA*, March 2002, available at [www.amnesty.com](http://www.amnesty.com) (outlining various provisions of the Patriot Act and discussing their implications for civil liberties); Michael T. McCarthy, *USA Patriot Act*, 39 HARV. J. ON LEGIS. 435 (2002) (examining the Patriot Act's expansion of government authority and its impact on civil liberties). For an analogous discussion of the Anti-Terrorism, Crime and Security Act 2001 see generally Virginia Helen Henning, *Anti-Terrorism, Crime and Security Act 2001: Has the United Kingdom Made a Valid Derogation from the European Convention on Human Rights?*, 17 AM. U. INT'L L. REV. 1263 (2002) (discussing whether the broad powers authorized to the United Kingdom under ATCSA are consistent with their obligations under the European Human Rights Convention); Amnesty International, *United Kingdom, Rights Denied: the UK's Response to 11 September 2001*, Sept. 5, 2002, available at [www.amnesty.com](http://www.amnesty.com) (expressing deep concern about serious human rights violations that have taken place as a consequence of the United Kingdom's response to the September 11, 2001 terrorist attacks in the United States); Adam Tomkins, *Legislating against Terror: The Anti-terrorism, Crime and Security Act 2001*, PUBLIC LAW, 2002, at 205 (discussing the various measures of ATCSA); Sadiq Khan, *Anti-Terrorism Crime and Security Act 2001*, SOLICITORS JOURNAL, Jan. 11, 2002, at 10; Michael Zander, *The Anti-Terrorism Bill—What Happened?*, NEW LAW JOURNAL, Dec. 21, 2001, at 1880.

<sup>8</sup> United and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. Law No. 107-56, 115 Stat. 272 (codified as amended in scattered sections of 8 U.S.C.).

Act) and the United Kingdom's Anti-terrorism, Crime and Security Act 2001<sup>9</sup> (ATCSA) which have proven extremely controversial. These provisions stand out as radical in the degree in which they sacrifice freedom in the name of national security. More specifically, the focus will be limited to §§ 411 and 412 of the Patriot Act and Part 4 of ATCSA, which provide the governments of the United States and United Kingdom with extensive powers to take into custody and detain non-citizens suspected of terrorism.<sup>10</sup> Each piece of legislation respectively enables the Attorney General of the United States and the Secretary of State of the United Kingdom to certify any non-citizen whom he suspects to be a terrorist.<sup>11</sup> Upon certification, the provisions which will be examined then require the mandatory detention of these individuals until the non-citizen is either ordered removed from the country or found not to be removable, and authorize the potential indefinite detention of these non-citizens who have been certified as terrorists.<sup>12</sup>

Part I of this Comment will introduce the advantages and disadvantages that accompany the various theories of mandatory detention. Keeping these theories in mind, Part II will begin by examining the major points of difference between the governments of the United States and the United Kingdom. An understanding of the structural differences between the two governments is essential before embarking on a comparison of their anti-terrorist legislation, both past and present. This Part will then lay the statutory framework for the Patriot Act and ATCSA by providing a brief history of the indefinite detention of non-citizen suspected terrorists in the United States and the United Kingdom prior to September 11, 2001. In examining the

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<sup>9</sup> Anti-terrorism, Crime and Security Act, 2001, c. 24 (Eng.).

<sup>10</sup> See United and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, §§ 411, 412 (codified as amended in scattered sections of 8 U.S.C.); Anti-terrorism, Crime and Security Act, §§ 21-30.

<sup>11</sup> See *id.* at § 412; § 21.

past efforts of these countries to combat terrorism prior to September 11, 2001 and by establishing exactly what the law was prior to the enactment of the Patriot Act and ATCSA, we can better understand the changes these pieces of legislation authorized.

Part III will then outline and compare specific detention provisions of the Patriot Act and Anti-Terrorism, Crime and Security Act 2001 which are at the crux of this Comment. The comparison will first examine the definition of a terrorist and exactly what qualifies as a terrorist activity under each of the respected acts in an effort to explain precisely how a decision is made to certify a non-citizen as a terrorist. This Part will then look at the implications of being certified a terrorist as it pertains to custody, release, and commencement of proceedings and analyze the detention provisions and the potential concerns that each piece of legislation raises. In addition, this Part will also demonstrate how each act purports to place a limitation on detention by examining the ability of certified terrorists under each piece of legislation to obtain judicial review of their certification. Finally, this Part will examine and analyze the various arguments which have been made against each of the pieces of legislation. As this Part will establish, while each act presumably limits the amount of time a certified non-citizen terrorist can be detained, a close reading reveals that indefinite detention is a possibility. Nevertheless, despite the prospect of indefinite detention, this analysis and comparison of each piece of legislation will also illustrate just how reasoned a response the Patriot Act is to protect the United States from the threats of terrorists and terrorism. On the contrary, as will be explained, ATCSA cannot be similarly justified.

Part IV will first posit how the United States Supreme Court (Supreme Court) would rule on the constitutionality of the detention provisions of the Patriot Act and similarly whether the

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<sup>12</sup> See *id.* at § 412; §§ 21-29.

European Court of Human Rights<sup>13</sup> (European Court) would find that the United Kingdom, in enacting the detention provisions of ATCSA, has violated its obligation to protect human rights and democratic principles under the European Convention on Human Rights (ECHR).<sup>14</sup> While each court has yet to rule on such issues, their previous decisions with regards to the detention provisions enacted in past legislation and their decisions during times of national crisis can guide us in making such an inquiry. Ultimately, the question for both the Supreme Court and the European Court is whether these governments can sacrifice the liberties of others for the purported security of the rest of their citizens. While it is probable that the controversial provisions of the Patriot Act will be upheld by the Supreme Court, it is questionable as to whether the European Court would similarly uphold the detention provisions of ATCSA. Irrespective of how each court would rule, however, this Comment will conclude that the detention strategy is inherently flawed and is unlikely, at least in the long term, to achieve the goals of preventing another terrorist attack.

Finally, this Comment will argue that despite the indisputable curtailment on the civil liberties of non-citizens under both acts, the detention provisions embodied in the Patriot Act represent a reasoned and proportionate response to the terrorist attacks of September 11, while those under ATCSA cannot be similarly justified. Even though the Patriot Act has come under heavy fire in both the United States and throughout the world, in researching the state of liberty and security after September 11, it is astounding to observe how restrained the legal response of the United States appears when contrasted with that of the United Kingdom. Although the

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<sup>13</sup> The European Court of Human Rights was established under Article 19 of the European Convention on Human Rights. The Court will be discussed in more detail in Parts III and IV of this Comment.

<sup>14</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953) [hereinafter ECHR].

United Kingdom was not directly attacked, the detention provisions of ATCSA are far more sweeping than those authorized under the Patriot Act. In comparing the legislative responses of both the United States and the United Kingdom to the terrorist attacks it becomes apparent that while the Patriot Act is a rational legislative response which includes sufficient protections to defend those subject to the Patriot Act's detention provisions, the unrestrained powers of the British government under ATCSA are neither strictly necessary, nor balanced, nor accompanied by adequate procedural safeguards to protect the rights of those detained under Anti-terrorism, Crime and Security Act 2001.

## I. THEORIES OF MANDATORY DETENTION

An appropriate starting point in the comparison of the detention provisions of the Patriot Act and ATCSA is a brief analysis of the basic theories which underlie the mandatory detention of non-citizens. In this analysis, it is essential to compare the benefits of categorical, mandatory detention with the benefits of case-by-case determinations which take into consideration the particular individual's potential threat to public safety and the person's likelihood of disappearing altogether. Essentially, do the benefits of mandatory detention outweigh the costs?

First, mandatory detention saves money because it avoids the expense of individualized hearings.<sup>15</sup> The government has limited resources and cannot afford to do a case-by-case adjudication of each non-citizen who is suspected of being a terrorist.<sup>16</sup> Second, mandatory detention diminishes the possibility of errors that arise when a detention determination is done on a case-by-case basis.<sup>17</sup> Predictions about the threat of a person to the public's safety or the

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<sup>15</sup> Stephen H. Legomsky, *The Detention of Aliens: Theories, Rules and Discretion*, 30 U. MIAMI INTER-AM. L. REV. 531, 544 (1999).

<sup>16</sup> *Id.* at 545-46.

<sup>17</sup> *Id.*



individual's likeliness to disappearance are inherently risky.<sup>18</sup> Often in the course of an individualized hearing, not all the evidence will be discovered or presented and the findings of fact may not be accurate.<sup>19</sup> In essence, mandatory detention, by eliminating the risk of prosecutorial error, protects the public more thoroughly. Finally, mandatory detention deters further immigration violations.<sup>20</sup> It both advances the government's interest in ensuring the removal of aliens who are ordered deported and sends a message to those non-citizens contemplating criminal or terrorist in the United States.<sup>21</sup> Arguably, if suspected terrorists are aware that they could be detained indefinitely, they may be discouraged from attempting to enter the United States illegally or from filing frivolous asylum claims.<sup>22</sup>

Nevertheless, there are shortcomings to the abovementioned theories. Inevitably, mandatory detention will lead to a number of false positives.<sup>23</sup> In other words, some of the people detained may or may not be suspected terrorists. Furthermore, these individuals may not pose any threat to the public's safety and may not abscond upon release. Some disadvantages include the deprivation of individual liberty; the inability to work and socialize; and isolation from friends, family, and the community. In addition, the individual suffers an economic loss by being unable to work, which results in the loss of income tax revenue that the detained person's employment would have generated, as well as the increased public costs of providing detention

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<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 546.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*; see also Daniel R. Dinger, *When We Cannot Deport, is it Fair to Detain? An Analysis of the Rights of Deportable Aliens Under 8 U.S.C. § 1231(A)(6) and the 1999 INS Interim Procedures Governing Detentions*, *BYU L. REV.* 1, 6 (2000).

<sup>22</sup> Legomsky, *supra* note 15, at 546.

<sup>23</sup> *Id.* at 545-46.

and possibly supporting the detainee's dependents through public assistance programs.<sup>24</sup> These losses combined constitute a great waste of both human and financial resources.<sup>25</sup>

On the other hand, and even more significantly, many individuals who do not fall squarely within any of the categories of persons who are automatically subject to mandatory detention may in fact still present a real danger of absconding or pose a real threat to public safety.<sup>26</sup> Every time the INS is required to detain a person who in fact poses no threat or danger at all, it has one fewer detention spot available for a person who poses a threat and whom the INS would have had the discretion to detain.<sup>27</sup> This factor is of great consequence. At any one time, there are approximately 125,000 persons in removal proceedings, but the INS has only 14,000 detention beds.<sup>28</sup> To the extent that mandatory detention is intended to minimize false negatives, therefore, the strategy might even be counterproductive.<sup>29</sup>

Thus, it appears that in least in certain cases, mandatory detention serves a useful enforcement function. There are, however, great drawbacks that accompany mandatory detention. With the advantages and disadvantages of mandatory detention in mind, we now turn the statutory framework that existed in regards to the mandatory detention of non-citizens suspected of terrorism in the United States and the United Kingdom prior to the tragic events of September 11, 2001.

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<sup>24</sup> *Id.* at 546-47.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 547.

<sup>27</sup> *Id.* at 547.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

## II. MANDATORY DETENTION OF NON-CITIZENS SUSPECTED OF TERRORISM IN THE UNITED STATES AND THE UNITED KINGDOM BEFORE SEPTEMBER 11, 2001

A comparison of any type of legislation enacted by two independent governments must begin with a basic understanding of how each government works and an explanation of the fundamental differences between the two systems. Unlike the United States, the United Kingdom does not have a supreme written Constitution and an established bill of rights.<sup>30</sup> Thus, the United Kingdom is a unitary state with a parliament whose legislative power is, legally speaking, unfettered, since there is no over-riding written constitution limiting its powers, and no power in the courts to invalidate an Act of Parliament.<sup>31</sup> In addition, the principle of separation of powers, while underlying the structure of the United States government, is unheard of within the British system.<sup>32</sup> In the absence of a federal system of government, the United Kingdom merges the functions of the executive and the legislature and does not provide the power of judicial review of primary legislation.<sup>33</sup>

These differing frameworks, more specifically, the absence of a power of judicial review of primary legislation, significantly affect the breadth of legislation and the powers afforded to

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<sup>30</sup> See Jacqueline Ann Carberry, *Terrorism: A Global Phenomenon Mandating a Unified International Response*, 6 IND. J. GLOBAL LEGAL STUD. 685, 695 (1999); 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, 283 (1997); D.G.T. Williams, *Aspects of Equal Protection in the United Kingdom*, 59 TULANE L. REV. 959, 960 (1985). For a more in-depth examination of the nature and the source of the unique constitution of the United Kingdom see Douglas W. Vick, *The Human Rights Act and the British Constitution*, 37 TEX. INT'L L.J. 329 (2002).

<sup>31</sup> See David Bonner, *United Kingdom: The United Kingdom Response to Terrorism*, in WESTERN RESPONSES TO TERRORISM 171-72 (Alex P. Schmid & Ronald D. Crelinsten eds., 1993). For an in-depth analysis of British law, the practice of the constitution and the overall structure of the government of the United Kingdom, see generally A.W. BRADLEY & K.D. EWING, *CONSTITUTIONAL AND ADMINISTRATIVE LAW* (1997).

<sup>32</sup> See Carberry, *supra* note 30, at 695.

<sup>33</sup> *Id.*

government officials.<sup>34</sup> This is clearly apparent and important when examining the anti-terrorism legislation enacted by the two governments over the years. Due to the absence of a formalized written constitution or a formal bill of rights, British law has consistently granted more power to its government to control terrorism.<sup>35</sup> This is because, as previously discussed, in the United Kingdom there is essentially a single principle, parliamentary sovereignty, which allows Parliament, technically the monarch, Lords, and Commons, unlimited power to alter both the substance and procedure of government.<sup>36</sup> This has resulted in the enactment of numerous specific anti-terrorism measures in response to the ongoing conflict between Catholics and Protestants in Northern Ireland.<sup>37</sup> Nevertheless, the power is not unchecked. The European Court of Human Rights monitors the British anti-terrorism provisions and places pressure on the government to respect basic human rights and liberties.<sup>38</sup>

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<sup>34</sup> *Id.* Even in the absence of judicial review, however, British judges are familiar with the exercise of a leading constitutional rule: the early strands of authority for modern concepts of judicial review date back from seventeenth-century England. For a further discussion of the concept of judicial review in the United Kingdom see Williams, *supra* note 30, at 964. See also BRADLEY & EWING, *supra* note 31, at 803-29.

<sup>35</sup> See Carberry, *supra* note 30, at 695. Examples of this type power granted to the British government to combat terrorism will be discussed in more detail in Part II.B of this Comment.

<sup>36</sup> See Barry Jones & Michael Keating, *Nations, Regions, and Europe: The UK Experience*, in THE EUROPEAN UNION AND REGIONS 89 (Barry Jones & Michael Keating, eds., 1995).

<sup>37</sup> See *id.* For an examination of the vast legislation passed by the United Kingdom in an effort to address the conflict in Northern Ireland see generally DONAHUE, *supra* note 6 (discussing the exercise of extraordinary state power by the United Kingdom in Ireland and the repeated codification of emergency powers as a means to retain control over Ireland.) In addition, Part II.B of this Comment will provide a summary of the United Kingdom's anti-terrorism legislation prior to September 11, 2001.

<sup>38</sup> See Carberry, *supra* note 30, at 695; Smith, *supra* note 30, at 283. The rulings of the European Court of Human Rights are binding on the United Kingdom as the United Kingdom has ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and fully accepted its control mechanism. Nevertheless, the United Kingdom, although obligated under ECHR, has consistently violated the treaty. For an in-depth analysis of the United Kingdom and its various violations of ECHR see generally JACKSON, *supra* note 6 (closely examining select violations of ECHR by the United Kingdom).

Conversely, the United States has historically addressed terrorism on a less formalized basis than the United Kingdom.<sup>39</sup> Instead of creating specific anti-terrorism legislation, the United States has generally incorporated anti-terrorism measures into pre-existing laws.<sup>40</sup> While the lack of explicit anti-terrorism legislation can partially be attributed to our unique government structure, it is primarily the consequence of the United States' limited exposure to domestic terrorism. Unlike the British, it was not until the 1990s that Americans were attacked at home and realized that they were no longer insulated from terrorism within their borders. Prior to this time, the government could not justify, nor did it need to enact, anti-terrorist legislation at the expense of civil liberties and rights. Beginning with the bombing on the World Trade Center in 1993 and culminating with the Oklahoma City Bombing in 1995, however, the government enacted comprehensive legislation which would address terrorism both domestically and internationally.<sup>41</sup> These tragedies committed on our own soil brought our vulnerabilities to the forefront and brought home to Americans the reality that they too are susceptible to acts of terrorism. While it would be another six years until the devastating September 11, 2001 attacks, these events resulted in a dramatic shift in the attitudes of both the American people and Congress towards terrorism.

Irrespective of the structural differences of the governments of the United States and the United Kingdom and regardless of the anti-terrorism legislation enacted by each of these governments in the past, it is probable that nothing could have prepared either nation for the terrorist attacks of September 11, 2001. Before focusing on the legislative reactions to

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<sup>39</sup> See Smith, *supra* note 30, at 283-84.

<sup>40</sup> *Id.*

<sup>41</sup> STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW POLICY 843 (2002). Although a United States citizen perpetrated the attack on the Murrah Federal Office Building in Oklahoma

September 11, 2001, however, to better explain how the newly granted detention powers authorized by the Patriot Act and Anti-Terrorism, Crime and Security Act 2001 have altered the landscape of non-citizen detention law in the United States and the United Kingdom, it is useful to first survey the rules governing detention as they existed prior to September 11, 2001 as well as to examine the key judicial decisions interpreting and applying them. Only then can we contemplate whether these governments have proceeded too far in sacrificing the freedoms of non-citizens in the name of national security.

*A. The Mandatory Detention of Non-Citizen Terrorists in the United States Prior to September 11, 2001*

Beginning in the 1950s and lasting through the 1980s, the legal structure governing the detention of non-citizens was relatively clear and understood. First, a critical distinction was made between resident non-citizens who had obtained entry into the United States, but who had yet to qualify for naturalization (including both legal and illegal resident non-citizens), and excludable non-citizens who had been detained at the border (including non-citizens who had been paroled into the United States).<sup>42</sup> If a non-citizen was deemed excludable, and thus was stopped at the port of entry, the individual could be detained indefinitely.<sup>43</sup> Conversely, if the

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City, Congress seized the opportunity to enact broad terrorism legislation to quell the public's fear of both citizen and non-citizen terrorists alike. *See id.*

<sup>42</sup> *See* M. Gavan Montague, *Should Aliens be Indefinitely Detained Under 8 U.S.C. § 1231? Suspect Doctrines and Legal Fictions Come Under Renewed Scrutiny*, 69 *FORDHAM L. REV.* 1439, 1441-42 (2001). Under INA § 212(d)(5), the Attorney General has the discretion to “parole” a non-citizen into the United States temporarily. Until 1980 the parole provision was often used to allow groups of refugees into the United States for indefinite periods. Today the provision is typically used to either enable non-citizens to come to the United States temporarily for urgent personal reasons or to allow applicants for admission to avoid detention pending determinations of admissibility. A grant of parole, however, is not considered an admission. *See* LEGOMSKY, *supra* note 41, at 137.

<sup>43</sup> *See* Harvard Law Review Association, *Plight of the Tempest-Tost: Indefinite Detention of Deportable Aliens*, 155 *HARV. L. REV.* 1915, 1919 (2002) [hereinafter *Plight of the Tempest - Tost*]; David A. Martin, *Graduated Application of Constitutional Protections for Aliens: The*

non-citizen was found deportable, meaning that the non-citizen had already procured entry into the United States, he could only be held for six months.<sup>44</sup> This distinction was extremely important because at that time it was widely held that the Constitution afforded greater rights to non-citizens already in the United States than to those who had only just arrived at the border.<sup>45</sup> After the expiration of this six-month period, the deportable non-citizen could be released.<sup>46</sup> The release of the non-citizen, however, was often conditioned on certain supervision and reporting requirements.<sup>47</sup>

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*Real Meaning of Zadvydas v. Davis*, 2001 SUP. CT. REV. 47, 52 (2001). See also *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950) (ruling that excludable non-citizens had no right of a judicial audit, applying independent constitutional standards, of the procedures used in exclusion proceedings: “Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.”); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953) (authorizing the indefinite detention of a non-citizen on Ellis Island).

<sup>44</sup> See *Plight of the Tempest-Tost*, *supra* note 43, at 1919; Martin, *supra* note 43, at 52.

<sup>45</sup> See Martin, *supra* note 43, at 52.

<sup>46</sup> See *id.* Several cases found an equitable exception suspending the running of the six-month period if the non-citizen in anyway delayed the process of securing traveling documents. See, e.g., *Dor v. District Director*, 891 F.2d 997, 1002-03 (2d Cir. 1989); *Balogun v. INS*, 9 F.3d 347, 351 (5th Cir. 1993).

<sup>47</sup> An example of immigration parole can be best understood through the example of the Marielitos. In 1980 the Cuban government opened up their port of Mariel for American citizens or residents to come and retrieve their family members. In addition, the Cuban government emptied their prisons and placed many ex-prisoners on boats to the United States. The ensuing boatlift brought over 120,000 Cubans to the United States. Upon arrival, these non-citizens were excludable, but the political situation did not enable the United States to return them to Cuba. As the sheer number of people made it impossible for the INS to process each non-citizen, virtually all of the Marielitos were released, but on immigration parole. Problems with the indefinite detention of these individuals arose, however, when these Marielitos violated the conditions of their parole and began committing crimes after their release. While the Supreme Court never ruled on the detention of these individuals, numerous District Courts upheld the indefinite detention of the Marielitos. See *Guzman v. Tippy*, 130 F.3d 64 (2d Cir. 1997); *Garcia Mir v. Meese*, 788 F.2d 1446 (11th Cir. 1986); *Fernandez-Roque v. Smith*, 734 F.2d 576 (11th Cir. 1984). For more information on the plight of the Marielitos see generally MARIO A. RIVERA, *DECISION AND STRUCTURE: U.S. REFUGEE POLICY IN MARIEL CRISIS* (1991) (examining the Cuban boatlift and its catastrophic consequences for the United States); see also LEGOMSKY, *supra* note 41, at 61-65.

In 1988, however, the statutory picture became considerably more complicated when Congress began to mandate the detention of particular undesirable non-citizens. For example, in response to public outrage over high crime rates and increased drug consumption, Congress enacted the Anti-Drug Abuse Act of 1988<sup>48</sup> (ADAA), which amended the Immigration and Nationality Act<sup>49</sup> (INA), to mandate detention of any alien convicted of an “aggravated felony.”<sup>50</sup>

### 1. Anti-Drug Abuse Act of 1988

ADAA required the Immigration and Nationality Service (INS) to hold non-citizens in detention throughout deportation hearings and until actual removal.<sup>51</sup> As one could expect, this legislation was controversial and was consequently challenged by non-citizens who were lawfully admitted prior to the enactment of ADAA and who had finished serving their criminal sentences.<sup>52</sup> These individuals were now not only subject to deportation, but also faced the possibility of potential indefinite detention as a result of their previous criminal convictions. Many courts struggled with ADAA and split on the validity of this legislation, with only a few upholding the legislation and many more holding that the non-citizens were entitled to an individualized consideration of release.<sup>53</sup> Shortly thereafter, Congress bowed to pressure and

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<sup>48</sup> Anti-Drug Abuse Act of 2001, Pub. L. No. 100-690, 102 Stat. 4181 (codified as amended in scattered sections of 8 U.S.C.).

<sup>49</sup> Immigration and Nationality Act, 8 U.S.C. §§ 1101-1537 (2002).

<sup>50</sup> *Id.* § 7343(a)(4) (amending 8 U.S.C. § 1252(a)). The ADAA defined aggravated felonies as crimes involving murder, drug trafficking, illicit trafficking in firearms or destructive devices, and attempts or conspiracies to commit such crimes in the United States. *Id.* § 7342 (amending 8 U.S.C. § 1101(a)). See also Dawn Marie Johnson, *The AEDPA and the IIRIRA: Treating Misdemeanors as Felonies for Immigration Purposes*, 27 J. LEGIS. 477, 480-81 (2001) (discussing the effects of the ADAA on immigration law and deportation proceedings).

<sup>51</sup> Anti-Drug Abuse Act of 1988, § 7343(a)(4) (amending 8 U.S.C. § 1252(a)).

<sup>52</sup> See Martin, *supra* note 43, at 61.

<sup>53</sup> See *United States v. Salerno*, 481 U.S. 739 (1987) (holding that the statute violated both substantive and procedural due process by denying the non-citizen any opportunity to prove that



liberalized the policy slightly by allowing the release of non-citizens who had been legally admitted into the United States and who could demonstrate that they did not pose a flight risk or danger to the community.<sup>54</sup> Even with the amendments, however, the statute still permitted, and in some cases required, post-order detention of non-citizens beyond the six-month period for those aggravated felons who could not be removed.<sup>55</sup> Furthermore, those non citizens who were not lawfully admitted, or who were excludable, had no right to attempt to demonstrate qualification for release.<sup>56</sup> Nevertheless, the decisions considering whether these detentions

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he was neither likely to abscond or a danger to the community); *Va Peng Joe v. Thornburgh*, 1990 WL 167457 (D.Mass.1990) (striking down the statute on both substantive and procedural due process grounds); *Kellman v. District Director*, 750 F.Supp 625 (S.D.N.Y. 1990) (invalidating the statute). *But see Morrobel v. Thornburgh*, 744 F.Supp. 725 (E.D.Va.1990) (finding that the statute did not violate substantive due process because the plenary power doctrine of Congress over immigration law confined the court to searching for a facially legitimate and bona fide reason for the restriction and that given the urgency of the war on drugs, this reason was easy to find). To understand why the *Morrobel* decision was decided in this way, it is important to note that the court in this case characterized the plaintiff's constitutional argument as substantive, and not procedural. The person had a bail hearing and he had requested relief which had been denied by the immigration judge. Therefore, the court concluded, what the plaintiff was really challenging was the substantive validity of the aggravated felony preclusion and that there was no procedural due process issue and thus no need to determine whether individualized hearing were constitutionally required. The court, only having to address the plaintiff's substantive arguments, was confined to the plenary power doctrine and only needed to find a facially and bona fide reason for the restriction. Given the urgency of the war on drugs, this reason was not difficult to find. *See Kleindienst v. Mandel*, 408 U.S. 753 (1972) (setting forth the "facially legitimate and bona fide reason" standard utilized by the court in *Morrobel*); *see also* LEGOMSKY, *supra* note 41, at 93-94.

<sup>54</sup> *See* Immigration and Nationality Act of 1990, Pub. L. No. 101-649, § 504(a), 104 Stat. 5049 (former 8 U.S.C. § 1252). *See also* LEGOMSKY, *supra* note 41, at 94; THOMAS ALEXANDER ALEINKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 898 (1998); *Plight of the Tempest-Tost*, *supra* note 43, at 1920; Stacy J. Borisov, *Give Me Liberty or Give Me Deportation: The Indefinite Detention of Non-Removable, Criminal Aliens*, 13 U. FLA. J.L. & PUB. POL'Y 183, 191 (2001).

<sup>55</sup> *See* ALEINKOFF ET AL., *supra* note 54, at 898.

<sup>56</sup> *Id.*

were lawful were often upheld based on the fact that individualized consideration had been given to the non-citizen's release.<sup>57</sup>

As a result of the amendments to ADAA, the rules mandating the detention of non-citizens appeared to be somewhat unclear. No longer was there any bright-line rule requiring the release of a detained non-citizen after six months. The new rules governing the detention of both deportable non-citizens and excludable non-citizens purported to authorize indefinite detention provided that there was an opportunity for regular review of the detention decision. Even this rule, however, was not entirely clear. It was not until 1996, with the passing of both Antiterrorism and Effective Death Penalty Act<sup>58</sup> (AEDPA) and Illegal Immigration Reform and Immigrant Responsibility Act<sup>59</sup> (IIRIRA) that Congress abruptly changed its direction and began to clarify the rules governing the mandatory detention of non-citizens.

## 2. Antiterrorism and Effective Death Penalty Act of 1996

Following the Oklahoma City Bombing, an unrelenting and fiercely resolved Congress capitalized on the public's concern with terrorism in passing AEDPA in April of 1996.<sup>60</sup> Congress seized this opportunity to come down hard on criminal non-citizens, especially those who were suspected terrorists.<sup>61</sup> This legislation, along with IIRIRA enacted later in the same year, radically altered the statutory framework which governed the detention of non-citizens.

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<sup>57</sup> *Id.* See also *Hernandez-Ebank v. Caplinger*, 951 F.Supp. 99 (E.D.La. 1996) (finding no constitutional violation in holding a non-citizen indefinitely because the non-citizen had entered lawfully and had received a bond hearing).

<sup>58</sup> Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub L No. 104-132, 110 Stat 1214 (codified as amended in scattered sections of 8 U.S.C.).

<sup>59</sup> Illegal Immigration and Immigrant Responsibility Act of 1996 (IIRIRA), Pub L No 104-208, 110 Stat 3009-546 (codified as amended in scattered sections of 8 U.S.C.).

<sup>60</sup> See Clark, *supra* note 4, at 248.

<sup>61</sup> While those responsible for the Oklahoma City Bombing were American citizens, Congress still used this opportunity to come down hard all terrorists, and in particular, non-citizen terrorists.

Combined, AEDPA and IIRIRA extended mandatory detention to several other major categories: (1) almost anyone who was inadmissible or deportable on crime-related grounds (not just aggravated felons); (2) those who were inadmissible or deportable on terrorism grounds; (3) most arriving passengers (i.e., those non-citizens who had yet to be admitted into the United States); and (4) individuals who were awaiting the execution of final removal orders.<sup>62</sup> In addition, under both AEDPA and IIRIRA, judicial review of immigration decisions was severely restricted.<sup>63</sup>

AEDPA significantly impacted the rules governing the detention of non-citizens in three important ways. First, it eliminated the exception provided under the previous law for the release of those aliens previously admitted lawfully who were determined by the INS to pose no threat to the community.<sup>64</sup> In other words, lawfully admitted convicted aggravated felons were no longer entitled to an individualized consideration of release and could potentially be detained indefinitely. Essentially, this marked a return to the unrelenting detention mandate which was enacted by ADAA in 1988. Second, AEDPA vastly expanded the definition of an aggravated felon and thus subjected a broader category of non-citizens to mandatory detention during removal proceedings and thereafter until repatriation.<sup>65</sup> Consequently, more aliens were subject

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<sup>62</sup> See Immigration and Nationality Act, Pub. L. No. 414, § §§ 235(b)(1)(B)(iii)(IV), 255 (b)(2)(A), 236(c)(1)(A,B,C,D), 241(a)(1,2,3), 66 Stat. 163, 177 (1952) (current version at 8 U.S.C. §§ 1101-1557 (2000)).

<sup>63</sup> See *id.* For a full examination of how AEDPA and IIRIRA limited judicial review of immigration actions see David Cole, *No Clear Statement: An Arguments for Preserving Judicial Review of Removal Decisions*, 12 GEO. IMMIGR. L.J., 427 (1998).

<sup>64</sup> See Borisov, *supra* note 54, at 191-92.

<sup>65</sup> See *id.* at 191; see also Immigration and Nationality Act, § 101(a)(43) (codified at 8 U.S.C. § 1101(a)(43) (2000)) (outlining those crimes which are deemed to be aggravated felonies). While the list of aggravated felonies is long, some examples include murder, rape, sexual abuse of a minor, illicit trafficking in a controlled substance, and illicit trafficking in firearms or destructive devices or in explosive materials. See Immigration and Nationality Act, § 101(a)(43) (codified at 8 U.S.C. § 1101(a)(43) (2000)).

to deportation based upon their classification as an aggravated felon.<sup>66</sup> Finally, in addition to expanding the definition of aggravated felony, AEDPA made nearly all deportable aliens with a criminal record ineligible for a relief provision that had previously allowed seven-year lawful permitted residents who committed crimes to seek discretionary relief from deportation from an immigration judge by showing rehabilitation, family or community ties, and other favorable factors.<sup>67</sup> In sum, because AEDPA eliminated the exception under previous law which allowed the INS to release those non-citizens previously lawfully admitted if they were deemed to pose no danger to the community or risk of flight, the INS lost its discretion to release most criminal non-citizens, irrespective of their removal prospects.<sup>68</sup>

Many of the changes under AEDPA did not remain in effect for long. IIRIRA, passed only a few months after AEDPA, was responsible for amending the INA and subjecting a broader category of non-citizens to mandatory detention during removal proceedings and thereafter until repatriation.<sup>69</sup> Essentially, under IIRIRA, if a non-citizen had been convicted of an aggravated felony, upon completion of his prison sentence, he could then be placed into the custody of the INS through an order of the Attorney General.<sup>70</sup> The Attorney General then had

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<sup>66</sup>Since the introduction of the concept of an “aggravated felony” in 1988 with the passing of ADAA, the definition has been vastly expanded. *See* Martin, *supra* note 43, at 63. IIRIRA, passed shortly thereafter AEDPA, expanded the concept of aggravated felony to an even wider range of offenses, by lowering certain thresholds that had to be exceeded before several of most widely applicable parts of the definition would apply. For a more in-depth discussion of the changes the AEDPA and IIRIRA made to the definition of an aggravated felony see LEGOMSKY, *supra* note 41, at 540-556; *see also id.*

<sup>67</sup> Immigration and Nationality Act, § 212(c) (codified at 8 U.S.C. § 1182(c) (2000)). *See also* Martin, *supra* note 43, at 63.

<sup>68</sup> *See* Borisov, *supra* note 54, at 192.

<sup>69</sup> *See* Immigration and Nationality Act, § 241(a)(2) (codified at 8 U.S.C. § 1231(a)(2) (2000)) (“During the removal period, the Attorney General shall detain the alien.”). *See also* *Plight of the Tempest-Tost*, *supra* note 43, at 1921.

<sup>70</sup> *See* Immigration and Nationality Act, § 241(a)(2) (codified at 8 U.S.C. 1231(a)(2) (2000)) (an alien who “is convicted of an aggravated felony at any time after admission is deportable”).

the authority to determine whether the non-citizen should be released into the United States or removed.<sup>71</sup>

### 3. Illegal Immigration Reform and Immigrant Responsibility Act of 1996

IIRIRA made three significant changes to the prior sections of the INA that pertained to the indefinite detention of non-citizens. First, IIRIRA redefined the long-standing distinctions between excludable and deportable non-citizens.<sup>72</sup> As discussed above, prior to the passing of IIRIRA, non-citizens who were stopped at the port of entry and detained at that point were deemed excludable, even if they were eventually granted conditional parole into the United States.<sup>73</sup> Alternatively, non-citizens who had gained entry into the United States, either legally or illegally were considered deportable.<sup>74</sup> This distinction was extremely important because traditionally courts had ruled that the Constitution afforded greater rights to non-citizens already in the United States than to those who had only just arrived at the border.<sup>75</sup> IIRIRA, however, abolished the significant legal distinction between excludable and deportable non-citizens by labeling excludable non-citizens and non-citizens who had illegally entered the country

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<sup>71</sup> See *id.* § 241 (codified at 8 U.S.C. § 1231 (2000)).

<sup>72</sup> See Montague, *supra* note 42, at 1443.

<sup>73</sup> See *id.* See also *Chi Thon Ngo v. INS*, 192 F.3d 390, n.4 (3d Cir. 1999).

<sup>74</sup> See *id.*

<sup>75</sup> See Martin, *supra* note 43, at 52 (discussing the exclusion-deportation line and its impact on non-citizens); see also *Chae Chan Ping v. United States*, 130 U.S. 581 (1889) (holding that the power to exclude foreigners is an incident of sovereignty in turning away a Chinese immigrant at the border who had previously lived in the United States); *Ekiu v. United States*, 142 U.S. 651 (1892) (excluding a Japanese immigrant whose husband already lived in the United States at the point of entry); *United States ex. rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950) (preventing the wife of a United States citizen from entering the country without the opportunity for a hearing and holding “whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.”); *Shaughnessy v. United States ex. rel. Mezei*, 345 U.S. 206 (1953) (refusing to allow back into the United States an individual who had previously lived in the United States for many years without incident).

inadmissible.<sup>76</sup> These non-citizens, along with non-citizens who had legally entered the United States, were now subject to uniform removal proceedings.<sup>77</sup> Hence, the bright-line which once existed between those stopped at the border and those apprehended within the United States became blurred. Second, IIRIRA expanded the offenses for which non-citizens could be removed.<sup>78</sup> Any crime that carried more than a one-year prison sentence, irrespective of how much time was served, or any crime that involved drugs or a firearm, now resulted in removal.<sup>79</sup>

Finally, and most significantly for the plight of non-citizens detained on grounds of suspected terrorism, IIRIRA eased the detention mandate under AEDPA and restored some release discretion to the INS.<sup>80</sup> IIRIRA enacted a new section of the INA, § 241(a), that comprehensively governed post-order detention, irrespective of the ground of deportability or excludability and regardless of the non-citizens criminal record.<sup>81</sup> It mandated the detention of all removable aliens for a ninety-day “removal period” beginning when the order became final, and it directed the INS to ensure their departure within that time.<sup>82</sup> It then provided for supervised release if removal had not been achieved during that period.<sup>83</sup> The law not only required the mandatory detention of deportable non-citizens for a period of ninety days while the INS made travel arrangements to return, it provided that criminal non-citizens could be detained beyond the removal period. (Criminal non-citizens included those removable on terrorist

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<sup>76</sup> See Montague, *supra* note 42, at 1443.

<sup>77</sup> See *id.*

<sup>78</sup> See *id.* at 1444.

<sup>79</sup> See Immigration and Nationality Act, § 237 (codified at 8 U.S.C. § 1227(2) (2000)); see also *id.*

<sup>80</sup> See Immigration and Nationality Act, § 241 (codified at 8 U.S.C. § 1231(a)(1)(A) (2000)); see also Montague, *supra* note 42, at 1444.

<sup>81</sup> See Immigration and Nationality Act, § 241 (codified at 8 U.S.C. § 1231(a)(6) (2000)); see also Martin, *supra* note 43, at 66.

<sup>82</sup> See Martin, *supra* note 43, at 66.

grounds, as well as those convicted of crimes of moral turpitude, aggravated felonies, drug-related offenses, firearms offenses, and a catchall category of “miscellaneous crimes,” or those non-citizens who were determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal.).<sup>84</sup> The federal government allowed exceptions in limited circumstances, permitting the release of aliens who were enrolled in witness protection programs and who did not pose flight or security risks.<sup>85</sup>

Therefore, while detention after the ninety-day removal period was not mandated for anyone, it was now explicitly permissible for specified categories of non-citizens. Furthermore, now a single unified post-removal order detention regime covered both those non-citizens stopped at the border as well resident non-citizens who may have lived their entire lives in the United States. These changes, coupled with the increasingly broad range of crimes for which non-citizens could now be deported, significantly expanded the number of non-citizens subject to indefinite detention.<sup>86</sup> Consequently, challenges to the lengthy and potential indefinite detention

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<sup>83</sup> *See id*; *see also* Immigration and Nationality Act, § 236 (codified at 8 U.S.C. § 1226(c) (2000)).

<sup>84</sup> *See id*. Recent court decisions have invalidated the no-bail provision of the INA as it applies to lawful permanent residents. *See Hoang v. Comfort*, 2002 WL 339348, at \*11 (10th Cir. 2002) (concluding that “the government has failed to show special justifications for the mandatory detention provision contained in INA §236(c) which are sufficient to outweigh a lawful permanent resident alien’s constitutionally protected interest in avoiding physical restraint without an individualized determination of flight risk or danger to the public”); *Kim v. Ziglar*, 276 F.3d 523, 535 (9th Cir. 2002) (holding that “the government has not provided a ‘special justification’ for no-bail civil detention sufficient to overcome a lawful permanent resident alien’s liberty interest in an individualized determination of flight risk and dangerousness”).

<sup>85</sup> ALEINKOFF ET AL., *supra* note 54, at 883.

<sup>86</sup> *See Martin*, *supra* note 43, at 67 (discussing the broad range of non-citizens subject to mandatory detention under IIRIRA). When enacting IIRIRA, Congress did not provide specific guidance as to when the INS should detain inadmissible or criminal non-citizens beyond the ninety-day “removal period.” Therefore, under the guidance of the Attorney General the INS introduced implementing regulations which provided that a non-removable non-citizen could be released from custody if the non-citizen demonstrated that their release would not pose a danger to the community or to the safety of other persons or to property or present a significant risk of

of non-citizens under § 241(a) made their way to the courts. In fact, by 2001 the INA's post-order detention provision had led to the indefinite detention of some 3,400 deportable non-citizens whose home countries refused to accept them.<sup>87</sup> Because of both the increasing number of suits filed by detained non-citizens and the subsequent split between the federal circuit courts across the country regarding the constitutionality of indefinite detention under § 241(a)(6), in October 2000, the United States Supreme Court agreed to take up the issue in order to resolve questions surrounding the use of indefinite detention.<sup>88</sup>

The decision of the Court in *Zadvydas v. Davis*<sup>89</sup> altered the landscape of non-citizen detention law by raising fundamental questions regarding the scope of Congress's power to authorize the confinement of non-citizens, the latitude available to the executive branch in enforcing such legislation, and the level of judicial deference that should be afforded the judgment of the political branches on immigration matters, particularly where national security interests are at stake.<sup>90</sup> Decided less than four months before the terrorist attacks, the Court's ruling and interpretation of INA § 241(a)(6) in *Zadvydas* represented the law as it existed in regards to the detention of non-citizen suspected terrorists as of September 11, 2001.<sup>91</sup>

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flight. The regulations allowed the continued detention of any alien unable to meet that burden. An initial custody determinations, consisting of a review of the alien's records and any written information submitted on their behalf, was to be conducted prior to the expiration of the ninety-day removal period in order to determine if such a burden could be met. Under further procedures, if the non-citizen's deportation was not effectuated and no release was granted by the end of the ninety-day period, a subsequent review was mandated "at the expiration of the three-month period after the ninety-day review or as soon thereafter as practicable." If detention was continued, subsequent reviews were to be held at least once a year. See Borisov, *supra* note 54, at 192-93.

<sup>87</sup> *Plight of the Tempest-Tost*, *supra* note 43, at 1921.

<sup>88</sup> See *id.* at 1923.

<sup>89</sup> 533 U.S. 678 (2001).

<sup>90</sup> See *Plight of the Tempest-Tost*, *supra* note 43, at 1915-16.

<sup>91</sup> The decision of the Supreme Court in *Zadvydas* will be discussed in detail in Part IV of this Comment.



*B. The Mandatory Detention of Non-Citizen Terrorists in the United Kingdom prior to September 11, 2001*

The United Kingdom has been dealing with terrorism and the detention of individuals deemed to pose a threat to its nation long before the United States even came into existence.<sup>92</sup> While some of their experiences with terrorism resulted from its withdrawal from their colonial empire, since 1968 the principal terrorist threat which has shaped the United Kingdom's response to terrorism has been connected with the questions surrounding whether Northern Ireland should remain part of the United Kingdom or rather it should join the Republic of Ireland.<sup>93</sup> Thus, this Part will focus primarily on the legislation pertaining to the detention of non-citizen suspected terrorists enacted by the United Kingdom from 1968 until September 11, 2001. In order to better understand the distinct situation of Northern Ireland which defines the United Kingdom's approach towards terrorism and which has molded its response to terrorism in the past, however, it is first necessary to briefly examine both the historical development of the problems of Northern Ireland as well as the United Kingdom's legislative responses to these troubles. This will provide a framework for how and why the United Kingdom has reached its current legislative position.

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<sup>92</sup> See Bonner, *supra* note 31, at 172. In addition, while beyond the purview of this Comment, it is important to realize that the problems associated with Ireland and Northern Ireland did not begin with the partition of the island by the British Government in 1920. Celtic tribes originally settled Ireland and were converted to Catholicism by Saint Patrick around 450 A.D. Since that time, the majority of Irish have followed the Church in Rome. With the beginning of British presence in Ireland in 1169 and finally with King Henry II's capture of Dublin in 1171, however, there has been strife between the Catholics and Protestants in Ireland and more specifically in Northern Ireland. See Clark, *supra* note 4, at 249-52. For a complete Irish history and the assumption and exercise of extraordinary State power by the British government in Ireland, see generally DONAHUE, *supra* note 6 (discussing counter-terrorism law and emergency powers in the United Kingdom from 1922-2000).

<sup>93</sup> See Bonner, *supra* note 31, at 172-73.

## 1. The Division of Ireland and Early British Anti-Terrorism Efforts

In 1920, with the Government of Ireland Act, Britain formally divided Ireland, establishing separate, subordinate parliaments in Belfast and Dublin.<sup>94</sup> Despite a short civil war spurred by the Irish Free State's opposition to the island's partition, the Republic of Ireland was finally recognized in 1949 with the Republic of Ireland Act.<sup>95</sup> Nevertheless, the establishment of an independent Ireland did not erase years of resentment and discord. Many Irish citizens, throughout the country, were not satisfied with a freedom that did not encompass all of Ireland.<sup>96</sup> Consequently, during the late 1960s, civil unrest steadily increased in Northern Ireland.<sup>97</sup> The government set up by the British in Northern Ireland, known better as Stormont, reacted with hostility, either ignoring or rejecting outright the demands of the protestors.<sup>98</sup> While the protests for reform were initially non-violent, seeing that its attempts to improve the conditions of the minority community in Northern Ireland through political and legal action had largely failed, the Irish citizens who were vehemently opposed to the idea of a divided Ireland quickly abandoned the tenets of non-violence.<sup>99</sup> Soon thereafter, the British military, at Stormont's request, came to Northern Ireland in 1969 to assist in patrolling the streets and essentially replaced the Royal Ulster Constabulary (RUC)<sup>100</sup> as the force primarily responsible for maintaining law and order in

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<sup>94</sup> Clark, *supra* note 4, at 252.

<sup>95</sup> *Id.*

<sup>96</sup> *See id.*

<sup>97</sup> *See id.* at 252-53; *see also* DONAHUE, *supra* note 6, at 117.

<sup>98</sup> *See* Clark, *supra* note 4, at 253; *see also* Oren Gross, "Once More unto the Breach": *The Systematic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies*, 23 YALE. J. INT'L LAW 437, 475 (1998).

<sup>99</sup> *See id.*

<sup>100</sup> The RUC is the British-backed, Protestant-run police force in Northern Ireland. *See* Roger Meyers, *A New Remedy for Northern Ireland: The Case for United Nations Peacekeeping Intervention in an Internal Conflict*, 11 N.Y.L. SCH. J. INT'L & COMP. L. 1, 16 (1990) (discussing the role of the RUC in Northern Ireland).

the territory.<sup>101</sup> The situation culminated in 1972 with the infamous “Bloody Sunday” massacre which left thirteen unarmed protesters dead at the hands of the British military.<sup>102</sup> The chaos which followed gave new life to the Irish Republican Army (IRA) which had remained quiet since the creation of the Free Irish State and resulted in the indefinite suspension of the Stormont government by Britain.<sup>103</sup> It was at this time that the British began direct rule of Northern Ireland.<sup>104</sup>

In 1973, following the bloodiest year of the “troubles” between Northern Ireland and Great Britain, the British Parliament enacted the Northern Ireland (Emergency Provisions) Act 1973 (EPA 1973) which repealed the Special Powers Act which had been in place since the partition of Ireland in the 1920s.<sup>105</sup> Many of the repealed statute’s provisions were retained in the new legislation.<sup>106</sup> In addition, EPA 1973 established the Diplock courts, in which the trial of persons suspected of certain offenses was to be conducted by one judge, operating under relaxed rules of evidence and sitting without a jury.<sup>107</sup>

Another layer of emergency legislation applying to Northern Ireland was introduced in 1974 with the enactment of the first Prevention of Terrorism (Temporary Provisions) Act (PTA 1974).<sup>108</sup> In contrast to EPA 1973, PTA 1974’s sphere of applicability was not limited to

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<sup>101</sup> *See id.*

<sup>102</sup> *See id.*

<sup>103</sup> *See id.*

<sup>104</sup> *See id.*

<sup>105</sup> *See Gross, supra note 98, at 276. See generally KEVIN BOYLE ET AL., LAW AND STATE: THE CASE OF NORTHERN IRELAND (1975) (discussing the history of British anti-terrorism legislation and how its effect on Northern Ireland).*

<sup>106</sup> *See Gross, supra note 98, at 476.*

<sup>107</sup> *See id. See also Bonner, supra note 31, at 183; Clark, supra note 4, at 256; DONAHUE, supra note 6, at 123-27. See generally JOHN D. JACKSON & SEAN DORAN, JUDGE WITHOUT JURY: DIPLOCK TRIALS IN THE ADVERSARY SYSTEM (1995) (providing an overview of how the Diplock court system operate).*

<sup>108</sup> *See Gross, supra note 98, at 476.*

Northern Ireland but instead encompassed all of the United Kingdom.<sup>109</sup> PTA 1974 essentially replaced the previous legislation, Prevention of Violence (Temporary Provisions) Act, which was passed by Parliament in 1939 in an effort to deal with an attempt by the IRA to extend their terrorist campaign to the United Kingdom.<sup>110</sup> After the passing of the 1939 Act, however, because the IRA lacked a sympathetic community from which to operate and because of the severe measures imposed by the British government, its activities diminished.<sup>111</sup> Therefore, similar to the 1939 legislation, PTA 1974 was introduced at a time where there was widespread public outrage and demands for greater police action against the IRA.<sup>112</sup> The broad regulatory power of PTA 1974 included the key anti-terrorism provisions which have consistently marked Britain's response to the unrest in Northern Ireland since the early 1970's.<sup>113</sup>

The introduction of PTA 1974 created a dual system of criminal justice in the United Kingdom.<sup>114</sup> Ordinary decent criminals suspected of the pettiest to the most horrific offenses were treated under the ordinary criminal law while those suspected of terrorism were now dealt with under PTA 1974.<sup>115</sup> The British government originally intended these "emergency powers"

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<sup>109</sup> See *id.*; see also Clark, *supra* note 4, at 253-54.

<sup>110</sup> See Gross, *supra* note 98, at 476; DONAHUE, *supra* note 6, at 35-36; HILLYARD, *supra* note 6, at 1-2.

<sup>111</sup> See DONAHUE, *supra* note 6, at 35-36.

<sup>112</sup> See HILLYARD, *supra* note 6, at 1.

<sup>113</sup> See Gross, *supra* note 98, at 476; see also Bonner, *supra* note 31, at 179. Prior to the passing of PTA 1974 and EPA 1973 the regulations which governed the detention of suspected terrorists were found under the 1922-43 Special Powers Acts (SPA). Although the government immediately announced its intent to repeal the 1922-43 SPA and Regulations and to replace them with new emergency legislation, the resultant 1973 EPA and 1974 PTA did not so much revoke the revoke the previous statutes as simply rename them and expand them. Additionally, while EPA 1973 sphere of applicability was limited to Northern Ireland, PTA was generally applicable throughout the United Kingdom. See DONAHUE, *supra* note 6, at 130.

<sup>114</sup> See HILLYARD, *supra* note 6, at 68.

<sup>115</sup> See *id.*

laws that were only applicable to suspected terrorist to last for the brief period it took to reestablish order in Northern Ireland.<sup>116</sup> That brief period, however, never expired.

PTA 1974 was based on two different sources, which, in one way or the other, had been introduced to deal with Irish political violence.<sup>117</sup> It drew upon and expanded upon a number of key elements of EPA 1973, particularly the powers of arrest, detention, and proscription and the Prevention of Violence (Temporary Provisions) Act 1939, which had been introduced to deal with a previous campaign of the IRA.<sup>118</sup> PTA 1974 provided the police with extended and expansive powers of arrest and detention and gave them new powers to control the movement of persons entering and leaving Great Britain and Northern Ireland. This new legislation swiftly became subsumed in British legislation.<sup>119</sup> Soon after this new legislation was enacted, the burden shifted from those supporting emergency measures to prove that they were imperative, to individuals seeking to repeal the legislation needing to demonstrate that an emergency no longer existed.<sup>120</sup> In other words, the purported temporary nature of the emergency measures seemed to be long forgotten as emergency measures slowly became the rule rather than the exception in Northern Ireland. While there were various reviews and minor amendments to both EPA 1973 and PTA 1974 between 1974 and 2000, these amendments were largely centered on cosmetic alterations to the existing statutes, leaving the vast majority of the provisions included in the amended versions of EPA and PTA still intact.<sup>121</sup> Few new powers were introduced and even fewer existing powers were relinquished. Over this period of time, a blending of EPA and PTA

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<sup>116</sup> See Clark, *supra* note 4, at 254.

<sup>117</sup> See HILLYARD, *supra* note 6, at 2.

<sup>118</sup> See *id.*

<sup>119</sup> See *id.* at 4; see also DONAHUE, *supra* note 6, at 258.

<sup>120</sup> See DONAHUE, *supra* note 6, at 258.

<sup>121</sup> See *id.*

and a more detailed consideration of permanent counter-terrorist law emerged.<sup>122</sup> The gradual merger of these provisions ultimately resulted in the passing of Terrorism Act 2000 in March 2001. Before discussing Terrorism Act 2000 and the law as it pertained to the United Kingdom as of September 11, 2001, however, in an effort to better understand the changes that Terrorism Act 2000 made, it is first essential to provide a brief history of the arrest and detention provisions as they existed prior to the passing of this piece of legislation.

## 2. Anti-Terrorism Law in the United Kingdom from 1973-2000

The “emergency powers” laws initiated with the passing of PTA 1974 and EPA 1973 granted extremely broad discretion to both the Royal Ulster Constabulary (RUC) and the British military in investigations of suspected terrorist activity in Northern Ireland.<sup>123</sup> PTA 1974 authorized law enforcement to arrest anyone without a warrant where it had reasonable grounds for suspecting that the arrested individual was guilty of some offense under the legislation or if the individual was or had been concerned in the commission, preparation, or instigation of acts of terrorism in connection with Northern Ireland affairs or international terrorism.<sup>124</sup> Police therefore were permitted to stop an individual on the street and question him regarding his identity and recent movements.<sup>125</sup> The provisions also permitted the RUC or the British military to search an individual’s premises and seize any possessions based upon the low threshold “reasonable suspicion” of terrorist activity.<sup>126</sup> Furthermore, anything found during a warrantless

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<sup>122</sup> *See id.*

<sup>123</sup> *See Clark, supra* note 4, at 254.

<sup>124</sup> HILLYARD, *supra* note 6, at 68.

<sup>125</sup> *Clark, supra* note 4, at 254.

<sup>126</sup> *Id.*

search could be confiscated if the law enforcement believed the item was somehow connected to a crime.<sup>127</sup>

In addition, PTA 1974 authorized the arrest and detention of suspects for questioning without trial.<sup>128</sup> The RUC was authorized to arrest and detain an individual for an initial period of forty-eight hours, which would then be extended to an additional five-day period upon the authorization of Northern Ireland's Secretary of State, all without formal charges or an appearance before a magistrate.<sup>129</sup> The total length of detention could not, however, exceed seven days.<sup>130</sup> Because the prime objective of all the PTAs had never been the pursuit of a prosecution but instead the pursuit of intelligence gathering in an effort to defeat terrorism, the RUC usually ended up releasing a majority of those they detained without ever charging them.<sup>131</sup>

A review procedure for the detention of suspected terrorists was introduced in an amendment to PTA in 1989. This procedure required an initial review to be carried out as soon as practicable after the beginning of the detention and that subsequent reviews would be carried out at twelve-hour intervals.<sup>132</sup> The reviews, however, could be postponed if it was not practicable to carry them out because the person was being questioned or if no review officer was readily available.<sup>133</sup> The detention could be continued only if it was necessary to obtain or preserve evidence specifically related to the offences under the Act or if the individual was

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<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 254-55.

<sup>130</sup> *See* HILLYARD, *supra* note 6, at 76.

<sup>131</sup> *See id.* at 93. In fact, as of 1993, of 7,052 people who had been detained in connection with Northern Ireland affairs under PTA, over 6,097, or eighty-six percent were released without any action being taken against them. These numbers demonstrate how great of an abuse of power PTA was in terms of the detention of suspected terrorists. The arrest and detention powers under PTA were instead used by the police essentially to screen the Irish community and seek out terrorists. *See id.* at 5, 90, 93.

<sup>132</sup> *See id.* at 75.

thought to be involved in terrorist activities.<sup>134</sup> What was so striking about this review procedure is that under the amended PTA, a person could be held for up to seven days without any outside assessment.<sup>135</sup> The detainee only had a right to make representations to the review officer.<sup>136</sup>

Finally, prior to the 1989 amendment there were no rules governing how long a person detained under PTA could be held without being permitted to contact a friend or lawyer. After 1989, however, suspected terrorists were permitted to request to have one person informed of their detention situation as soon as practicable.<sup>137</sup> Nevertheless, this concession was often delayed if there were reasonable grounds for believing that alerting someone as to an individual's detention would interfere with the gathering of information about the commission, preparation or instigation of acts of terrorism or because it would make it more difficult to prevent an act of terrorism or to secure the conviction of someone involved.<sup>138</sup>

### 3. Terrorism Act 2000

The purported “temporary” legislation of PTA and EPA was replaced with Terrorism Act 2000. This piece of legislation reformed and extended the aforementioned counter-terrorist legislation, and put it largely on a permanent basis.<sup>139</sup> Terrorism Act 2000 came into effect in early 2001 and applied to non-citizen terrorist groups as well as domestic terrorist groups and was the sole responsibility of the Home Secretary. Therefore, as discussed earlier in this Part, Terrorism Act 2000, unlike other anti-terrorism measures like PTA and EPA did not require annual Parliamentary review. Specifically, the Act (1) prohibited fund-raising and other kinds

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<sup>133</sup> *See id.*

<sup>134</sup> *See id.*

<sup>135</sup> *See id.* at 76.

<sup>136</sup> *See id.*

<sup>137</sup> *See id.* at 77.

<sup>138</sup> *See id.*



of financial support for terrorism, together with power for a court to order forfeiture of any money or other property connected with the offenses; (2) provided the police with powers to arrest and detain suspected terrorists, and broader powers to stop and search vehicles and pedestrians, and to impose parking restrictions; (3) provided examination powers at ports and borders; (4) provided for the treatment of suspects who are detained and for judicial extension of the initial period of detention; (5) proscribed weapons training for terrorist purposes, including recruitment for such training; and (6) proscribed the directing of a terrorist organization, possessing articles for terrorist purposes, possessing information for terrorist purposes, and incitement of overseas terrorism.<sup>140</sup> Terrorism Act 2000 was presciently enacted by the United Kingdom in an effort to both expand its power to combat terrorism ahead of the September 11, 2001 attacks as well as to provide some permanency to the United Kingdom's counter-terrorism law.

In addition, Terrorism Act 2000 repealed previous anti-terrorism measures and adopted a wider definition of terrorism, recognizing that terrorism may have religious or ideological as well as political motivation, and covered actions which might not be violent in themselves but which can, in a modern society, have a devastating impact.<sup>141</sup> These could include interfering with the supply of water or power where life, health or safety may be put at risk, and the disrupting of key computer systems.<sup>142</sup>

Terrorism Act 2000 was less than a year old when the attacks of September 11, 2001 occurred. Therefore, the full effects of the Act's detention provisions were never fully realized

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<sup>139</sup> See John R. Burroughs et al., *Arms Control and National Security*, 36 INT'L LAW. 471, 484 (2002).

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

and instead have been amended and expanded on by Anti-Terrorism, Crime and Security Act 2001 as will be examined closely in Part III of this Comment.

### III. DETENTION UNDER THE UNITING AND STRENGTHENING AMERICA BY PROVIDING APPROPRIATE TOOLS REQUIRED TO INTERCEPT AND OBSTRUCT TERRORISM ACT OF 2001 AND THE ANTI-TERRORISM, CRIME AND SECURITY ACT 2001

Just six weeks after the September 11, 2001 terrorist attacks, Congress passed the Patriot Act—a sweeping anti-terrorism bill which, among other things, broadened the definition of “terrorist” and gave law enforcement officials expansive new powers to detain and prosecute accused terrorists.<sup>143</sup> A number of the Patriot Act’s provisions are uncontroversial and in fact were welcomed by the public during a time they felt most vulnerable to international terrorism.<sup>144</sup> The Act, nevertheless, stands out as radical in the degree in which it sacrifices political freedoms in the name of national security and consolidates new powers in the executive branch.<sup>145</sup> The particular provisions at the center of this Comment, §§ 411 and 412,<sup>146</sup> which when acting together have been widely criticized as depriving non-citizens of their due process and First Amendment rights, mandate the detention of non-citizens suspected of terrorism.<sup>147</sup> Section 411 greatly expands the class of non-citizens who are subject to deportation on grounds

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<sup>143</sup> See Regina Germain, *Rushing to Judgment: The Unintended Consequences of the USA Patriot Act for Bona Fide Refugees*, 16 GEO. IMMIGR. L.J. 505, 505 (2002).

<sup>144</sup> For example, other provisions of the Act provide for such things as increased funding for counterterrorism activities, particularly for increased border protection, condemnation of discrimination against Arab and Muslim Americans, preservation of immigration benefits for victims, and direct assistance for victims and their families. See Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, §§ 101-103, 402, 404, 421-427 (to be codified as amended in scattered sections of 8 U.S.C.). For a complete discussion of federal initiatives in response to the September 11 terrorist attacks see Jan C. Ting, *Unobjectionable but Insufficient—Federal Initiatives in Response to the September 11 Terrorist Attacks*, 34 CONN. L. REV. 1145 (2002).

<sup>145</sup> See NANCY CHANG, SILENCING POLITICAL DISSENT 43-4 (2002).

<sup>146</sup> Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, §§ 411, 412 (to be codified as amended in scattered sections of 8 U.S.C.). For the complete text of §§ 411 and 412, see *infra* pp. 96-105, app. A.

of terrorism through its expanded definitions of the terms “terrorist activity,” “engage in terrorist activity,” and “terrorist organization.”<sup>148</sup> Section 412 substantially enlarges the authority of the Attorney General to place non-citizens he suspects are engaged in terrorist activities in detention while their deportation proceedings are pending.<sup>149</sup>

ATCSA is the United Kingdom’s counterpart to the Patriot Act. Passed in December 2001 in response to the September 11 terrorist attacks in the United States, ATCSA increases the British government’s power to prevent non-citizen suspected terrorists from abusing the immigration laws of the United Kingdom. Like the Patriot Act, ATCSA has been widely criticized because it is comprised of unusually coercive powers.<sup>150</sup> In contrast to the Patriot Act, however, ATCSA was not passed in response to any widely-perceived public emergency in the United Kingdom. The attacks of September 11 were isolated events perpetrated against the United States. There have been no attacks against the United Kingdom and in fact, the attacks of September 11 did not deliberately target Britons.<sup>151</sup> Furthermore, as will be discussed below, ATCSA takes the detention of non-citizens suspected of terrorism a step further than authorized by the Patriot Act. While most of the Act was accepted without much argument, a small number of provisions provoked enormous controversy. Prior to the enactment of the provisions under

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<sup>147</sup> See *id.* at 62.

<sup>148</sup> See Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, § 411 (to be codified as amended in scattered sections of 8 U.S.C.).

<sup>149</sup> See *id.* § 412 (to be codified as amended in scattered sections of 8 U.S.C.).

<sup>150</sup> See generally Trevor Aldridge, *End of the Affair*, SOLICITORS JOURNAL, Jan. 18, 2002 at 31 (arguing that ATCSA is the antithesis of freedom and civil liberty); *Big Brother’s Watching You*, SOLICITORS JOURNAL, Dec. 21, 2001 at 1174 (arguing that ATCSA will make the United Kingdom a less democratic place); Josh Wadham, *Out of Proportion*, SOLICITOR’S JOURNAL, Nov. 23, 2001 at 1074 (discussion the detention provisions of ATCSA and arguing that they are disproportional to the situation in the United Kingdom).

Part 4 of ATCSA the United Kingdom basically had three options for dealing with suspected non-citizen terrorists: (1) deport them to a safe third country; (2) prosecute them under existing United Kingdom law; or (3) let them go free.<sup>152</sup> Section 23 of ATCSA gives the government yet another option, potential indefinite detention to prevent the suspected non-citizen terrorist from engaging in any future terrorist activities which may be detrimental to the United Kingdom.<sup>153</sup>

The most controversial provisions of the act, contained in Part 4,<sup>154</sup> will be outlined here. Part 4, and more specifically, §§ 21-33 of ATCSA, lays out the powers of the Secretary of State to certify people as “suspected international terrorists” and “national security risks” and for their consequent detention without charge or trial for an unspecified and potentially unlimited period of time.

As Part II of this Comment explained, September 11, 2001 did not mark the introduction of terrorism to the governments and people of the United States and the United Kingdom. Each country had previously encountered acts of terrorism and had responded to terrorism and terrorist threats through various pieces of legislation, albeit differently. The September 11, 2001 terrorist attacks were different, though. The precise planning and hatred that characterized the attacks and the overall destruction left in their wake was unlike anything either nation had seen before. This Part will examine and compare the legislative responses of both nations to the terrorist attacks of September 11, 2001. More specifically, this Part will focus on and outline the specific measures of each of these pieces of legislation which allow for the potential indefinite detention of non-citizens. Through this comparison it becomes apparent how restrained the United States’

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<sup>151</sup> Jonathan L. Black-Branch, *Powers of Detention of Suspected International Terrorists under the United Kingdom Anti-Terrorism, Crime and Security Act 2001: dismantling the cornerstones of a civil society*, 27 E.L.REV. 19, 26 (2002).

<sup>152</sup> See Henning, *supra* note 7, at 1269.

<sup>153</sup> Anti-terrorism, Crime and Security Act, 2001, § 23.

legal response to the terrorist acts of September 11 appears. Finally, this Part will analyze the outlined detention provisions and discuss the potential problems which are almost certain to arise in enforcing both of these pieces of legislation.

#### *A. Expanding the Definition of Terrorism*

##### *1. Section 411 of the Patriot Act*

Section 411 of the Patriot Act imposes guilt by association on non-citizens by vastly expanding the class of non-citizens that can be removed on terrorist grounds. Before September 11, the term “terrorist activity” was commonly understood to be limited to premeditated and politically-motivated violence targeted against a civilian population.<sup>155</sup> Section 411, however, stretches that term to encompass *any* crime that involves the use of “a weapon or dangerous device (other than for mere personal monetary gain).”<sup>156</sup> Under this expansive definition, a non-citizen who grabs a knife or a provisional weapon in any type of heat-of-the-moment altercation may be deemed removable as a “terrorist.”<sup>157</sup>

In addition, the term “engage in terrorist activity” has also been expanded to include soliciting funds for, soliciting membership for, and providing material support to a “terrorist organization” even when that organization has legitimate political and humanitarian ends and the non-citizen seeks only to support these lawful ends.<sup>158</sup> Before September 11, non-citizens were deportable for engaging in or supporting terrorist activity, but not for mere association. Non-citizens could be deported for providing material support to an organization only if they knew or

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<sup>154</sup> *Id.* §§ 21-36. For the complete text of Part 4 of ATCSA, see *infra* pp. 106-118, app. B.

<sup>155</sup> See CHANG, *supra* note 145, at 62.

<sup>156</sup> Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, § 411(a) (to be codified as amended at 8 U.S.C. § 1182).

<sup>157</sup> See CHANG, *supra* note 145, at 62.

<sup>158</sup> Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, § 411(a) (to be codified as amended at 8 U.S.C. § 1182).

reasonably should have known that their activity would support the organization “in conducting a terrorist activity.”<sup>159</sup> Section 411 of the Patriot Act, however, eliminates that nexus requirement. It makes non-citizens deportable for wholly innocent associational activity with a “terrorist organization,” whether or not there is any connection between the non-citizen’s associational conduct and any act of violence, much less terrorism.<sup>160</sup>

Furthermore, the definition of the term “terrorist organization” has been expanded to include groups that have never before been designated as terrorist if they are composed of “two or more individuals, whether organized or not,” who engage in specified terrorist activities.<sup>161</sup> Therefore, under this law, in a situation in which a non-citizen has solicited funds for, solicited membership for, or provided material support to an undesignated “terrorist organization,” § 411 imposes on him the difficult burden of “demonstrat[ing] that he did not know, and should not

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<sup>159</sup> Immigration and Nationality Act, § 212 (codified at 8 U.S.C. § 1182(a)(3)(B)(iii) (2000)).

<sup>160</sup> Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, § 411(a) (to be codified as amended at 8 U.S.C. § 1182). The Patriot Act defines a deportable offense as the solicitation of members or funds for, or the provision of material support to any terrorist group. There is no defense available, not even for those who can show that their support had no connection to furthering terrorism. The government is free to designate any organization that uses or threatens to use violence as a terrorist. In addition, the law makes non-citizens who support even non-designated groups deportable if the group has engaged in or threatened violence, unless the non-citizen can prove that he neither knew nor reasonably should have known that his support would further the group’s terrorist activities. *See id.* Because § 411 appears to redefine and enlarge the elements of the probable cause requirement for arrest, the statute has also been attacked as being in violation of a non-citizen’s Fourth Amendment rights. An examination of the Fourth Amendment implications of the Patriot Act is outside the scope of this Comment but has been addressed extensively elsewhere. *See, e.g.,* Sharon H. Rackow, *How the USA Patriot Act Will Permit Governmental Infringement Upon the Privacy of Americans in the Name of “Intelligence” Investigations*, 150 U. PA. L. REV. 1651 (2002) (discussing how the Patriot Act broadened the government’s right to engage in electronic surveillance); John W. Whitehead & Steven H. Aden, *Forfeiting “Enduring Freedom” for “Homeland Security”: A Constitutional Analysis of the USA Patriot Act and the Justice Department’s Anti-Terrorism Initiatives*, 51 AM. U. L. REV. 1081 (2002) (providing an in-depth analysis of several of the Constitutional concerns which are raised by the Patriot Act).

reasonably have known, that the act would further the organizations terrorist activity.”<sup>162</sup> For example, if an unsuspecting non-citizen donates money to a charity that is held to be a terrorist organization, the seemingly innocent act of giving by the non-citizen may very well serve as a ground for removal.<sup>163</sup>

While the First Amendment implications of § 411 of the Patriot Act are beyond the scope of this Comment, it should be noted that by redefining the definitions of terrorist activity and terrorist organization, the Patriot Act also resurrects the notion of an ideological exclusion—the act of denying entry to non-citizens for pure speech.<sup>164</sup> Section 411 bars admission to non-citizens who “endorse or espouse terrorist activity,” or who “persuade others to support terrorist activity a terrorist organization,” in ways determined by the Secretary of State to undermine U.S. efforts to combat terrorism.<sup>165</sup> It also excludes non-citizens who are representatives of groups that “endorse acts of terrorist activity” in ways that similarly undermine U.S. efforts to combat terrorism.<sup>166</sup> It is well-established that citizens have a constitutional right to endorse terrorist organizations or terrorist activity, so long as their speech is not intended and likely to produce imminent lawless action.<sup>167</sup> While the Supreme Court has ruled that non-citizens that have yet to

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<sup>161</sup> Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, 411(a) (to be codified as amended at 8 U.S.C. § 1182).

<sup>162</sup> *Id.* To qualify as an undesignated “terrorist organization” under 8 U.S.C. § 1182(a)(3)(B)(vi)(III), “a group of two or more individuals, whether organized or not,” must engage in one or more of the “terrorist activities” outlined in 8 U.S.C. § 1182(a)(3)(B)(iv)(I)-(III). *Id.*

<sup>163</sup> In addition, the Patriot Act’s proscription on associational activity potentially encompasses every organization that has even been involved in a civil war or a crime of violence, from a pro-life group that once threatened workers at an abortion clinic to the Irish Republican Army. *See Cole, Enemy Aliens, supra* note 6, at 967.

<sup>164</sup> *See id.* at 970.

<sup>165</sup> Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, § 411 (to be codified as amended at 8 U.S.C. § 1182).

<sup>166</sup> *See id.*

<sup>167</sup> *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

procure entry into the United States have limited constitutional rights,<sup>168</sup> these ideological exclusions nevertheless raise constitutional concerns. The First Amendment is designed to protect free public debate and in keeping out those persons who voice unpopular beliefs, the opportunity of US citizens to hear and consider those ideas may be diminished.<sup>169</sup> Excluding people for their ideas stands in stark contrast to the spirit of political freedom for which the United States stands and for which we are deeply resolved to protecting for in response to the September 11 attacks.<sup>170</sup>

## 2. Terrorist Status under ATCSA

The core of ATCSA is contained in Part 4 which addresses immigration and asylum. Part 4 allows suspected international terrorists to be deported from or imprisoned in the United Kingdom.<sup>171</sup> The Secretary of State may certify that anyone is a suspected international terrorist if he reasonably believes that the person's presence in the United Kingdom is a risk to national security and that the person is a terrorist.<sup>172</sup> This is analogous to the power of the Attorney General under the Patriot Act to certify a non-citizen as a terrorist.<sup>173</sup> In contrast to the limits placed on Attorney General's power under the Patriot Act in regards to the amount of time he has to commence proceedings against the detained non-citizen, however, there is no such limitation placed on the Secretary of State in Britain. As discussed above, under § 412 of the

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<sup>168</sup> See, e.g., *Kleindienst v. Mandel*, 408 U.S. 753 (1972) (stating that a non-citizen outside the United States does not have a First Amendment right to contest his exclusion); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950) (ruling that non-citizens outside the borders of the United States do not have a Constitutional right to enter).

<sup>169</sup> See *Cole*, *Enemy Aliens*, supra note 6, at 970.

<sup>170</sup> See *id.* at 971.

<sup>171</sup> See generally Anti-terrorism, Crime and Security Act, 2001, §§ 21-36 (containing those provisions which make up Part 4 of ATCSA dealing with immigration and asylum).

<sup>172</sup> Anti-terrorism Crime and Security Act, 2001, § 21.

<sup>173</sup> Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, § 411 (to be codified as amended at 8 U.S.C. § 1182).



Patriot Act, the Attorney General is required to place a detained non-citizen either in removal proceedings or charge him with a criminal offense within seven days after the commencement of detention. If the preceding requirement is not satisfied, the Attorney General must release the non-citizen. Under ATCSA, however, there is no similar limitation placed on the Secretary of State to detain an individual. Thus, prior to even certification, a non-citizen could potentially be detained for an indefinite amount of time.

Under ATCSA, the all-important word “terrorist” is defined as a person who (a) is or has been concerned in the commission, preparation, or instigation or acts of international terrorism; (b) is a member or belongs to an international terrorist group; or (c) has links with an international terrorist group provides for the power of certification of a person as a suspected international terrorist.<sup>174</sup> The last of these criteria is potentially extremely broad and vague and the government came under pressure from Parliament to clarify the phrase “links with.”<sup>175</sup> In response, the government narrowed the scope of the phrase by offering the following definition: “a person has links with an international terrorist group only if he supports or assists it.”<sup>176</sup> Thus, the expanded definition of a terrorist under ATCSA is comparable to that under the Patriot Act which now makes non-citizens deportable as terrorist for wholly innocent associational activity with a “terrorist organization,” regardless if there is any connection between the non-citizen’s associational conduct and any act of violence, much less terrorism.<sup>177</sup>

The term “terrorism” in this section of Anti-terrorism, Crime and Security Act 2001 has the same meaning as in Terrorism Act 2000, § 1. This definition is broad and includes:

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<sup>174</sup> See Anti-terrorism, Crime and Security Act, 2001, § 21; *see also* Tomkins, *supra* note 7, at 211.

<sup>175</sup> Tomkins, *supra* note 7, at 211.

<sup>176</sup> Anti-terrorism, Crime and Security Act, 2001, § 21.

the use or threat of action ... designed to influence the government or to intimidate the public ... for the purpose of advancing a political, religious, or ideological cause...which involves serious violence against a person or serious damage to property, endangers a person's life, creates a serious risk to the health or safety of the public, or is designed seriously to interfere with or seriously to disrupt an electronic system.”<sup>178</sup>

By seeking to merely influence the government, rather than seeking to intimidate or coerce the government, and by expanding the definition of terrorism to encompass the most serious violence, the distinction between terrorism and other criminal activity governed by regular public order law instead of special provisions of terrorism law, has become blurred.<sup>179</sup> Thus, the potential reach of this provision of Part 4 concerning suspected non-citizen terrorists is considerable. This is important because although granting extraordinary powers to the state during times of emergency may be justified, the availability of these powers must be limited to situations where it is absolutely necessary and even then only in carefully defined and specified circumstances.<sup>180</sup> The problem is that the United Kingdom has not satisfied these criteria in passing the ATCSA.

Compared to the Patriot Act, the definition of terrorism under ATCSA appears to be as expansive but noticeably less vague. Under the Patriot Act, the term “terrorist activity” has been stretched to include any crime that involves the use of “a weapon or dangerous device (other than for mere personal monetary gain).”<sup>181</sup> Thus, while the definition under both pieces of legislation increases the types of activity which will be considered terrorist acts, the definition under

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<sup>177</sup> Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, § 411(a) (to be codified as amended at 8 U.S.C. § 1182).

<sup>178</sup> Terrorism Act, 2000, c. 11, § 1.

<sup>179</sup> See Tomkins, *supra* note 7, at 211-12.

<sup>180</sup> See *id.* at 212.

<sup>181</sup> Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, § 411 (to be codified as amended at 8 U.S.C. § 1182).

ATCSA more clearly articulates exactly what type acts will fall under the Act's definition. Each definition, however, is open to similar types of abuse.

## B. *Detention of Certified Individuals*

### 1. Section 412 of the Patriot Act

At the same time that § 411 expands the class of non-citizens who are deportable on grounds of terrorism, § 412 inflates the Attorney General's power to detain non-citizens who are suspected of terrorism and radically revises the rules governing detention of non-citizens.<sup>182</sup>

Prior to September 11, 2001, non-citizens in removal proceedings were subject to preventative detention under essentially the same standards that apply to defendants in criminal proceedings: They could be detained without bond if they posed a danger to the community or a risk of flight.<sup>183</sup> If the government could not make such a showing in a hearing before an immigration judge, non-citizens were entitled to release on bond.<sup>184</sup>

Conversely, § 412 of the Patriot Act authorizes the Attorney General to detain non-citizens without a hearing and without a showing that they pose a threat to national security or a flight risk.<sup>185</sup> He need only certify that he "has reasonable grounds to believe" that a non-citizen is engaged in terrorist activity or in any other activity endangering the national security of the United States, and the non-citizen is then subject to potentially indefinite mandatory detention.<sup>186</sup>

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<sup>182</sup> See CHANG, *supra* note 145, at 64; Cole, *Enemy Aliens*, *supra* note 6, at 971.

<sup>183</sup> Cole, *Enemy Aliens*, *supra* note 6, at 971.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, § 412(a)(3) (to be codified at 8 U.S.C. § 1226a). In addition, because the definition of "engage in terrorist activity" have been defined so broadly as to include the use of, or threat to use, a weapon with intent to endanger person or property, it would encompass a non-citizen who used a kitchen knife in a domestic abuse with her abusive husband, or a non-citizen who found themselves in a bar fight, picked up a bottle, and threatened another person with it. Clearly, not all such persons pose a danger or flight risk necessitating

Following certification by the Attorney General, a non-citizen suspected of terrorist activity must be taken into custody and may be held without charge of a criminal or immigration violation for up to seven days.<sup>187</sup> To continue detention beyond seven days, the government must begin deportation proceedings or bring criminal charges against the non-citizen.<sup>188</sup> If the government fails to do so, the non-citizen must be released.<sup>189</sup> For a non-citizen against whom the government initiates deportation proceedings, detention must continue, even if the non-citizen is granted relief from removal, until the Attorney General decertifies him.<sup>190</sup> If the certified non-citizen is deemed removable and his removal is unlikely in the “reasonably foreseeable future,” he may be detained for an additional period of up to six months if his release would “threaten the national security of the United States or the safety of the community or any person.”<sup>191</sup> If the non-citizen is ultimately determined not to be removable, however, he must be released.<sup>192</sup>

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mandatory preventative detention, nevertheless the Patriot Act empowers the Attorney General to detain such persons without even proving that they pose a danger or flight risk. *See* Patriot Act, *supra* note 5, at § 411(a). *See also* Cole, *Enemy Aliens*, *supra* note 6, at 971.

<sup>187</sup> Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, § 412(a)(5) (to be codified at 8 U.S.C. § 1226a).

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Id.* § 412(a)(2) (to be codified at 8 U.S.C. § 1226a).

<sup>191</sup> *Id.* § 412(a)(6) (to be codified at 8 U.S.C. § 1226a). This section has been extremely controversial because while the Patriot Act appears to state that the longest possible detention is six months, the explicit language only requires the Attorney General to review the certification every six months. Thus, the language of the statute seems to permit a non-citizen to be subject to indefinite detention provided that the Attorney General reviews his certification every six months and determines that the certification should not be revoked. Thus, while there is a cap of seven days on the initial detention period under § 412(a)(5), once detained for a removal proceeding of criminal charge, this period is ultimately redefined to the extent that the non-citizen cannot be removed and continues to be certified based upon on reasonable grounds to believe that the non-citizen poses a risk to national security. *See id.* § 412(a)(6), (7) (to be codified at 8 U.S.C. § 1226a).

<sup>192</sup> *Id.* § 412(a)(2) (to be codified at 8 U.S.C. § 1226a).

Section 412 also requires the Attorney General to review the detention of non-citizens certified under the Act every six months and to report to Congress on the number of aliens certified, their nationality, the grounds for certification, and the duration of detention.<sup>193</sup> In addition, certified individuals who are detained under the Patriot Act do have access to judicial review.<sup>194</sup> Detainees are allowed to initiate habeas corpus proceedings in any district court otherwise having jurisdiction.<sup>195</sup> Appeals from unfavorable decisions, however, are limited and more difficult to obtain than prior to September 11, 2001. Appeals may be made only to the U.S. Court of Appeals for the District of Columbia and the law which must be applied in such cases is limited to the law applied by that court or the United States Supreme Court.<sup>196</sup>

## 2. Detention under ATCSA

The most significant power which the state now has under Part 4 of Anti-Terrorism, Crime and Security Act 2001 pertaining to suspected international terrorists is the authority of the Secretary of State to detain a certified suspected non-citizen terrorist indefinitely without trial.<sup>197</sup> This is easily distinguishable from the Patriot Act which explicitly provides for proceedings, either removal or criminal, to be commenced against the non-citizen within seven days of their apprehension as well as provides for judicial review of any decision to certify an individual as a terrorist. Conversely, under § 23 of ATCSA a suspected non-citizen terrorist may be detained indefinitely if his removal from the United Kingdom is prevented *either* by a point of law or by a practical consideration.<sup>198</sup> This last point deserves some further explanation.

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<sup>193</sup> Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, § 412(c) (to be codified at 8 U.S.C. § 1226a).

<sup>194</sup> *Id.* § 412(b) (to be codified at 8 U.S.C. § 1226a).

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> Anti-terrorism, Crime and Security Act, 2001, § 23.

<sup>198</sup> *See id.*

There are two primary reasons why the deportation or removal of a non-British national from the United Kingdom may prove difficult. First, removal or deportation from the United Kingdom could be prevented by, for example, the fact that the individual concerned may be a stateless person or because the United Kingdom authorities are unable to find another country willing to accept him or her.<sup>199</sup> The very fact that the individual has been certified by the Secretary of State as a suspected terrorist may make finding another country an extremely frustrating task.<sup>200</sup>

Second, the United Kingdom government may also be prevented from effecting a removal or deportation of anyone certified as a suspected terrorist as a result of the United Kingdom's obligations under Article 3 of European Commission on Human Rights.<sup>201</sup> In *Chahal v. United Kingdom*,<sup>202</sup> the European Court ruled that the British government's attempt to deport an individual who had been detained pending deportation to India on "national security" grounds was in violation of ECHR.<sup>203</sup> Chahal was an Indian Sikh who had entered the United Kingdom illegally and was detained pending deportation, but feared return to India because of his previous Sikh separatist activities. The Court, in interpreting the ECHR, found that Article 3 protected one of the most fundamental values of democratic society in that it prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct and that Article 3 makes no provision for exceptions and no derogation from it is permissible.<sup>204</sup>

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<sup>199</sup> See AMNESTY INTERNATIONAL, AMNESTY INTERNATIONAL'S MEMORANDUM TO THE UK GOVERNMENT ON PART 4 OF THE ANTI-TERRORISM, CRIME AND SECURITY ACT 2001, Sept. 5, 2002, available at [www.amnesty.com](http://www.amnesty.com) (last visited Jan. 8, 2003).

<sup>200</sup> See *id.*

<sup>201</sup> See *id.* Article 3 of ECHR states "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment." See ECHR, *supra* note 14, art. 3.

<sup>202</sup> 23 Eur. Ct. H.R. 413 (1997).

<sup>203</sup> See *id.* at 446.

<sup>204</sup> See *id.* at 414.

Adhering to this interpretation, the Court held that the prohibition of torture contained in Article 3 of ECHR was absolute and that allegations of national security risk were immaterial to a determination of whether a person faced a “real risk” of torture if returned.<sup>205</sup>

Another extremely important aspect of § 23 of ATCSA is the United Kingdom’s derogation from Article 5 of the European Convention on Human Rights (ECHR), so as to ensure that the provisions contained in Part 4 of the new legislation do not violate the United Kingdom’s obligations under Article 5 of the Convention.<sup>206</sup> While Article 5(1)(f) of ECHR permits the lawful “detention of a person to prevent his effecting an unauthorized entry into the country or of a person against who action is being taken with a view to deportation,”<sup>207</sup> because the government intends to detain even those individuals who are not subject to removal proceedings,<sup>208</sup> this Article will not save all detentions which the government proposes under this provision.<sup>209</sup> Therefore, to enable Anti-terrorism, Crime and Security Act 2001 to be passed, the British government was forced to formally derogate under Article 15 of ECHR from Article 5(1)

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<sup>205</sup> See *id.* at 446.

<sup>206</sup> See Khan, *supra* note 7, at 11. Article 5 of ECHR provides that “Everyone has the right to liberty and security of person.” ECHR, *supra* note 14, art. 5. This provision has consistently been ruled by the European Court to reinforce the fundamental duty of member states to respect the right of all human being to their physical security. See MARK JANIS ET AL., EUROPEAN HUMAN RIGHTS LAW 309 (2000).

<sup>207</sup> ECHR, *supra* note 14, art. 5(1)(f).

<sup>208</sup> The reason why the government would choose to detain someone instead of deporting them is the result of Britain’s obligations under Article 3 of ECHR. The European Court has consistently held that it is a violation of Article 3 for a state to deport a person where “substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment in contrary to Article 3 in the receiving county.” Unlike Article 5, Article 3 is one of the few provisions of ECHR which is absolute and which states cannot derogate from. See Tomkins, *supra* note 7, at 212-13.

<sup>209</sup> *Id.* at 212. As the European Court held in *Chahal*, “any deprivation of liberty under Article 5(1)(f) will be justified only for as long as deportation proceedings are in progress. If such proceedings are not prosecuted with due diligence, the detention will cease to be permissible.” See *Chahal*, 23 Eur. Ct. H.R. at 417.

of ECHR which relates to the detention of a person where there is an intention to remove or deport him from the United Kingdom.<sup>210</sup>

What also clearly distinguishes ATCSA from the Patriot Act is that ATCSA excludes regular judicial review of the Secretary of State's decisions and actions under both § 21 (certification of a person as a suspected terrorist) and § 23 (indefinite detention without trial of a suspected terrorist).<sup>211</sup> As previously discussed, under § 412 of the Patriot Act a non-citizen detained as a certified terrorist has the ability to obtain judicial review of his detention. This review is available exclusively in habeas corpus proceedings and applies to any non-citizen subject to detention under the Patriot Act. Conversely, ATCSA provides that such decisions and actions may only be questioned in legal proceedings before the Special Immigration Appeals Commission (SIAC).<sup>212</sup>

SIAC was established by Parliament in 1997 to entertain certain appeals against immigration and deportation decisions which have been taken on national security grounds.<sup>213</sup>

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<sup>210</sup> Khan, *supra* note 7, at 11. Article 15(1) of ECHR provides that “in time of war or other public emergency threatening the life of the nation, any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation...”. *See id.* The British government has not claimed that this is a “time of war” and thus, the basis of its derogation is on that this is a time of “public emergency.” The question which therefore must be contemplated is whether the various requirements of Article 15(1) are met here. More specifically, is there currently a public emergency which threatened the life of the United Kingdom and if so, are the measures contained in ATCSA strictly required by the exigencies of this emergency? *See id.* These questions and the validity of the United Kingdom's derogation will be discussed in more depth in Part IV of this Comment.

<sup>211</sup> *Id.* at 217.

<sup>212</sup> *See* Anti-terrorism, Crime and Security Act, 2001, §§ 21, 25.

<sup>213</sup> *See* Tomkins, *supra* note 7, at 217. Special Immigration Appeals Commission was established in order to bring United Kingdom law into conformity with Article 5(4) of ECHR following the decision of the European Court in *Chahal*. *See Chahal*, 23 Eur. Ct. H.R. at 448-49. Before, the sorts of decisions which now come before SIAC could be reviewed only by an advisory panel in respect of which applicants were not entitled to legal representation and were given only an outline of the grounds for the Secretary of State's decision. Furthermore, the



SIAC enjoys the status of that of a superior court of record—one of the effects of which is that it is not subject to additional judicial review.<sup>214</sup> In a proceeding before SIAC, the appellant has his legal representatives chosen for them by the government and this person is not responsible to the appellant.<sup>215</sup> Furthermore, proceedings before SIAC may be held in the absence of the appellant and/or his lawyer and proceedings may occur without the appellant being fully aware of the reasons for the decisions which have been made in respect of him.<sup>216</sup> Therefore, unlike § 412 of the Patriot Act, there are no explicit provisions under ATCSA providing those arrested and detained under the Act with the right to bring proceedings to have a court determine quickly the lawfulness of the detention, and order release if the detention is deemed unlawful. The fundamental safeguard of habeas corpus present in the Patriot Act therefore does not protect non-citizens suspected of terrorism against arbitrary detention under ATCSA.

Operating within the procedural constraints of SIAC, limited review of §§ 21-23 is, however, available under ATCSA.<sup>217</sup> Nevertheless, as discussed above, unlike the Patriot Act, there is no explicit provision of ATCSA which requires the Secretary of State to commence proceedings within a certain period of time. A non-citizen could therefore be held for a considerable amount of time without being charged with any type of immigration violation or criminal activity. Thus, while SIAC is permitted to hear appeals against certification decisions under § 21,<sup>218</sup> a non-citizen could be held for a long period before even being certified. The rules governing appeals to SIAC require that all appeals be brought within three months of the

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panel's recommendations were neither binding on the Secretary of State nor disclosed to the applicant. *See* Special Immigration Appeals Commission Act 1997.

<sup>214</sup> *See* Zander, *supra* note 7, at 1880.

<sup>215</sup> Tomkins, *supra* note 7, at 217-18.

<sup>216</sup> *Id.* at 218.

<sup>217</sup> *Id.*

<sup>218</sup> Anti-terrorism, Crime and Security Act, 2001, § 25.

certification and SIAC is required to cancel a certification if it considers that there are no reasonable grounds for suspecting the person to be a terrorist.<sup>219</sup> With no limit on how long a non-citizen can be held without being certified as a terrorist, however, an individual could be detained arbitrarily without a chance for judicial review for a period longer than three months. SIAC is also required to conduct a review of every certificate issued under § 21 once the suspected terrorist has been in detention for six months.<sup>220</sup> Cancellation of a certification by SIAC, however, “shall not prevent the Secretary of State from issuing another certificate.”<sup>221</sup> Thus, SIAC appears to have little authority to overrule a decision of the Secretary of State to certify a non-citizen as a terrorist.

Despite the overall extraordinary power of detention without trial which is placed into the hands of the state, there are two safeguards contained within Anti-terrorism, Crime and Security Act 2001 which purport to protect against arbitrary detention by the government. First, § 28 requires there to be a review by a person to be appointed by the Secretary of State of the operation of §§ 21-23.<sup>222</sup> This review must be conducted within fourteen months of the Act’s coming into force.<sup>223</sup> This review is somewhat similar to the requirement under § 412 of the Patriot Act which requires the Attorney General to submit reports to various government committees on the number of non-citizens who are being affected by the Act’s detention provisions. Second, § 29 requires that §§ 21-23 will expire within fifteen months after the Act’s

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<sup>219</sup> *Id.*

<sup>220</sup> *Id.* § 26. Additionally, identical to the appeals procedure under § 25, if on a review under § 26 SIAC determines that there are no reasonable grounds for suspecting that the person concerned is a terrorist within the meaning of the Act, SIAC must cancel the certification.

<sup>221</sup> *Id.* § 27.

<sup>222</sup> *Id.* § 28.

<sup>223</sup> *Id.*

coming into force, although the Secretary of State retains the power to revive them.<sup>224</sup>

Furthermore, § 29(7) provides that §§ 21-23 will cease to have effect altogether five years after the Act's coming into force and in order to revive these provisions a further Act of Parliament would be required.<sup>225</sup>

### *C. Criticism of the Patriot Act and ATCSA's Detention Measures*

#### *1. Patriot Act*

While Congress's incorporation of judicial review and time limitations into the detention provisions of the Patriot Act purport to eliminate the potential for indefinite mandatory detention, it has been alleged that these safeguards may not go far enough.<sup>226</sup> Even with the limits placed on the executive branch's authority to implement immigration policy, the detention provisions contained in the Patriot Act undoubtedly raise serious constitutional concerns.

First, and most notably, the detention provisions have been argued to violate a non-citizen's due process rights.<sup>227</sup> By giving the Attorney General the authority to detain a non-citizen based upon a reasonable suspicion of "terrorist activity" broadly conceived, the language of the statute appears impermissibly vague.<sup>228</sup> Though decided before the Patriot Act was

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<sup>224</sup> *Id.* § 29.

<sup>225</sup> *Id.*

<sup>226</sup> For example, as discussed *supra* note 170, while §§ 412(a)(6) and (7) seem to purport that the longest possible detention authorized under the Patriot Act is six months, upon a careful examination of the language of the statute it becomes apparent that the Attorney General is only required to review the certification every six months. The statute says nothing regarding the length of time a certified non-citizen can ultimately be detained. Thus, while under § 412(a)(5) detention is initially limited to seven days, once an individual is detained for a removal proceeding or criminal charges, the period for which the non-citizen could be detained is undefined to the extent that the non-citizen is unable to be removed and continues to be certified by the Attorney General based upon reasonable grounds that the non-citizen is a threat to national security. See Whitney D. Frazier, *The Constitutionality of Detainment in the Wake of September 11th*, 90 KY. L.J. 1089, 1112-13 (2001-02).

<sup>227</sup> See *Plight of the Tempest-Tost*, *supra* note 43, at 1934.

<sup>228</sup> See *id.*

enacted, the recent decision of the Supreme Court in *City of Chicago v. Morales*,<sup>229</sup> best illustrates this recognized concept of impermissible vagueness and sets forth the analysis the Supreme Court would likely employ when interpreting a statute such as the Patriot Act. In *City of Chicago* the Court held Chicago's gang loitering ordinance unconstitutional because it defined the offense so vaguely as to provide "absolute discretion to police officers to decide what activities constitute loitering."<sup>230</sup> The Court recognized that "preservation of liberty depends in part on the maintenance of social order,"<sup>231</sup> but ruled that the law violated due process because it failed to "provide the kind of notice that would enable people to understand what conduct it prohibits."<sup>232</sup>

Applying the analysis of the Supreme Court in *City of Chicago*, it is possible that the expansion of the term "terrorist activity" to include the use of "firearm, or other weapon or dangerous device" under the Patriot Act may be impermissibly vague.<sup>233</sup> For instance, this definition seems to be applicable to any situation from the use of a chemical bomb in a busy New York City subway station to a bar room fight where one individual threatens another with a broken beer bottle. Furthermore, the statute's vague description of "terrorist organizations" leaves non-citizens constantly pondering whether they are participating in or donating to groups that engage in "terrorist activity" which would in turn lead to their certification as a terrorist.<sup>234</sup> For example, a non-citizen's good faith donation to a charitable association or a mere innocent association with a particular organization may consequently result in their deportation. This is because the Patriot Act includes as "terrorist organizations" any group with "two or more

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<sup>229</sup> 527 U.S. 41 (1999).

<sup>230</sup> *Id.* at 61.

<sup>231</sup> *Id.* at 64.

<sup>232</sup> *Id.* at 56.

<sup>233</sup> See *Plight of the Tempest-Tost*, *supra* note 43, at 1935.

individuals, whether organized or not,” provided the group engages in specified activities.<sup>235</sup> To more adequately protect the due process rights of non-citizens, a more precise definition may be necessary to define exactly what conduct will result in detention under the statute.<sup>236</sup>

Yet another possible due process concern raised by the Patriot Act is that it allows the indefinite detention of non-citizens who have been granted relief from removal and of non-citizens for who repatriation is not reasonably foreseeable (provided their release would “threaten the national security of the United States or the safety of the community or any person”).<sup>237</sup> In *Zadvydas v. Davis*, the Supreme Court held that indefinite civil detention violates due process unless it is ordered in “non-punitive circumstances” in which a “special justification” exists.<sup>238</sup> The *Zadvydas* Court did however recognize in dictum that suspected terrorists could be held for indefinite periods in preventative detention.<sup>239</sup> The Court appeared to understand that removable non-citizens detained for “terrorism or other special circumstances where special arguments might be made for forms of preventative detention” should not be affected by the general rule disapproving the indefinite detention of non-citizens not likely to be removed in the reasonably foreseeable future.<sup>240</sup> Thus, as will be further argued in Part IV of this Comment, *Zadvydas* seemingly exempted suspected terrorists as a “small segment of particularly dangerous individuals” that the government may in fact subject to indefinite detention.<sup>241</sup>

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<sup>234</sup> *See id.*

<sup>235</sup> *See id.*

<sup>236</sup> *See id.*

<sup>237</sup> Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, § 412(a) (to be codified at 8 U.S.C. § 1226a).

<sup>238</sup> *Zadvydas*, 533 U.S. at 690.

<sup>239</sup> *See id.* at 696.

<sup>240</sup> *Id.*

<sup>241</sup> *Id.* at 691.

One could also attack the Patriot Act on procedural due process grounds.<sup>242</sup> The statute does not require an objective showing that the individual poses a danger to the community and instead relies on the Attorney General's determination that he has "reasonable grounds" to believe that a non-citizen is engaged in terrorist activity and therefore subject to certification.<sup>243</sup>

In addition to the above due process attacks which arguably could be made against the Patriot Act's detention provisions, the Act has been criticized on other grounds as well. First, it has been argued that the detention provisions of the Patriot Act provide the certified terrorist with limited options for relief. The statute prohibits administrative appeal of the Attorney General's decision to certify a non-citizen as a terrorist.<sup>244</sup> Detainees are therefore left with one avenue for relief—the filing a habeas petition in federal court.<sup>245</sup> This purported safeguard has been criticized, however, on the grounds that the statute does not establish a standard of review that will apply to the Attorney General's certification and the decision to certify the alien in the first place may rest on secret evidence that cannot be reviewed by the detainee.<sup>246</sup> Nevertheless, as well be discussed below, this avenue of relief available, irrespective of the limits placed upon

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<sup>242</sup> The limitations imposed by the Due Process Clause are of two distinct types—procedural and substantive. Procedural due process commands that when the government acts to deprive a person of life, liberty, or property, it must do so in accord with procedures that are deemed fair. Procedural due process usually requires that a person be given notice and opportunity to be heard before a deprivation of rights occurs. Substantive due process insists that the law itself be fair and reasonable and have an adequate justification regardless of how fair or elaborate the procedures may be for implementing it. *See generally* ALLAN IDES & CHRISTOPHER N. MAY CONSTITUTIONAL LAW, INDIVIDUAL RIGHTS 2001 (discussing the provisions of the United States Constitution that protect individuals against the government).

<sup>243</sup> *See Plight of the Tempest-Tost*, *supra* note 43, at 1936.

<sup>244</sup> *Id.* at 1937.

<sup>245</sup> Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, § 412(b) (to be codified at 8 U.S.C. § 1226a).

<sup>246</sup> *See* Kent Scheidegger et al., The USA PATRIOT Act of 2001: Criminal Procedure Sections 13 (Federalist Society White Paper, Nov. 2001); Anite Ramasastry, *Indefinite Detention Based upon Suspicion: How the Patriot Act Will Disrupt Many Lawful Immigrants' Lives*, Findlaw's

it, is substantially greater than the relief available to those non-citizens detained in the United Kingdom under Anti-terrorism, Crime and Security Act 2001.

Finally, as briefly touched upon in Part III.A.1 of this Comment, the Patriot Act may infringe on a non-citizen's freedom of expression. By expanding the definition of the term "terrorist activity" to include the donation to or solicitation of funds for a "terrorist organization," the provisions allow for potentially indefinite detention of non-citizens based solely on political associations which seemingly are under the purview of the First Amendment. In *Brandenburg v. Ohio*<sup>247</sup>, the Supreme Court held that the "constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting imminent lawless action and is likely to incite or produce such action."<sup>248</sup> Furthermore, in *NAACP v. Claiborne Hardware Co.*<sup>249</sup>, the Court went even further and ruled that "mere advocacy of the use of force or violence does not remove speech from the protection of the First Amendment."<sup>250</sup> Nevertheless, the holdings of the Court in these two cases are not likely to have an impact when attacking the constitutionality of the detention provisions of the Patriot Act. The reason is that the detention provisions of the Patriot Act pertain to non-citizens. Although permanent resident non-citizens do enjoy First Amendment rights,<sup>251</sup> under certain circumstances it is well-established that they

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Legal Comment. (Oct. 5, 2001), *available at* [http://writ.news.findlaw.com/commentary/20011005\\_ramasasttry.html](http://writ.news.findlaw.com/commentary/20011005_ramasasttry.html) (last visited Jan. 8, 2003).

<sup>247</sup> 395 U.S. 444 (1969).

<sup>248</sup> *Id.* at 447.

<sup>249</sup> 458 U.S. 886 (1982).

<sup>250</sup> *Id.* at 927.

<sup>251</sup> *See* *Johnson v. Eisentrager*, 339 U.S. 763, 771 (1950); *Bridges v. Wixon*, 326 U.S. 135, 148 (1945).

may enjoy less constitutional protection than citizens.<sup>252</sup> A strong argument can be made that any association with a terrorist organization like al-Qaida is both directed at inciting imminent lawless action and is very likely to incite or produce exactly this type of action.

In sum, the implications of §§ 411 and 412 of the Patriot Act for non-citizens are certainly far-reaching, but as will be argued in *infra* Part III.B of this Comment, not as sweeping as the detention provisions found under ATCSA. Non-citizens who engage in political activities in connection with any organization risk being certified as terrorists and subject to potentially indefinite detention whether on a technical immigration violation or on terrorism grounds.<sup>253</sup> In addition, non-citizens are unable to protect themselves from these risks by avoiding association with organizations that have been designated as “terrorist organizations” because the Act expands that term to include undesignated and undefined grounds.<sup>254</sup> Non-citizens cannot even protect themselves by limiting their activity to seemingly innocent behavior such as soliciting membership for, soliciting funds for, and providing material support to a newly designated “terrorist organization” with only the goal of promoting the organization’s lawful ends because the Act broadens the term “engage in terrorist activity” to include exactly these types of activities.<sup>255</sup> Therefore, in the post-Patriot Act world, non-citizens who are intent on avoiding the risks of being certified as a suspected terrorist and the possibility of indefinite detention should refrain from any associations with organizations that could potentially be deemed

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<sup>252</sup> See Harvard Law Review Association, “*Foreign*” Campaign Contributions and the First Amendment, 110 HARV. L. REV. 1886, 1895 (1997). For a general analysis of the constitutional rights of non-citizens see GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW 3-15 (1996); Linda S. Bosniak, *Membership, Equality, and the Difference that Alienage Makes*, 69 N.Y.U. L. REV. 1047, 1048-59 (1994).

<sup>253</sup> See Nancy Chang, *The USA PATRIOT Act: What’s So Patriotic About Trampling on the Bill of Rights?*, available at [http://www.ccr-ny.org/whatsnew/usa\\_patriot\\_act.asp](http://www.ccr-ny.org/whatsnew/usa_patriot_act.asp) (last visited Nov. 4, 2002).

<sup>254</sup> See *id.*



terrorist, even if they are partaking in seemingly innocent activities.<sup>256</sup> While the full effect of the detention provisions of the Patriot Act have yet to be recognized, our commitment to the Bill of Rights and to the democratic values that define the United States have undoubtedly been put to the test by the events of September 11, 2001. Exactly how far the government can proceed in sacrificing civil liberties in hopes of gaining an added measure of security will certainly be tested in the upcoming months throughout the federal court system. As will be discussed below and in detail in Part IV of this Comment, however, regardless of how the Supreme Court ultimately rules and despite the Patriot Act's infringement on the civil liberties of non-citizens, the detention provisions of the Patriot Act, when compared with those of the United Kingdom's ATCSA, reflect a reasoned balance between both liberty and security.

## 2. ATCSA

Like the Patriot Act, the detention provisions of the Anti-Terrorism, Crime and Security Act 2001 have been extensively attacked as being both unlawful and disproportionate in light of the state of affairs in the United Kingdom since September 11, 2001. Before outlining these criticisms in detail, however, it would be helpful to first provide a brief introduction to ECHR in order to better understand the obligations the United Kingdom is required to fulfill as a member. Only then can a more comprehensive analysis of whether the detention measures of ATCSA are justifiable be undertaken.

Adopted in 1950, ECHR obligates its member countries to "secure the rights and freedoms" of the Convention to everyone in their jurisdiction.<sup>257</sup> Broadly speaking, ECHR provides international protection for a variety of civil and political rights much like those

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<sup>255</sup> *See id.*

<sup>256</sup> *See id.*

<sup>257</sup> *See ECHR, supra* note 14, art. 1

contained in the United States Bill of Rights.<sup>258</sup> The fundamental goal of ECHR is to promote individuals rights and freedoms in an effort to best protect democracy.<sup>259</sup>

ECHR is comprised of various provisions. Of particular importance to the focus of this Comment is Article 5, which addresses the detention of non-citizens. It protects against unwarranted state intrusions upon the liberty and security of individuals by prohibiting unjustified detentions.<sup>260</sup> Although the member countries consider the rights and freedoms detailed in ECHR to be fundamental to democracy, however, ECHR nevertheless contains a public emergency exception. Article 15(1) of ECHR provides that “in times of war or other public emergency threatening the life of the nation any High Contracting Party may take measure derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation ....”<sup>261</sup> In reviewing a member country’s declaration of a public emergency under Article 15, the European Court has consistently maintained that it plays a limited role in the review of a member country’s derogation under Article 15.<sup>262</sup> The Court instead grants member countries a margin of appreciation recognizing that each member state is primarily responsible for its own survival and stability.<sup>263</sup> Because individual governments have continuous and direct contact with the everyday conditions of the state and therefore are in the best position to make such a determination, the Court requires each member country to

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<sup>258</sup> JACKSON, *supra* note 6, at 11.

<sup>259</sup> *See* Henning, *supra* note 7, at 1270.

<sup>260</sup> *See* ECHR, *supra* note 14, art. 5.

<sup>261</sup> *Id.* art. 15.

<sup>262</sup> *See, e.g., Brannigan*, 17 Eur. Ct. H.R. 539 (1994) (affording a broad conception of the margin of appreciation doctrine in finding the derogation of the United Kingdom under Article 15 of ECHR to be lawful). For an explanation of the margin of appreciation doctrine, see Gross, *supra* note 98, at 495-99.

<sup>263</sup> *See* Henning, *supra* note 7, at 1274.

determine the severity of the threat to the nation and allows the country to determine the scope of the measures which are necessary to monitor the situation.<sup>264</sup>

In *Lawless v. Ireland*,<sup>265</sup> the Court entertained a challenge by an Irish individual who at one time was a member of the IRA and then, according to his own account, left that organization fewer than five months later.<sup>266</sup> Nevertheless, he was detained without trial for a period of almost six months.<sup>267</sup> The European Court held that detaining Lawless violated his right to liberty Article 5 of ECHR.<sup>268</sup> Therefore, it was essential to examine if the detention could be justified under the provisions of Article 15.

In *Lawless*, the Commission defined, and the Court agreed, that a public emergency for the purposes of Article 15 of ECHR is a situation of exceptional and imminent danger or crisis affecting the general public, as distinct from particular groups, and constituting a threat to the organized life of the community which composes the State in question.<sup>269</sup> This definition was further developed by the Commission, which in the 1969 case of *Denmark, Norway, Sweden & the Netherlands v. Greece*<sup>270</sup> (the “Greek Case”) held that in order to satisfy Article 15, a public emergency had to be “actual or imminent,” its effects had to “involve the whole nation,” the continuance of the organized life of the community must be threatened,” and the crisis or danger must be “exceptional,” in that normal measures were “plainly inadequate.”<sup>271</sup>

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<sup>264</sup> See *id.*

<sup>265</sup> 1 Eur. Ct. H.R. 15 (1979-80). For an in-depth analysis of the Court’s ruling in *Lawless* see generally BRIAN DOOLAN, *LAWLESS V. IRELAND (1957-1961): THE FIRST CASE BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS: AN INTERNATIONAL MISCARRIAGE OF JUSTICE?* (2001).

<sup>266</sup> *Lawless*, 1 Eur. Ct. H.R. at 17.

<sup>267</sup> *Id.*

<sup>268</sup> *Id.* at 37.

<sup>269</sup> See *id.* at 30.

<sup>270</sup> 1969 Y.B. Eur. Conv. On H.R. 1.

<sup>271</sup> 1 EUROPEAN COURT OF HUMAN RIGHTS, *THE GREEK CASE: REPORT OF THE COMMISSION* (1969).

Applying the rules of *Lawless* and the *Greek* case to the present state of affairs, it is difficult to conclude that the current climate in the United Kingdom amounts to the type of public emergency which threatens the life of the nation. First, it is important to note that despite the supposed present international “war on terrorism,” the United Kingdom is the only one of the forty-one member states to have ratified the Convention which has found it necessary to derogate from the terms of ECHR over this matter.<sup>272</sup> It is thus somewhat doubtful that the current state of affairs in the United Kingdom could constitute a public emergency within the meaning of ECHR.<sup>273</sup> The attacks on the United States have ended and there has yet to be an attack on the United Kingdom. Therefore, while it may be accurate to say there is a concern and that the United Kingdom should remain alert, it is questionable if there is a public emergency in the United Kingdom at this time.<sup>274</sup>

Furthermore, even if it was determined that a public emergency does presently exist in the United Kingdom, it is even more difficult to conclude that the detention measures contained in Anti-terrorism, Crime and Security Act 2001 are absolutely necessary. It appears that the measures implemented in relation to the detention of non-citizens suspected of terrorism are not commensurate with the current situation in the United Kingdom.<sup>275</sup> The current situation appears distinguishable from Northern Ireland’s position in *Brannigan & McBride v. United Kingdom*, where the Court held that the United Kingdom’s derogation from Article 5 was in fact justified.<sup>276</sup> Whereas between 1972 and 1992 there were some 3,000 deaths and over 40,000 terrorist incidents attributed to terrorism in Northern Ireland, there have been no terrorist

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<sup>272</sup> See Tomkins, *supra* note 7, at 205-06.

<sup>273</sup> Black-Branch, *supra* note 151, at 26.

<sup>274</sup> See *id.*

<sup>275</sup> See *id.*

<sup>276</sup> See Tomkins, *supra* note 7, at 215.

incidents in the United Kingdom directly associated with what happened in the United States on September 11, 2001.<sup>277</sup> In fact, in January 2002, shortly after the passing of ATCSA, the Home Secretary confirmed in Parliament that there was “no immediate intelligence pointing to a specific threat to the United Kingdom.”<sup>278</sup>

In addition, even if the government was to prevail on the public emergency argument, it would have to prove to the satisfaction of the Court, that the continuing operational effectiveness of the al-Qaida network poses an immediate and specific threat to the United Kingdom which is nonetheless serious enough so that the nation should regard itself as being in a state of emergency.<sup>279</sup> Even if this argument were to succeed, it is probable that the breadth of the coercive powers contained in Part 4 of ATCSA would make it difficult to establish that the detention measures contained in the Act are strictly necessary.<sup>280</sup> The detention provisions are not limited only to those persons who pose a terrorist threat to the United Kingdom as a result of the September 11, 2001 attacks. Instead, the Act covers all non-citizens suspected of terrorism, not just those responsible for the attacks in the United States.<sup>281</sup> Thus, the expansive nature of the detention measures contained in Part 4 of ATCSA will make it difficult to show that the provisions contained in the Act are strictly necessary to respond to the attacks of September 11, 2001.

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<sup>277</sup> See *id.* at 216. Despite the absence of terrorist attacks in connection with the attacks in the United States on September 11, 2001 in the United Kingdom, the British government has continually insisted that there is a high probability that sooner or later international terrorist will launch an attack against the United Kingdom. See, e.g., “*High*” *Chance of UK Terror Attack*, available at <http://www.cnn.com/2002/WORLD/europe/12/18/terror.alert/index.html> (Dec. 18, 2002) (discussing a government briefing in London which warned of the possibility of future terrorist attacks in the United Kingdom) (last visited Jan. 8, 2003).

<sup>278</sup> Khan, *supra* note 7, at 11.

<sup>279</sup> See Tomkins, *supra* note 7, at 216.

<sup>280</sup> See *id.*

<sup>281</sup> See Anti-terrorism, Crime and Security Act, 2001, § 21.

In short, ATCSA is a momentous piece of legislation that conferred great power, arguably, too much power, to the state, especially in the areas of deportation and detention without trial. Undoubtedly, the power to indefinitely detain will adversely affect non-citizen nationals suspected by the Secretary of State of involvement in terrorism but who cannot be deported. Furthermore, it is probable that innocent people are likely to be rounded up as well in the search for suspected non-citizen terrorists.<sup>282</sup> Whether these new laws are justified and proportionate in light of the current situation in the United Kingdom as well as how these laws should be used have been popular matters of debate and causes of concern since the laws' passing.<sup>283</sup> At this point, it is still too early to attempt to assess the legal and political impact of ATCSA as it remains to be seen what kind of use will be made of the detention powers outlined in the above discussion. While many of ATCSA's provisions are seemingly identical to those found under the Patriot Act, however, the detention provisions under the Act are considerably more suspect than those of its American counterpart. As this Comment will argue in Part IV, the way in which the United Kingdom responded to the terrorist attacks of September 11, 2001 poses an unjustifiable threat to the freedom and civil liberty of non-British nationals in the United Kingdom and proceeds too far in the name of national security.

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<sup>282</sup> See Wadham, *supra* note 150, at 1074.

<sup>283</sup> In July of 2002 SIAC found that the targeting of non-citizens of the United Kingdom certified by the Secretary of State to be suspected terrorists under Part 4 of ATCSA was discriminatory and that the detention measures were not compatible with the United Kingdom's obligations under ECHR. See Amnesty International News Release, *Detaining Non-UK Nationals Indefinitely is Discriminatory*, available at <http://www.amnestyusa.org/news/2002/uk07302002.html> (July 30, 2002) (last visited October 5, 2002); *BBC News, Terror Suspects Win Appeal*, available at <http://news.bbc.co.uk/1/hi/uk/2161710.stm> (last visited Oct. 5, 2002). As of the writing of this Comment, the United Kingdom is appealing the judgment and the detainees detained under the detention provisions of ATCSA had yet to be released.

#### IV. THE USA PATRIOT ACT AND ANTI-TERRORISM, CRIME AND SECURITY ACT 2001: REASONED RESPONSES OR OVERREACTIONS?

##### A. *USA Patriot Act*

###### 1. Will the Supreme Court Uphold a Challenge to the Patriot Act's Detention Provisions?

Unquestionably, the U.S. government has a compelling interest in responding to the terrorist attacks of September 11, 2001. Whether these interests justify broad restrictions such as the indefinite detention of non-citizens suspected of terrorism has yet to be determined, however. Surely restrictions such as this raise serious constitutional concerns. Nevertheless, as will be discussed below, the Supreme Court has consistently upheld the executive's extraordinary powers to protect national security and it is unlikely that the current "war" on terror will be an exception. Thus, it is not only possible, but probable that the detention provisions of the Patriot Act would pass constitutional muster. Furthermore, this Comment will argue that the Patriot Act's detention provisions, while possibly hostile to the traditional civil liberties of non-citizens in the United States, are more justifiable than the detention provisions enacted by the United Kingdom under ATCSA. In addition, not only are the detention measures under the Patriot Act reasoned responses to the terrorist attacks of September 11, but they may be necessary responses in this uncertain time. While history tells us that in our fight for freedom we may inevitably impinge upon certain civil liberties, history also reassures us that these emergency measures have had no lasting effect on American society once our battles have been won and peace has been restored.<sup>284</sup> In fact, the Patriot Act, with its explicit safeguards, may illustrate how previous

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<sup>284</sup> See Ting, *supra* note 144, at 1147 (for example, both Lincoln's suspension of habeas corpus during the Civil War, Roosevelt's internment of Japanese-Americans during World War II arguably had no permanent effect of American society once these battles were won and peace restored). For a more complete discussion on how the United States has rebuilt themselves after engaging in major wars, see generally G. JOHN IKENBERRY, AFTER VICTORY: INSTITUTIONS,

infringements on civil liberties have heightened our sensitivity to the importance of protecting civil liberties. It must be recognized that if we lose our fight against terrorism, the civil liberties of all people, citizens and non-citizens alike, will no longer survive.<sup>285</sup> Nevertheless, it cannot be ignored that detention theories are inherently flawed and thus, in the long term, the detention provisions under the Patriot Act, while possibly reasoned responses in the name of liberty and security, may ultimately fail in their goal to eliminate the terrorist threat to the United States.

It is not a matter of if, but instead a question of when, the power to potentially indefinitely detain a non-citizen found under § 412 of the Patriot Act will be challenged in the Supreme Court as a violation of the non-citizen's Fifth Amendment due process rights. In predicting how the Court would resolve the constitutionality of the Patriot Act's detention provisions, it is important to remember the track record of the judiciary. The judiciary has consistently deferred to the wishes of the political branches of government during times of crisis by finding the state interest in national security to be paramount to competing interests.<sup>286</sup> For instance, during the Civil War, President Abraham Lincoln established military courts to try those sympathizing with the Confederacy and suspended habeas corpus.<sup>287</sup> Similarly, during World War I, the Supreme Court upheld the conviction of Eugene Debs for expressing his anti-war sentiment.<sup>288</sup> More recently, following the bombing of Pearl Harbor during World War II, the Supreme Court upheld an executive order which mandating the internment of both Japanese citizens and non-citizens based solely on their ancestry.<sup>289</sup> While the current "war" on terrorism

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STRATEGIC RESTRAINT, AND THE REBUILDING OF ORDER AFTER MAJOR WARS (2001) (addressing what states that have just won major wars do with their newly acquired power).

<sup>285</sup> *See id.*

<sup>286</sup> *See* CHANG, *supra* note 145, at 136.

<sup>287</sup> *See* Mathews, *supra* note 2, at 465-67.

<sup>288</sup> *See* Debs v. United States, 249 U.S. 211 (1919).

<sup>289</sup> *See* Korematsu v. United States, 323 U.S. 214 (1945).



differs from in that the “war” on terrorism is not being waged against any particular nation and because Congress has not declared war as required by Article I of the Constitution,<sup>290</sup> the Supreme Court would likely draw an analogy between these historical instances and the current state of affairs.

The Supreme Court decided long ago that a formal declaration of war is not necessary for the Executive to wage war.<sup>291</sup> During the Civil War, in determining what constituted a war the Court held in *The Prize Cases*<sup>292</sup> that “war has been well defined to be that state in which a nation prosecutes its right by force.”<sup>293</sup> In addition, the Court found that “war may exist without a declaration on either side” and that “it is not necessary to constitute war, that both parties should be acknowledged as independent nations or sovereign States.”<sup>294</sup> Just like there was no formal declaration of war preceding the Civil War, in the current “war” on terrorism, Congress has made the functional equivalent of a declaration of war in its authorization of the use of force against al-Qaida.<sup>295</sup> Therefore, as in *The Prize Cases*, this type of authorization may be sufficient for the Supreme Court to analogize the current state of affairs to instances where there were more traditional declarations of war and for the Court to take judicial notice that a state of war exists.<sup>296</sup>

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<sup>290</sup> U.S. Const. Art. I, § 8.

<sup>291</sup> See [The Prize Cases](#), 67 U.S. (2 Black) 635, 668 (1862).

<sup>292</sup> [The Prize Cases](#), 67 U.S. (2 Black) 635 (1862).

<sup>293</sup> *Id.* at 666.

<sup>294</sup> *Id.* at 668.

<sup>295</sup> See Authorization for Use of Military Force, [Pub. L. No. 107-40](#), 115 Stat. 224 (Sept. 18, 2001) (stating that the act is an authorization of military force made pursuant to the War Powers Resolution).

<sup>296</sup> Interestingly enough, the state of affairs following the Civil War provides further historical support for the notion that civil liberties may be restricted even without a formal declaration of war. The Reconstruction Act of 1867, passed in response to widespread Ku Klux Klan violence in the South, showed a willingness on the part of Congress to restrict civil liberty in times of national crisis, even though the nation was not at war. See Matt J. O’Laughlin, *Exigent*

During World War II the United States was once again faced with a threat to national security when members of the German armed forces, carrying explosive, fuses, and timing devices, secretly proceeded in a submarine to the coast of the United States.<sup>297</sup> Similar to government's considerations in passing the Patriot Act, concerned that the current laws were not sufficient to protect the United States from these types of individuals, President Roosevelt quickly issued an order establishing a military commission<sup>298</sup> for the trial of the saboteurs.<sup>299</sup> All eight German soldiers who landed in the United States were tried before the military commission, with six eventually being sentenced to death.<sup>300</sup>

Following their convictions, the German soldiers filed a petition for habeas corpus to challenge the constitutionality of their trial by military commission.<sup>301</sup> In *Ex parte Quirin*,<sup>302</sup> the

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*Circumstances: Circumscribing the Exclusionary Rule in Response to 9/11*, 70 UMKC L. REV. 707, 714 (2002). Although the Civil War had ended two years earlier, Congress believed it was necessary, in an effort to restore order, to institute military rule in the South. *See id.* After passing the Reconstruction Acts, Congress then restricted the appellate jurisdiction of the Supreme Court to hear the issue, ensuring that it would not be held unconstitutional. *See id.* The Reconstruction Acts laid out conditions for the readmission of states into the union, one of which was the ratification of the Fourteenth Amendment. *See id.* Essentially, Congress coerced the votes of southerners through the use of military rule. Without this restraint on liberty, it is likely that Fourteenth Amendment would not have been ratified. These circumstances suggest that the Fourteenth Amendment, at least in part, came to fruition by placing restraints on civil liberty. *See id.* at 715.

<sup>297</sup> *Ex Parte Quirin*, 317 U.S. 1, 21-22 (1942).

<sup>298</sup> Similar to the Military Order passed by President Roosevelt during World War II, on November 13, 2001 President Bush also promulgated a Military Order authorizing the trial of non-citizens suspected of complicity in the terrorist attacks of September 11, 2001. While an in-depth discussion of President Bush's Military Order is beyond the scope of this Comment, it has been addressed extensively elsewhere. *See, e.g.,* Christopher M. Evans, *Terrorism on Trial: The President's Constitutional Authority to Order the Prosecution of Suspected Terrorists by Military Commission*, 51 DUKE L.J. 1831 (2002); Daryl A. Mundis, *The Use of Military Commissions to Prosecute Individuals Accused of Terrorist Acts*, 96 AM. J. INT'L L. 320 (2002); Diane F. Orentlicher & Robert Kogod Goldman, *When Justice Goes to War: Prosecuting Terrorist Before Military Commissions*, 25 HARV. J.L. & PUB. POL'Y 653 (2002).

<sup>299</sup> *Quirin*, 317 U.S. at 21-22.

<sup>300</sup> *Id.* at 22-23; *see also* Evans, *supra* note 298, at 1842-43.

<sup>301</sup> *Quirin*, 317 U.S. at 23-24; *see also* Evans, *supra* note 298, at 1842-43.

Supreme Court convened in a special term to hear arguments in the case of the petitioners. Not surprisingly, the court dismissed the petitioner's arguments and upheld their convictions reasoning that the President's wartime detention decisions are to be accorded great deference from the courts.<sup>303</sup> The opinion also established the presumption that presidential actions taken pursuant to the commander in chief power during wartime are valid, unless those actions are clearly in conflict with the Constitution.<sup>304</sup> Chief Justice Stone wrote, "[T]he detention and trial of petitioners—ordered by the President in the declared exercise as Commander in Chief of the Army in time of war and of grave public danger—are not to be set aside by the courts without the clear conviction" that they are in violation of the Constitution or laws of the United States.<sup>305</sup>

While true that the situation in which President Roosevelt authorized military commissions can be distinguished from state of affairs which precipitated the passing of the Patriot Act, a close reading of *Quirin* supports the contention that the Supreme Court would likely uphold the detention provisions of the Patriot Act. In contrast to the invasion of the German soldiers and the circumstances which existed when President Roosevelt promulgated his order, the United States was not in the state of an armed conflict on the morning of September 11, 2001, prior to the attacks. In addition, unlike World War II, despite the president's proclaimed "war on terrorism" the United States is not officially at war. Nevertheless, the severity of the September 11 attacks, in both their purpose and effect, undoubtedly commenced a state of "quasi-war" in the United States. The decision of the Supreme Court in *Quirin* clearly illustrates that during times of conflict and increased national security, civil liberties are not high priorities for the judges. Furthermore, the Court's decision in *Quirin* regarding the

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<sup>302</sup> 317 U.S. 1 (1942).

<sup>303</sup> *Id.* at 25.

<sup>304</sup> *Id.*

appropriateness of the use of military tribunals primarily turned on the particular facts in the case including, the time in which the events in the case took place, the identity of the offenders, and the state of affairs of the nation. This reasoning, when applied to the appropriateness of the detention provisions of the Patriot Act, supports the detention of non-citizens suspected of terrorism in the aftermath of the terrorist attacks of September 11, 2001.

In another famous World War II case, *Korematsu v. United States*,<sup>306</sup> the Court upheld the evacuation of people of Japanese ancestry to relocation centers.<sup>307</sup> Korematsu was convicted of disobeying the order by remaining in an area contrary to the order.<sup>308</sup> In a short ten-page opinion the Court affirmed his conviction and held that the evacuation of people of Japanese ancestry was necessary because of the presence of an unascertained number of disloyal members of the group.<sup>309</sup> In affirming his conviction the Court noted “the validity of action under the war power must be judged wholly in the context of war. That action is not to be stigmatized as lawless because like action in times of peace would be lawless.”<sup>310</sup> The decision of the Court in *Korematsu* confirms the fact that judges are wary to strike down wartime measures during times of conflict and when the national security of the United States is threatened. Thus, there is little reason to believe that the Supreme Court would depart from this line of decisions when interpreting the detention provisions of the Patriot Act.

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<sup>305</sup> *Id.*

<sup>306</sup> 323 U.S. 214 (1944).

<sup>307</sup> *Id.* at 218.

<sup>308</sup> *Id.* at 215-216.

<sup>309</sup> *Id.* at 218, 224.

<sup>310</sup> *Id.* at 224.

Finally, and most significantly for determining the fate of the Patriot Act's detention provisions, there is the decision of the Supreme Court in *Zadvydas*, which came down less than three months before the terrorist attacks of September 11, 2001.<sup>311</sup>

*Zadvydas v. Davis* combined two cases that had led to opposite results in the courts of appeals. Both cases involved non-citizens who had enjoyed the status of lawful permanent resident after arriving in the United States as children.<sup>312</sup> Kestutis Zadvydas was a non-citizen resident of the United States who was born to Lithuanian parents in a German displaced persons camp.<sup>313</sup> After a drug conviction, he served two years in prison and was detained thereafter by the INS which ordered his removal.<sup>314</sup> Because both Germany and Lithuania refused to accept Zadvydas as their own citizen, however, the INS held him beyond the ninety-day removal period allowed by the statute.<sup>315</sup> Nevertheless, the Fifth Circuit upheld the statute reasoning that although Zadvydas's status as a permanent resident afforded him greater procedural due process rights, this status did not afford him greater substantive rights under the Due Process Clause.<sup>316</sup> In essence the court refused, at least for detention purposes, to recognize a meaningful distinction between deportable non-citizens subject to final orders of removal and excludable non-citizens.<sup>317</sup> Moreover, the Fifth Circuit found that Zadvydas's continued detention did not constitute "permanent confinement" because his removal was not an absolute impossibility and because he could be released upon a determination that he no longer represented a flight risk or

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<sup>311</sup> See *Zadvydas v. Davis*, 533 U.S. 678 (2001).

<sup>312</sup> *Zadvydas*, 533 U.S. at 682-86.

<sup>313</sup> *Id.* at 684.

<sup>314</sup> *Id.*

<sup>315</sup> *Id.*

<sup>316</sup> *Id.* at 685; see also *Plight of the Tempest-Tost*, *supra* note 43, at 1922 (discussing the Fifth Circuit's decision in *Zadvydas v. Underdown*, 185 F.3d 279 (5th Cir. 1999)).

<sup>317</sup> See *Martin*, *supra* note 43, at 69.

danger to the community.<sup>318</sup> Therefore, because Zadvydas failed to sustain his burden to the INS by proving that he was not dangerous and releasable, and as long that the INS provided a procedure for periodic review of releasability coupled with good faith efforts to effectuate deportation, ongoing detention did not violate the Constitution.<sup>319</sup>

Similar to Zadvydas, Kim Ho Ma came to the United States from Cambodia and had been a resident non-citizen since the age of seven.<sup>320</sup> After being convicted of manslaughter, he spent a little over two years in prison where upon release he was placed into the custody of the INS to begin removal proceedings.<sup>321</sup> The INS detained Ma beyond the ninety-day period because Cambodia would not accept him.<sup>322</sup> In contrast to the decision of the Fifth Circuit in *Zadvydas*, however, the Ninth Circuit refused to uphold the statute.<sup>323</sup> Instead, the court construed the INA to prohibit detention for more than a “reasonable time” beyond the ninety-day removal period.<sup>324</sup> The court found that where, as in Ma’s case, no reasonable likelihood of removal exists, the statute did not authorize detention beyond ninety days.<sup>325</sup>

The Supreme Court granted certiorari in both cases to resolve the circuit split, consolidated them, vacated and remanded.<sup>326</sup> The majority held that any law allowing the indefinite detention of deportable non-citizens would raise substantial constitutional concerns.<sup>327</sup> To survive a constitutional challenge, the court reasoned that indefinite civil detention must

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<sup>318</sup> See *Plight of the Tempest-Tost*, *supra* note 43, at 1922.

<sup>319</sup> See *Martin*, *supra* note 43, at 69.

<sup>320</sup> *Zadvydas*, 533 U.S. at 685.

<sup>321</sup> *Id.*

<sup>322</sup> *Id.* at 686.

<sup>323</sup> *Id.*; see also *Martin*, *supra* note 43, at 69-70.

<sup>324</sup> See *Plight of the Tempest-Tost*, *supra* note 43, at 1923.

<sup>325</sup> *Id.*

<sup>326</sup> *Id.*

<sup>327</sup> *Id.*

occur in “non-punitive circumstances” where a “special justification” exists.<sup>328</sup> Even assuming that the objectives for detaining individuals such as Zadvydas and Ma were non-punitive, the Court found no sufficient compelling special justification for their indefinite confinement once the likelihood of their repatriation became remote.<sup>329</sup> In addition, the majority was not persuaded by the governments’ justifications for detention. The government’s first justification for detention—preventing flight from removal proceedings—did not constitute enough of a justification for continued INS detention.<sup>330</sup> Similarly, while the Court acknowledged that the government’s second justification—protecting the community from harm—was valid, the Court stressed that preventative detention based on dangerousness would be permitted only when it is imposed on highly dangerous individuals and only if there are “strong procedural protections” in place.<sup>331</sup> The majority was skeptical of the INA’s post-order detention provision because it applied to a broad range of non-citizens rather than a narrow segment of the population, and because it offered minimal procedural protections.<sup>332</sup>

Nevertheless, in order to avoid finding the post-order provision unconstitutional, the Court construed the statute to permit incarceration beyond the ninety-day period only as long as removal remained “reasonably foreseeable.”<sup>333</sup> In doing so, the majority established a presumption that detention of a deportable non-citizen is reasonable for six months following a final order of removal.<sup>334</sup> After that time, the detained non-citizen may petition the government for release by showing “good reason” to believe that there is no significant likelihood of removal

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<sup>328</sup> *Zadvydas*, 533 U.S. at 690.

<sup>329</sup> *See id.*; *see also Plight of the Tempest-Tost*, *supra* note 43, at 1923.

<sup>330</sup> *See Zadvydas*, 533 U.S. at 691; *see also Plight of the Tempest-Tost*, *supra* note 43, at 1923.

<sup>331</sup> *See Zadvydas*, 533 U.S. at 691; *see also Plight of the Tempest-Tost*, *supra* note 43, at 1923-24.

<sup>332</sup> *See id.* at 691-92; 1923-24.

<sup>333</sup> *See Zadvydas*, 533 U.S. at 701.

in the reasonably foreseeable future.<sup>335</sup> The government must rebut such a showing to continue holding the non-citizen in custody.<sup>336</sup>

Despite the Court's expression of serious doubt about the constitutionality of the INA's post-order detention mandate, however, the majority did recognize, in language that now appears prescient, that the cases before it did not require it "to consider terrorism or other special circumstances where special arguments might be made for forms of preventative detention and for heightened deference to the judgments of the political branches with respect to matters of national security."<sup>337</sup> In doing so, the Court essentially carved out a potential exception for certain non-citizen terrorists and recognized that terrorism creates a type of public fear that may not be present with other national threats of security. The acknowledgement by the majority of the genuine danger represented by terrorism or other exceptional circumstances seems to eerily foreshadow the events of September 11, 2001 and the subsequent struggles our nation is now faced with following the unprecedented attacks. While lessons from the past may counsel against such a rule that affords heightened judicial deference to the political branches in cases that implicate national security, this loophole created by the majority undoubtedly gives the political branches room to maneuver and for the Supreme Court to utilize detention in the current war on terrorism. The *Zadvydas* decision therefore would not require the release of non-citizens held on allegations of terrorism who have no prospect of being able to return to their home

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<sup>334</sup> *See id.*

<sup>335</sup> *Id.*

<sup>336</sup> *Id.*

<sup>337</sup> *Id.* at 696.



country. What the Patriot Act appears to do is effectively codify this exception requiring the continued detention of removable non-citizens suspected of terrorism.<sup>338</sup>

The Patriot Act's provisions on indefinite detention for certified non-citizens suspected of terrorism are likely to be ruled constitutional given both the current heightened popular awareness of the national security threat posed by non-citizens living in the United States with the intent to perpetrate terrorist attacks against Americans and because the detention provisions of the Act exceed the *Zadvydas* standard regarding suspected terrorists held on an indefinite basis. First, § 412(b) specifically provides judicial review of suspected non-citizen terrorists held on an indefinite basis.<sup>339</sup> Second, the new law proscribes fixed time limits for review of the Attorney General's initial certification. Section 412(a)(6) provides that an alien whose "removal is unlikely in the reasonably foreseeable future may be detained for additional periods of up to six months if release threatens national security or the safety of an individual or community."<sup>340</sup> In addition, § 412(a)(7) requires the Attorney General to review the certification every six months and allows the suspected non-citizen terrorist to request a reconsideration of the certification every six months.<sup>341</sup> It is only if all these provisions are satisfied that the terrorist suspect may be subject to potential indefinite detention. Therefore, if the Court stands by its decision in *Zadvydas* and follows precedent of this decision and other decisions passed down in times of crisis, it is unlikely that the detention provisions of the Patriot Act will be struck down as an unconstitutional infringement on the rights of non-citizens.<sup>342</sup>

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<sup>338</sup> See Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, § 412 (to be codified at 8 U.S.C. § 1226a).

<sup>339</sup> See *id.* at § 412(b) (to be codified at 8 U.S.C. § 1226a).

<sup>340</sup> See *id.* at § 412(a)(6) (to be codified at 8 U.S.C. § 1226a).

<sup>341</sup> See *id.* at § 412(a)(7) (to be codified at 8 U.S.C. § 1226a).

<sup>342</sup> Finally, the most telling indication of how the Supreme Court will rule on the detention provisions of the Patriot Act may be found in the words spoken by Supreme Court Justice Sandra

## 2. Are the Detention Provisions of the Patriot Act Justifiable?

Extraordinary times call for extraordinary measures. During this uncertain time, it is impossible for the United States to predict the future with any type of certainty. History has warned us that in a struggle against evil, the traditional civil liberties of some individuals may have to be curtailed. Nevertheless, history also assures us that once the emergency is over, the provisions which adversely compromised traditional civil liberties will be eliminated and peace can be restored.<sup>343</sup>

The detention provisions of the Patriot Act, while certainly hostile to the traditional civil liberties of non-citizens, can be defended as a reasoned and justifiable response to the terrorist attacks of September 11, 2001. While the provisions do subject more individuals than ever to deportation on terrorism grounds due to the newly expanded definitions of the terms “terrorist activity” and “terrorist organization,” safeguards have been built into the Patriot Act in an effort to adequately protect non-citizens from the possibility of arbitrary indefinite detention. Some of these protections include a limitation on the Attorney General’s power to delegate his certification power to the Deputy Attorney General alone,<sup>344</sup> a requirement to initiate removal

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Day O’Connor. Upon her visit to the World Trade Center site in New York shortly after the terrorist attacks O’Connor commented that, “we are likely to experience more restrictions on personal freedom than has even been the case in this country.” Linda Greenhouse, *A Nation Challenged: The Supreme Court; In New York Visit, O’Connor Foresees Limits on Freedom*, NY TIMES, Sept. 29, 2001, at B5. This statement by O’Connor is also extremely important because she is often considered the swing vote on the current Supreme Court. Her views are therefore crucial. In addition to this comment, her concurring opinion in *Foucha* may indicate that she is more open to some kinds of indefinite detention than the other members of the Court who made up the *Zadvydas* majority. See T. Alexander Aleinikoff, *Detaining Plenary Power: The Meaning and Impact of Zadvydas v. Davis*, 16 GEO. IMMIGR. L.J. 365, 384 (2002) (discussing the future of the *Zadvydas* decision).

<sup>343</sup> See Ting, *supra* note 144, at 1147.

<sup>344</sup> See Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, § 412 (to be codified at 8 U.S.C. § 1226a).

proceedings or bring criminal charges within seven days of the commencement of detention,<sup>345</sup> a limitation on the detention of non-citizens who cannot be removed and those non-citizens who are waiting to be removed if it is determined that the release of these non-citizens would threaten national security or public safety,<sup>346</sup> mandatory review of certification by the Attorney General every six months,<sup>347</sup> and a provision for judicial review through the filing of a habeas petition and appeals.<sup>348</sup>

Finally, and quite possibly most significantly, in contrast to the situation in the United Kingdom, the terrorist attacks of September 11, 2001 were perpetrated on American soil. After the attacks, it was discovered that the State Department had issued visas to all nineteen hijackers responsible for the terrorist attacks.<sup>349</sup> These lapses in immigration law enforcement brought to light how our relatively open borders and open society make us an easy target for terrorist activity. Consequently, the federal government was forced to take action fast. While the detention of non-citizens as authorized under the Patriot Act may not be the best solution or even the most effective approach to combat terrorism, it represents a reasoned response to a difficult situation. After all, if the United States does not fight terrorism, civil liberties as a whole will not survive as there will be no one left to fight for freedom and democracy.<sup>350</sup> The civil liberty that the United States government should focus on at this crucial time is that of all people, both American and non-Americans, to live their lives free from the threat of terrorism.<sup>351</sup> This is a priority that surely factored into the United States government reasoning when enacting the

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<sup>345</sup> *Id.*

<sup>346</sup> *Id.*

<sup>347</sup> *Id.*

<sup>348</sup> *Id.*

<sup>349</sup> See *Plight of the Tempest-Tost*, *supra* note 43, at 1931.

<sup>350</sup> See Ting, *supra* note 144, at 1147.

<sup>351</sup> See *id.*

detention provisions of the Patriot Act. Nevertheless, while the continuing threat posed by terrorism may justify the detention provisions, the United States must remain mindful that if and when the situation stabilizes, the detention measures should be reviewed to ensure that the civil liberties of non-citizens are not unnecessarily being truncated.<sup>352</sup> In addition, even given the continuing threat new of terrorist attacks, it is essential for the United States to abide by the explicit safeguards which have been outlined in the Patriot Act to protect against the possibility of potential arbitrary indefinite detention.<sup>353</sup>

#### *B. Anti-Terrorism, Crime and Security Act 2001*

##### **1. Will the European Court Uphold the United Kingdoms Derogation from ECHR under Anti-Terrorism, Crime and Security Act 2001?**

In contrast to the U.S. Supreme Court's potential reasoning in upholding the Patriot Act, it is questionable whether the European Court would rule that the detention provisions of Anti-

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<sup>352</sup> This Comment is not arguing that the threat of terrorism will be eradicated anytime soon or even that it will ever be completely eliminated. The development of international terrorism has placed the world under a real and most likely permanent threat. In fact, this view is supported by President Bush himself who believes it is going to be way beyond our lifetimes before the war on terrorism comes to an end. *See Padilla v. Bush* No. 02 Civ. 4445, 2002 U.S. Dist. LEXIS 23086, at \*10-13 (S.D.N.Y. Dec. 4, 2002) (summarizing the government's June 11, 2002 arguments in reply to Padilla's then-pending motion to vacate the material witness statute). Instead, what this Comment is arguing is that the new and expanded detention powers under the Patriot Act should be both limited in time and confined to periods of emergency and uncertainty.

<sup>353</sup> Most notably, the United States government must ensure that non-citizens certified as terrorists have access to the judicial review procedures explicitly outlined in the Patriot Act which enable certified terrorists to file a habeas petition to protest their certification and detention. *See* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, § 412 (to be codified at 8 U.S.C. § 1226a). In addition, it is important that the Attorney General review the certification of each non-citizen every six months without exception. *See id.* Finally, it is mandatory that the Attorney General submit reports to the Committee on the Judiciary of the House of Representatives and the Committee on the Judiciary of the Senate every six months regarding: (1) the number of non-citizens detained under these provisions; (2) the grounds for the certifications; (3) the nationalities of those non-citizens certified; (4) the length of the detention for each certified non-citizen; and (5) the number of non-citizens certified who—(A) were granted relief from removal;

terrorism, Crime and Security Act 2001 are valid. Irrespective of a specific terrorist threat or independent terrorist attack against the United Kingdom, because of the nation's relationship to the United States, it cannot be ignored that the nation is a target for terrorist activity. While true that traditionally the United Kingdom has been afforded great deference when addressing terrorist threats and while there are purported safeguards contained within ATCSA to ensure that the detention provisions of the Act are reviewed and remain temporary, the European Court will most likely find that the detention provisions of ATCSA have proceeded too far in the name of national security and rule that the United Kingdom has not made a valid derogation from ECHR under Article 15. Given the current state of affairs in the United Kingdom, unlike the Patriot Act, not only are the detention measures of ATCSA unnecessary and disproportionate, they also fail to provide adequate procedural safeguards to protect non-citizens from arbitrary detention.

While from the beginning, both the European Court and Commission have indicated that they will not abdicate jurisdiction over Article 15 questions, both have assumed an extremely deferential attitude towards governmental assertions of conformity with requirements of Article 15.<sup>354</sup> Governments historically fare well when their decisions concerning the existence of a particular situation of emergency are reviewed by the European Court. Nevertheless, in regards to the United Kingdom's recent derogation, there is reason to believe that the Court would rule differently.<sup>355</sup>

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(B) were removed; (C) the Attorney General had determined are no longer non-citizens who should be certified; or (D) were released from detention. *See id.*

<sup>354</sup> Gross, *supra* note 98, at 492.

<sup>355</sup> *See id.* at 493. The traditional deference shown to member countries is the result of such factors as tremendous delays in bringing cases before the Commission and the Court, the lack of a fact-finding mechanism for the Commission and the Court, and the restriction on the Commission and the Court to initiate an investigation into a specific situation in a state party. Instead, procedural rules require the Commission and the Court to await a formal application by another state party to the Convention or by an individual. *Id.* However, it is the doctrine of the

Several significant cases have come before the European Court of Human Rights and the European Commission on Human Rights<sup>356</sup> that have judged the efforts of the United Kingdom to control terrorism in Northern Ireland within the constraints of ECHR.<sup>357</sup> For the purposes of this Comment, only those cases which addressed the detention provisions of the United Kingdom's terrorist legislation after the passing of Prevention of Terrorism (Temporary

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"margin of appreciation" which is the main mechanism by which this deferential attitude is implemented. This doctrine and the jurisprudence developed around it have resulted in bringing a significant element of subjectivity into the identification of public emergencies and as a result have undermined the ability of European Commission and Court to formulate rules based on strict requirements opting instead for vague standards that increase the leeway for discretion and flexibility. *Id.* at 495.

The margin of appreciation doctrine essentially means that when reviewing whether a public emergency exists in a particular case or whether certain governmental emergency measures were in fact "strictly necessary," the Commission and the Court will generally not interfere with the state's judgment on the matter if it falls within a certain margin of appreciation. *Id.* at 496. If in derogating a state's appreciation is at least on the margin of its powers under Article 15, the Commission and Court usually rules in its favor. *Id.* The rationale is that in such cases the public's interest in an effective government and in the maintenance of order should prevail and that the national government is in the best position to balance the conflicting considerations of the public interest and complex factors involved in preserving law and order in the face of public emergency. *Id.* This is because the national government is presumed to be more familiar than the Commission or the Court with the particular circumstances which face the nation. *Id.* at 497. In fact, invalidating a state's judgment on a matter is only possible when the judgment is entirely outside the margin. *Id.* Thus, as it is nearly impossible to obtain a decision against the national government in situations alleged to amount to "public emergencies threatening the life of a nation," there is little reason to believe that the previous practices of the Commission and Court in avoiding an independent review of the evidence and the tendency to succumb to the position of the national government will be abandoned in addressing the detention provisions under the Anti-terrorism, Crime and Security Act 2001. *See id.*

<sup>356</sup> Both the European Court of Human Rights and the European Commission on Human Rights were established under Article 19 of ECHR. *See* ECHR, *supra* note 14, art. 19. The Commission may start an investigation into a complaint alleging that a State Party has violated ECHR upon an interstate complaint (i.e., a complaint filed by another member state) under Article 24 of ECHR or upon an application of an individual. *See id.* arts. 4-25. If an application is found to be admissible by the Commission, the Commission first attempts to achieve a friendly settlement between the parties. *See id.* art. 30. In the case where no settlement can be reached, the Commission then has the ability to refer the case to the Court. For a more detailed explanation of how ECHR and the European Court and Commission function, see generally JANIS ET AL., *supra* note 206 (providing a broad overview of how the European System operates).

Provisions) Act of 1974 (PTA 1974) and Northern Ireland (Emergency Procedures) Act of 1973 (EPA 1973) will be addressed here.<sup>358</sup>

Article 5.3 of ECHR provides that everyone lawfully arrested or detained “shall be brought promptly before a judge or other officer authorized by law to exercise judicial power, and shall be entitled to trial within a reasonable time or to release pending trial.”<sup>359</sup> The issue in *Brogan and Others v. United Kingdom*<sup>360</sup> involved four individuals who were arrested under § 12 of PTA as amended in 1984.<sup>361</sup> These individuals were detained between four and six days under PTA on suspicion of involvement in Northern Ireland terrorism.<sup>362</sup> This section of PTA proscribed the IRA and in § 12(1) provided that a law enforcement agent could arrest without warning any person whom he had reasonable grounds for suspecting to be a terrorist.<sup>363</sup> Section 12(4) provided for forty-eight hours initial detention and § 12(5) provided that detention could be

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<sup>357</sup> See generally JACKSON, *supra* note 6 (studying the conflicts which have arisen between the United Kingdom, the European Court and ECHR).

<sup>358</sup> In 1971, prior to the enactment of either the 1973 EPA or the 1974 PTA, in the case of *Ireland v. United Kingdom*, the Irish government contended that measures such as the detention and internment without trial as well as certain interrogation techniques introduced under the Civil Authorities (Special Powers) Act (Northern Ireland) 1922 violated Articles 3, 5, and 6 of ECHR. The Commission concluded that although the powers of detention and internment did violate the provisions of Article 5 of the European Convention, this detention without trial could be justified under Article 15 as being strictly required by the exigencies of the situation. In addition, the Commission concluded that the use of certain interrogation techniques such as deprivation of food and standing against a wall amounted to torture under Article 3 of ECHR. See *Ireland v. United Kingdom* 2 Eur. Ct. H.R. 25 (1979-80). This decision focused primarily on the interrogation techniques and procedures used by Britain rather than on the powers of detention. What is significant, however, is that the decision in *Ireland* both affirmatively recognized that an emergency did in fact exist in the United Kingdom, even though there was a continuous crisis and not a temporary public emergency. Additionally, it is important to recognize the expansion of the margin of appreciation doctrine by the Commission in this case. Both of these factors may have direct implications on how the European Court would rule on the detention provisions of the Anti-terrorism, Crime and Security Act 2001. See Gross, *supra* note 98, at 469-73.

<sup>359</sup> See ECHR, *supra* note 14, art. 5.

<sup>360</sup> 11 Eur. Ct. H.R. 117 (1989).

<sup>361</sup> See *Brogan*, 11 Eur. Ct. H.R. at 120-22.

<sup>362</sup> See *id.*

extended by five additional days.<sup>364</sup> None of the four was brought before a judge and none was charged after subsequent release.<sup>365</sup> Brogan and the other three detainees argued that their detention violated Article 5.3 of ECHR because they were not taken before a magistrate.

The European Court of Human Rights concluded that the extrajudicial powers of arrest and detention contained in PTA were incompatible with the United Kingdom's obligations under ECHR.<sup>366</sup> Being that none of the four suspects was brought immediately before a judge, the European Court had a fairly easy time of finding a breach of Article 5.3. The European Court ruled that even the shortest period for which one of the four individuals had been held, four days and six hours, violated ECHR.<sup>367</sup>

The British government, obviously dejected with the court's ruling, insisted that it needed to retain the seven day detention period found under PTA.<sup>368</sup> In response, Britain announced that it would derogate from its ECHR obligations under Article 15:<sup>369</sup>

There have been in the United Kingdom in recent years campaigns of organized terrorism connected with the affairs of Northern Ireland which have manifested themselves in activities which have included repeated murder, attempted murder, maiming, intimidation and violent civil disturbance and in bombing and fire raising which have resulted in death, injury and widespread destruction of property. As a result, a public emergency within the meaning of Article 15(1) of the Convention exists in the United Kingdom.<sup>370</sup>

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<sup>363</sup> See *id.* at 122; see also JACKSON, *supra* note 6, at 48-9.

<sup>364</sup> See *id.* at 123-24; see also JACKSON, *supra* note 6, at 49.

<sup>365</sup> See *Brogan*, 11 Eur. Ct. H.R. at 122; see also Gross, *supra* note 98, at 477.

<sup>366</sup> See Patricia M. Roche, *The United Kingdom's Obligation to Balance Human Rights and its Anti-Terrorism Legislation: The Case of Brogan and Others*, 13 FORDHAM INT'L L. J. 328, 346 (1989-90).

<sup>367</sup> See *Brogan*, 11 Eur. Ct. H.R. at 135-36; see also Gross, *supra* note 98, at 477.

<sup>368</sup> See DONAHUE, *supra* note 6, at 260.

<sup>369</sup> See *id.* Article 15 is a public emergency exception contained in ECHR which allows member countries to derogate from their obligations under ECHR under certain circumstances. See ECHR, *supra* note 14, art. 15. Article 15 was discussed more extensively in Part III.B.3 of this Comment and is useful to keep in mind when analyzing the detention provisions of ATCSA and determining the validity of the British government's derogation from ECHR in passing the Act.

<sup>370</sup> See DONAHUE, *supra* note 6, at 260.



Adhering to the European Court’s reasoning in *Brogan*, it seems likely that the detention provisions of ATCSA would be found to violate ECHR. In *Brogan*, the Court held that the fact that a detained person is not charged or brought before a court does not in itself amount to a violation of ECHR.<sup>371</sup> In addition, the court believed that a violation of ECHR could not arise if the arrested person was released promptly before any judicial review of his detention would have been feasible.<sup>372</sup> If the detained person was not released promptly, however, the court held that he would be entitled to an appearance before a judge or judicial officer.<sup>373</sup> In assessing and interpreting notion of “promptness” the court recognized the special problems associated with the investigation of terrorist offenses.<sup>374</sup> Nevertheless, the court did not believe that the terrorist threat which faced the United Kingdom justified the disposal of prompt judicial control.<sup>375</sup> Thus, the court adhered to a narrow interpretation of the meaning of the word “promptness” in order to ensure that the rights of detained individuals were protected.<sup>376</sup> Under this interpretation, even the four days and six hours spent in police custody by one of the detainees was outside the strict constraints as to the time permitted by ECHR.<sup>377</sup>

Applying the considerations of the Court in *Brogan* to ATCSA, it is unlikely that the Court would uphold the detention provisions of Part 4. ATCSA contains no explicit provision which requires the Secretary of State to commence proceedings within a certain period of time. A non-citizen could therefore be held for an indefinite period of time without being charged with any type of immigration violation or criminal activity. Thus, the Court would likely conclude

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<sup>371</sup> *Brogan*, 11 Eur. Ct. H.R. at 133.

<sup>372</sup> *Id.*

<sup>373</sup> *Id.*

<sup>374</sup> *Id.* at 135.

<sup>375</sup> *Id.*

<sup>376</sup> *Id.* at 134-35.

<sup>377</sup> *Brogan*, 11 Eur. Ct. H.R. at 136.

that individuals held pursuant to the detention provisions of ATCSA are not brought promptly before a judicial authority or released promptly following their arrest. Identical to the Court's reasoning in *Brogan*, "the undoubted fact that the arrest and detention of the applicant were inspired by the legitimate aim of protecting the community as a whole from terrorism is not on its own sufficient to ensure compliance with the specific requirements of Article 5(3)."<sup>378</sup>

In addition, as noted by the Court in *Brogan*, the remedy of habeas corpus was available to the applicants in that case.<sup>379</sup> Thus, even though they did not avail themselves of such proceedings, the detained individuals in *Brogan* did have an opportunity to have the lawfulness of their arrest and detention reviewed by a competent court.<sup>380</sup> Under ATCSA, however, those detained under Part 4 are not afforded the safeguard of habeas corpus. Instead, ATCSA precludes regular judicial review of the Secretary of State's decisions under §§ 21 and 23 and allows these decisions only to be questions in legal proceedings before the Special Immigration Appeals Commission (SIAC).<sup>381</sup> Thus, unlike the detained individuals in *Brogan*, those arrested and detained under ATCSA have no right to bring proceedings in order to have a court quickly determine the lawfulness of their detention.

The validity of the British government's derogation from ECHR was subsequently challenged in *Brannigan & McBride v. United Kingdom*,<sup>382</sup> once again by detainees who were contesting the length of their detention. After being arrested in 1989, Brannigan was held altogether for more than six days while McBride was held for more than four days before both

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<sup>378</sup> *Id.*

<sup>379</sup> *Id.*

<sup>380</sup> *Id.*

<sup>381</sup> See Anti-terrorism, Crime and Security Act, 2001, §§ 21, 25; see also *infra* Part III.B.2 for a more in-depth discussion of SIAC.

<sup>382</sup> 17 Eur. Ct. H.R. 539 (1994).

men were released without charge.<sup>383</sup> The facts of this case were, therefore, substantially similar to those of *Brogan*. This time, however, the British government conceded that Article 5(3)'s promptness requirement was not met but invoked as a defense to the derogation notice it submitted following the European Court's decision in *Brogan*, claiming that the Article 5(3) violation was justified under Article 15.<sup>384</sup>

The detainees argued that given the "quasi-permanent" nature of the state of emergency in Northern Ireland, the margin of appreciation<sup>385</sup> accorded the United Kingdom should be narrowed, especially given the court's ruling in *Brogan* that judicial review was one of the fundamental requirements of a democratic society.<sup>386</sup> Despite this argument, the majority of the European Court instead adopted a broad conception of the margin of appreciation and found in the United Kingdom's favor. According to the preconditions for derogation<sup>387</sup> that (1) there existed a "war or other public emergency threatening the life of the nation," (2) the derogation was "strictly required by the exigencies of the situation," and (3) the measures were not inconsistent with the State's other international obligations, the court determined that the

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<sup>383</sup> See Gross, *supra* note 98, at 480. Unfortunately, McBride was killed before the European Court could rule on his case. He was one of three people killed at a Sinn Fein Center by an RUC officer, who killed himself as well a few hours after the murders. See JACKSON, *supra* note 6, at 54.

<sup>384</sup> See *Brannigan*, 17 Eur. Ct. H.R. at 551-52.

<sup>385</sup> The European Court has consistently held that the court plays a limited role in review of a member country's declaration of a public emergency under Article 15. The Court generally grants member countries this margin of appreciation because it recognizes that each member state is primarily responsible for its own survival and stability. That is not to say however that member nations enjoy absolute deference from the Court regarding the scope of derogation from their obligations under ECHR. For a more in-depth discussion of the margin of appreciation and how it operates see Part V of this comment. See also Gross, *supra* note 98, at 495-99. See generally Nicholas Lavender, *The Problem of the Margin of Appreciation*, 4 EUR. HUM. RTS. L. REV. 380 (1997) (arguing that the European Court's use of the margin of appreciation doctrine when interpreting ECHR needs to be more consistent).

<sup>386</sup> See JACKSON, *supra* note 6, at 54.

derogation was valid.<sup>388</sup> It decided that as far as the “strictly required” question was concerned, the government had not overstepped its margin of appreciation in its decision to exclude judicial control as part of the process of extending detention.<sup>389</sup> The court concluded that adequate and effective safeguards existed against potential abuse of the arrest and detention powers given to the government’s agents.<sup>390</sup>

While there are similarities between the circumstances in *Brannigan* and the current state of affairs in the United Kingdom, there are also differences which distinguish the detention provisions under ATCSA and thus make it likely that the Court, even despite their ruling in *Brannigan*, would strike down the detention measures of ATCSA. In finding that the United Kingdom had not exceeded their margin of appreciation, the Court strongly emphasized the various effective safeguards which were imbedded in the legislation at issue in *Brannigan*.<sup>391</sup> The Court felt that these safeguards provided an important measure of protection against arbitrary detention.<sup>392</sup> In contrast, these safeguards that the Court relied on in upholding the United Kingdom’s derogation in *Brannigan*, are glaringly absent from ATCSA.

First, the remedy of habeas corpus available in *Brannigan*, which was readily available to test the lawfulness of the original arrest and detention, does not exist under ATCSA.<sup>393</sup> Second, unlike those detained in *Brannigan*, individuals detained under ATCSA do not have an absolute and legally enforceable right to consult a solicitor after forty-eight hours from the time of

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<sup>387</sup> The preconditions for a valid derogation under Article 15 of ECHR were explored in more detail in Parts III.B.3 and IV.B.1 of this Comment.

<sup>388</sup> See DONAHUE, *supra* note 6, at 260.

<sup>389</sup> See Gross, *supra* note 98, at 481.

<sup>390</sup> See *id.*

<sup>391</sup> *Brannigan*, 17 Eur. Ct. H.R. at 575.

<sup>392</sup> *Id.*

<sup>393</sup> *Id.*

arrest.<sup>394</sup> Instead, because of the unconventional procedure before SIAC, an individual's legal representatives will be chosen for him by the Attorney-General (or other appropriate law officer) and will not be responsible to the individual.<sup>395</sup> Third, the Court in *Brannigan* recognized that the legislation at issue had been kept under regular independent review and that it was subject to regular renewal.<sup>396</sup> While ATCSA does contain a review provision and requires that there be a review of the detention provisions by a person appointed by the Secretary of State within fourteen months of ATCSA's coming into force,<sup>397</sup> as well as provide for the expiration of the detention provisions fifteen months after ATCSA's enactment,<sup>398</sup> the effectiveness of these provisions has yet to be seen. In addition, the review provisions of ATCSA are distinguishable from the legislation at issue in *Brannigan*, as the review of the detention provisions under ATCSA are not subject to independent review. Instead, it is the Secretary of State, the same individual who determines who will and will not be certified as a terrorist under ATCSA, who appoints a person to review the legislation.<sup>399</sup> Furthermore, while § 29 does provide that the detention provisions will expire after fifteen months, the Secretary of State (by order subject to approval by both Houses), can revive the detention provisions.<sup>400</sup>

Finally, the Court in *Brannigan* recognized the limited scope of the derogation and how it was designed to address the specific terrorist threat posed by Northern Ireland.<sup>401</sup> In *Brannigan*, the derogation was in response to organized terrorism directly connected to the affairs of the British Government. This terrorism was occurring on a regular basis over a period of time and

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<sup>394</sup> *Id.* at 575-76.

<sup>395</sup> *See* Tomkins, *supra* note 7, at 217-18.

<sup>396</sup> *Brannigan*, 17 Eur. Ct. H.R. at 576.

<sup>397</sup> *See* Anti-terrorism, Crime and Security Act, 2001, § 28.

<sup>398</sup> *Id.* § 29.

<sup>399</sup> *Id.* § 28.

<sup>400</sup> *Id.* §29.

was directly affecting British citizens.<sup>402</sup> Conversely, unlike the state of affairs in the United Kingdom at the time *Brannigan* was decided where the derogation was a reasoned response to a situation rooted in the everyday lives of British citizens,<sup>403</sup> the derogation order under ATCSA under the current circumstances does not seem justified from the view of the general British public. Unlike the legislation in question in *Brannigan*, the detention provisions of ATCSA have little to do with the recent developments in international security and are not carefully targeted at the exceptional situation with which they were designed to deal.

In addition, the dissents of the court suggested that some of the judges on the European Court were growing tired of the persistent state of emergency and consequent derogations in Northern Ireland. For example, Judge Pettiti of France refused to concede that the independence of judge might be undermined by participating in the decision whether or not to extend a period of detention.<sup>404</sup> Similarly, the dissenting opinions of Judges DeMeyer and Makarczyk and the concurring opinions of Judges Russo and Martens together suggested that the duration of the derogations by the United Kingdom and the expansive broadening of the margin of appreciation granted the United Kingdom were becoming problematic.<sup>405</sup> These opinions, while not those of the great majority of the court, nevertheless may prove important when the European Court finally is forced to rule on the detention provisions enacted by the Anti-Terrorism Crime Security Act 2001.

Lending some support to the conclusion that the European Commission and Court would possibly uphold the detention provisions contained in Anti-terrorism, Crime and Security Act

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<sup>401</sup> *Brannigan*, 17 Eur. Ct. H.R. at 576.

<sup>402</sup> See Black-Branch, *supra* note 151, at 29.

<sup>403</sup> See *id.*

<sup>404</sup> See JACKSON, *supra* note 6, at 55.

<sup>405</sup> See *id.*

2001 are the measures in place to ensure that the United Kingdom continually reviews the necessity of the emergency powers and that the derogation from its obligations under ECHR last only as long as the emergency lasts. ATCSA requires review of the sections concerning the detention of suspected non-citizen terrorists and provides rules that the government must abide by in the review process.<sup>406</sup> These rules include specifying the number of people who must review the sections, the timing of the review, and the presentation of a report on the review to both the Secretary of State and Parliament.<sup>407</sup> Furthermore, the purported temporary nature of the detention measures will similarly be an important factor in determining whether the Commission and Court will support the Act's detention provisions. The Act limits the Secretary of State's power to certify and detain suspected non-citizen terrorists by explicitly stating that the detention provisions found under §§ 21-23 will expire as of November 10, 2006.<sup>408</sup> Because these measures may help to ensure that the British government will not abuse its powers and that the measures taken in response to the public emergency are narrowly tailored to the circumstances required by the emergency, it is possible, although not likely, that the Commission and Court would uphold the validity of the detention provisions.

Overall however, the lack of procedural safeguards and the highly suspect and disproportional nature of the detention measures contained in ATCSA, makes it likely that the European Court would not uphold the detention provisions. While the European Court has been fairly deferential to British claims of exigency in the past and has often afforded the British a wide margin of appreciation when the nation has been faced with similar difficult situations in dealing with the threat posed by suspected non-citizen terrorists, the current situation is

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<sup>406</sup> See Anti-terrorism Crime and Security Act, 2001, § 28.

<sup>407</sup> See *id.* §§ 28, 122.

<sup>408</sup> See *id.* § 29.

distinguishable from the previous terrorist threats the United Kingdom has confronted.<sup>409</sup> While the traditional deference consistently afforded to the United Kingdom combined with the fact that the Act contains a clause that purportedly makes the detention of suspected non-citizen terrorists a temporary measure,<sup>410</sup> cannot be ignored, it is improbable that the European Court would uphold the detention provisions as a valid and proportional response to the threat of terrorism that exists in the United Kingdom.

## 2. Can the Detention Provisions of the Anti-Terrorism, Crime and Security Act 2001 be Justified?

One of the key questions regarding the passing of ATCSA and the validity of the detention provisions has been whether the United Kingdom has correctly concluded that it faces a public emergency within the meaning of Article 15 of ECHR and has taken only those steps required by the circumstances of global terrorism to protect the life of the nation. As previously discussed, the detention of a non-citizen without the intention or authority to deport him clearly violates Article 5(1)(f) of ECHR as the Convention only permits the detention of non-citizens if deportation proceedings have been initiated. Consequently, in order to meet their obligations under ECHR, the United Kingdom had to declare a state of emergency to temporarily suspend its obligations under ECHR as permitted under Article 15 of the Convention. Article 15 applies only to an exceptional crisis or emergency situation which affects the entire population and constitutes a threat to the organized life of the community of the State.<sup>411</sup> Therefore, despite the fact that the European Court would afford a wide margin of discretion to the United Kingdom if

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<sup>409</sup> See, e.g., *Brannigan* 17 Eur. Ct. H.R. 539 (1994) (finding that the United Kingdom's derogation from ECHR under Article 15 was justified). See also Gross, *supra* note 98, at 492-93 (discussing how governments often fare well when their decisions concerning the existence of a particular situation of emergency are reviewed by the European Court).

<sup>410</sup> See Anti-terrorism, Crime and Security Act, 2001, § 29.

<sup>411</sup> Wadham, *supra* note 150, at 1074.



the derogation was challenged, it is doubtful that the situation in the United Kingdom has reached such crisis proportions as to justify derogation from ECHR.

In attempting to justify § 23 of ATCSA, which allows an individual who is certified as a suspected terrorist, the British government explained:

Section 23 of the Anti-terrorism, Crime and Security Act 2001 contains an extended power to arrest and detain a foreign national where it is intended to remove or deport the person from the United Kingdom because the Secretary of State believes that his presence is a risk to national security and suspects him of being an international terrorist, but where such removal or deportation is not for the time being possible.<sup>412</sup>

The British Government's explicit derogation statements emphasized that many of the victims of the September 11 attacks were British citizens.<sup>413</sup> The attack, however, did not target Britons exclusively. There were victims from over seventy countries, including those nations who are also Members states within the Council of Europe. Nevertheless, despite the fact that these countries were equally affected by the terrorist attacks, none of them have found it necessary to issue derogations orders from ECHR is an effort to protect its citizens from further terrorist attacks.<sup>414</sup> The British government failed to explain why the United Kingdom should be more affected than other countries.<sup>415</sup> In addition, in passing ATCSA the Government admitted that there was no immediate intelligence pointing to a specific threat in the United Kingdom.<sup>416</sup>

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<sup>412</sup> Black-Branch, *supra* note 151, at 22.

<sup>413</sup> *See id.* at 26. At least one-hundred British citizens were killed in the September 11, 2001 terrorist attacks—the largest number of Britons ever killed in a day outside war. *See* Steven Morris & Jeevan Vasagar, *British Death Toll Reaches into the Hundreds, Most Britons Ever killed in a Day Outside War*, THE GUARDIAN, Sept. 14, 2001, available at <http://www.guardian.co.uk/wtccrash/story/0,1300,551735,00.html>.

<sup>414</sup> *See id.*

<sup>415</sup> In fact, even Germany, where it has been learned that several of the September 11 hijackers resided before perpetrating the attacks, has refused to issue a derogation order from Article 5 of ECHR. *See id.*

<sup>416</sup> *See* Tomkins, *supra* note 7, at 216.

For these reasons, it is far from certain that the United Kingdom is justified in arguing that there is currently a public emergency which threatens the lives of British citizens.

In discussing the United Kingdom's responsibilities as a member of ECHR, it is important to acknowledge that the power of the United Kingdom to derogate from its obligations under ECHR is significant. This is especially evident in comparing the powers of both the United Kingdom and the United States to protect the rights of non-citizens. The ability for the United Kingdom to so easily and effortlessly derogate from their obligations demonstrates that the civil liberties of non-citizens are subject to the wishes of the government.<sup>417</sup> In contrast, in the United States, where undoubtedly the impact of the September 11 attacks has been much greater than that in the United Kingdom, individuals are protected through the Constitution and through an explicit Bill of Rights which ensures that certain fundamental civil liberties cannot be entirely curtailed.<sup>418</sup> Furthermore, unlike in the United Kingdom, judges in the United States have the power to strike down legislation which is unconstitutional and inconsistent with the rights non-citizens.<sup>419</sup> Thus, under the Patriot Act, the judicial branch effectively acts as a check on the power of the other branches of government to protect the rights of non-citizens. Conversely, ATCSA provides no such protection to non-citizens subject to the legislation's detention measures.

Furthermore, not only does Article 15(1) of ECHR require a public emergency before allowing derogation from ECHR, but also requires that measures derogating from Government obligations under the Convention must be strictly required by the exigencies of the situation.<sup>420</sup> In addition to § 23 discussed above, other provisions relating to the detention of non-citizens

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<sup>417</sup> See Black-Branch, *supra* note 151, at 29-30.

<sup>418</sup> See *id.* at 30.

<sup>419</sup> See *id.*

certified under the Act are clearly hard to defend as strictly necessary given the present situation in the United Kingdom. For example, §§ 25 and 26 of ATCSA unjustifiably preclude habeas corpus proceedings as well as exclude regular judicial review of the Secretary of State's decisions to certify and consequently indefinitely detain a non-citizen suspected of terrorism without the right to a trial.<sup>421</sup> ATCSA provides that such decisions and actions can only be questioned in legal proceedings before the Special Immigration Appeals Commission (SIAC) and thus ousts intervention by courts.<sup>422</sup> Furthermore, procedures before SIAC are unconventional: The non-citizen does not have a right to either be present at the hearing or even to be provided with the specific reasons for the decisions being made regarding his detention.<sup>423</sup> In addition, the non-citizen has no choice of legal representation.<sup>424</sup> Instead, his legal representation is chosen for him by the government and is not even responsible to the non-citizen.<sup>425</sup> Finally, and in direct contrast to the Patriot Act, which provides that a non-citizen must be charged within seven days of being arrested, non-citizens detained pursuant to ATCSA can be held without charge or trial for an indefinite period of time.<sup>426</sup> The prisoner essentially is charged and convicted of being a terrorist without the chance of even being brought before a judge.

The United Kingdom undoubtedly faced a difficult dilemma in the wake of the terrorist attacks of September 11. The government, however, failed in striking a balance between

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<sup>420</sup> *See id.* at 26.

<sup>421</sup> *See* Anti-terrorism, Crime and Security Act, 2001, §§ 25, 26.

<sup>422</sup> *See id.* §§ 26, 27.

<sup>423</sup> *See* Tomkins, *supra* note 7, at 217-18.

<sup>424</sup> *See id.*

<sup>425</sup> *See id.* at 218.

<sup>426</sup> *See* AMNESTY INTERNATIONAL, NEWS RELEASE, UK, GOVERNMENT IN THE DOCK FOR INDEFINITE DETENTION WITHOUT CHARGE OR TRIAL (2002), *available at* <http://www.amnestyusa.org/news/2002/uk07172002.html> (last visited Oct. 10, 2002).

protecting the civil liberties of non-citizens on the one hand and preventing terrorism on the other. In light of the above mentioned provisions of ATCSA, it is nearly impossible to conclude that the measures implemented under Part 4 of ATCSA are commensurate with the current state of affairs in the United Kingdom. The government essentially took advantage of the terrorist attacks in the United States to pass a raft of coercive and disproportionate measures that are not targeted at any exceptional situation which they were purported to address. Consequently, it is hard to argue that the present circumstances constitute any type of emergency in the United Kingdom or that the detention provisions in Part 4 of ATCSA are strictly necessary to deal with the situation as it currently exists in the country. The United Kingdom should look more closely to other countries, both those in the European Union and in particular the United States, for alternative means of monitoring terrorist suspect without denying them the basic principles of liberty and justice.

## CONCLUSION

After September 11, 2001, the United States and the United Kingdom recognized the vulnerability of their borders. With the passage of the Patriot Act and ATCSA, the governments of both nations have many new tools available to combat the threat of terrorism within their borders. With this unprecedented power, however, also comes new responsibility and the obligation to learn from past mistakes.

Through the Patriot Act and ATCSA, the United States and the United Kingdom respectively have resorted to trying to prevent another attack by detaining non-citizens suspected of terrorism who are in some way associates with those who have been identified in connection with prior terrorist activities. History has taught us, however, that the theory of internment does not work. While a typical response to terrorism is an effort to remove dangerous factors from

society, the detention strategy is inherently flawed because removing a volatile element from a society does not defuse its destructive nature but merely transplants it.<sup>427</sup> For instance, while this strategy has been used extensively by the British in Northern Ireland, the British have found that they have detained largely the wrong people and often even when the detentions have proved effective, they have had the effect of alienating a much larger group than were originally sympathetic to the terrorists.<sup>428</sup> As Lord Dubs, a member of the British government, declared in 1998 when debating the detention provisions in the Northern Ireland (Emergency Provisions)

Bill:

[i]n this Bill the decision have been taken to get rid of the power of internment. Frankly it has not worked. The government cannot see any circumstances in which they would wish to use the power of internment. It is fundamentally a process that is against the rule of law and undermines democratic principles. The government believe that to get rid of the power is sensible...we do not believe that it in any way weakens the power of the government to deal with terrorism. The use last time of internment to deal with terrorism was a failure.<sup>429</sup>

Furthermore, irrespective of effectiveness, it is essential for the governments of the United States and the United Kingdom to look at the effect of the detention provisions contained in the Patriot Act and ATCSA on civil liberties as a whole. While on the one hand, these countries must be permitted to create greater security from future attacks in an effort to protect its own citizens, on the other hand, it is not permissible for them to trample on basic civil liberties of non-citizens in doing so. As a result of the expanded definitions of terrorism and terrorist activities, as well as the detention provisions contained in both the Patriot Act and

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<sup>427</sup> See Clive Walker, *Constitutional Governance and Special Powers Against Terrorism: Lessons from the United Kingdom's Prevention of Terrorism Acts*, 35 COLUM. J. TRANSNAT'L L. 1, 17 (1997).

<sup>428</sup> See Bonner, *supra* note 31, at 174-75; see generally CHRISTOPHER HEWITT, THE EFFECTIVENESS OF ANTI-TERRORIST POLICIES (1984) (examining and comparing the policies that have been used against urban terrorism, and evaluating their effectiveness).

<sup>429</sup> Tomkins, *supra* note 7, at 214.

ATCSA, non-citizens who are suspected of terrorism in both countries may now find themselves subject to detention with the potential for arbitrary indefinite detention a generally available option for both governments.

Nevertheless, despite the legitimate concerns that the internment of non-citizens suspected of terrorism raises regarding how far the United States and the United Kingdom can proceed in the name of national security, and besides the fact that detention is ineffective as a means to combat terrorism, it cannot be ignored that the world is a much different place than it was prior to September 11, 2001. Understandably, and despite the infringement of civil liberties and freedoms, the United States and the United Kingdom were tempted by the ability to control and restrict the rights of those who were thought to be capable of perpetrating another attack. In comparing the Patriot Act and ATCSA, however, it becomes apparent how restrained the United States legal response to the terrorist attacks appears. Although not directly attacked, in passing Anti-terrorism, Crime and Security Act 2001 the United Kingdom enacted detention measures much more sweeping than anything found under the Patriot Act.

Assuming that public safety and a secure and civil society is the primary goal of both the United States and the United Kingdom, the detention provisions of the Patriot Act are a well-reasoned response to the terrorist attacks of September 11, 2001. In the face of great stress, the American system of checks and balances has worked relatively well to protect the United States from another terrorist attack as well as to detain only those non-citizens who pose a legitimate threat to the national security of the nation. That being said, however, the United States government should not necessarily be praised for the detention measures found in the Patriot Act. While the American public may have initially supported or at least acquiesced to the detention provisions of the Patriot Act, almost two years have passed since the attacks of

September 11, 2001. It is essential for the United States government to be mindful that these detention provisions do not have to be permanent and to recognize that they most probably should not be permanent. In other words, it is important to re-evaluate these provisions provided the situation stabilizes. The United States government must remember that even those emergency measures enacted in previous conflicts that most adversely compromised tradition civil liberties—Lincoln’s suspension of habeas corpus, FDR’s internment of Japanese-Americans—were re-evaluated once the wars were won.<sup>430</sup> Quite possibly, if history is any indication, the current infringements on the civil liberties of non-citizens in the United States will heighten our sensitivity so that our concern for civil liberties in the future will be far greater than it is today.<sup>431</sup>

Conversely, the government of the United Kingdom did not strike any sort of balance between protecting the basic civil liberties of non-citizens and guarding against any threat of terrorism in the United Kingdom. Undoubtedly, in passing ATCSA, the United Kingdom had the same goals as the United States. Detaining suspected terrorists using the disproportionate detention measures under ATCSA, in the absence of any widely-perceived public emergency, however, is not the answer. ATCSA is not a well thought-out and measured response to the terrorist attacks of September 11, 2001. Given the United Kingdom’s vast history with terrorism, the government was well aware of the alternative means of monitoring suspected without denying them the basis principles of liberty and justice. This Comment is not arguing that the government should be denied the powers it truly needs in order to defend the United Kingdom’s national security, but these measures need to be strictly necessary, proportionate, accompanied by adequate procedural safeguards as well as targeted at a true emergency situation

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<sup>430</sup> See Ting, *supra* note 144, at 1147.

which they were designed to improve. Unfortunately, the detention measures of ATCSA fail to satisfy any of these criteria, and thus, cannot be justified.

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<sup>431</sup> *Id.*



## Appendix A

### **SEC. 411. DEFINITIONS RELATING TO TERRORISM**

(a) **GROUND OF INADMISSIBILITY.** Section 212(a)(3) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(3)) is amended—

(1) in subparagraph (B) –

(A) in clause (i) –

(i) by amending subclause (IV) to read as follows:

“(IV) is a representative (as defined in clause (v)) of—

(aa) a foreign terrorist organization, as designated by the Secretary of State under section 219, or

(bb) a political, social or other similar group whose public endorsement of acts of terrorist activity the Secretary of State has determined undermines United States efforts to reduce or eliminate terrorist activities,”;

(ii) in subclause (V), by inserting “or” after “section 219,”; and

(iii) by adding at the end the following new subclauses:

“(VI) has used the alien's position of prominence within any country to endorse or espouse terrorist activity, or to persuade others to support terrorist activity or a terrorist organization, in a way that the Secretary of State has determined undermines United States efforts to reduce or eliminate terrorist activities, or

(VII) is the spouse or child of an alien who is inadmissible under this section, if the activity causing the alien to be found inadmissible occurred within the last 5 years,”;

(B) by redesignating clauses (ii), (iii), and (iv) as clauses (iii), (iv), and (v), respectively;

(C) in clause (i)(II), by striking "clause (iii)" and inserting "clause (iv)";

(D) by inserting after clause (i) the following:

“(ii) **EXCEPTION.**--Subclause (VII) of clause (i) does not apply to a spouse or child--

(I) who did not know or should not reasonably have known of the activity causing the alien to be found inadmissible under this section; or

(II) whom the consular officer or Attorney General has reasonable grounds to believe has renounced the activity causing the alien to be found inadmissible under this section.”;

(E) in clause (iii) (as redesignated by subparagraph (B)) –

(i) by inserting “it had been” before “committed in the United States”; and

(ii) in subclause (V)(b), by striking “or firearm” and inserting, “firearm, or other weapon or dangerous device”;

(F) by amending clause (iv) (as redesignated by subparagraph (B)) to read as follows:

”(iv) ENGAGE IN TERRORIST ACTIVITY DEFINED.--As used in this chapter, the term 'engage in terrorist activity' means, in an individual capacity or as a member of an organization–

(I) to commit or to incite to commit, under circumstances indicating an intention to cause death or serious bodily injury, a terrorist activity;

(II) to prepare or plan a terrorist activity;"(III) to gather information on potential targets for terrorist activity;

(IV) to solicit funds or other things of value for–

(aa) a terrorist activity;

(bb) a terrorist organization described in clause (vi)(I) or (vi)(II); or

(cc) a terrorist organization described in clause (vi)(III), unless the solicitor can demonstrate that he did not know, and should not reasonably have known, that the solicitation would further the organization's terrorist activity;

(V) to solicit any individual–

(aa) to engage in conduct otherwise described in this clause;

(bb) for membership in a terrorist organization described in clause (vi)(I) or (vi)(II); or

(cc) for membership in a terrorist organization described in clause (vi)(III), unless the solicitor can demonstrate that he did not know, and should not reasonably have known, that the solicitation would further the organization's terrorist activity; or

(VI) to commit an act that the actor knows, or reasonably should know, affords material support, including a safe house, transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identification, weapons (including chemical, biological, or radiological weapons), explosives, or training--

(aa) for the commission of a terrorist activity;

(bb) to any individual who the actor knows, or reasonably should know,

has committed or plans to commit a terrorist activity;  
(cc) to a terrorist organization described in clause (vi)(I) or (vi)(II); or  
(dd) to a terrorist organization described in clause (vi)(III), unless the actor can demonstrate that he did not know, and should not reasonably have known, that the act would further the organization's terrorist activity.  
This clause shall not apply to any material support the alien afforded to an organization or individual that has committed terrorist activity, if the Secretary of State, after consultation with the Attorney General, or the Attorney General, after consultation with the Secretary of State, concludes in his sole unreviewable discretion, that this clause should not apply"; and

(G) by adding at the end the following new clause:

“(vi) **TERRORIST ORGANIZATION DEFINED.** As used in clause (i)(VI) and clause (iv), the term 'terrorist organization' means an organization—

(I) designated under section 219;

(II) otherwise designated, upon publication in the Federal Register, by the Secretary of State in consultation with or upon the request of the Attorney General, as a terrorist organization, after finding that the organization engages in the activities described in subclause (I), (II), or (III) of clause (iv), or that the organization provides material support to further terrorist activity; or

(III) that is a group of two or more individuals, whether organized or not, which engages in the activities described in subclause (I), (II), or (III) of clause (iv).”; and

(2) by adding at the end the following new subparagraph:

(F) **ASSOCIATION WITH TERRORIST ORGANIZATIONS.**--Any alien who the Secretary of State, after consultation with the Attorney General, or the Attorney General, after consultation with the Secretary of State, determines has been associated with a terrorist organization and intends while in the United States to engage solely, principally, or incidentally in activities that could endanger the welfare, safety, or security of the United States is inadmissible.”.

**(b) CONFORMING AMENDMENTS.**

(1) Section 237(a)(4)(B) of the Immigration and Nationality Act (8 U.S.C. 1227(a)(4)(B)) is amended by striking “section 212(a)(3)(B)(iii)” and inserting “section 212(a)(3)(B)(iv)”.

(2) Section 208(b)(2)(A)(v) of the Immigration and Nationality Act (8 U.S.C. 1158(b)(2)(A)(v)) is amended by striking “or (IV)” and inserting “(IV), or (VI)”.

(c) RETROACTIVE APPLICATION OF AMENDMENTS.

(1) IN GENERAL.--Except as otherwise provided in this subsection, the amendments made by this section shall take effect on the date of the enactment of this Act and shall apply to--

- (A) actions taken by an alien before, on, or after such date; and
- (B) all aliens, without regard to the date of entry or attempted entry into the United States--

- (i) in removal proceedings on or after such date (except for proceedings in which there has been a final administrative decision before such date); or
- (ii) seeking admission to the United States on or after such date.

(2) SPECIAL RULE FOR ALIENS IN EXCLUSION OR DEPORTATION PROCEEDINGS.-- Notwithstanding any other provision of law, sections 212(a)(3)(B) and 237(a)(4)(B) of the Immigration and Nationality Act, as amended by this Act, shall apply to all aliens in exclusion or deportation proceedings on or after the date of the enactment of this Act (except for proceedings in which there has been a final administrative decision before such date) as if such proceedings were removal proceedings.

(3) SPECIAL RULE FOR SECTION 219 ORGANIZATIONS AND ORGANIZATIONS DESIGNATED UNDER SECTION 212(a)(3)(B)(vi)(II)--

(A) IN GENERAL.--Notwithstanding paragraphs (1) and (2), no alien shall be considered inadmissible under section 212(a)(3) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(3)), or deportable under section 237(a)(4)(B) of such Act (8 U.S.C. 1227(a)(4)(B)), by reason of the amendments made by subsection (a), on the ground that the alien engaged in a terrorist activity described in subclause (IV)(bb), (V)(bb), or (VI)(cc) of section 212(a)(3)(B)(iv) of such Act (as so amended) with respect to a group at any time when the group was not a terrorist organization designated by the Secretary of State under section 219 of such Act (8 U.S.C. 1189) or otherwise designated under section 212(a)(3)(B)(vi)(II) of such Act (as so amended).

(B) STATUTORY CONSTRUCTION.--Subparagraph (A) shall not be construed to prevent an alien from being considered inadmissible or deportable for having engaged in a terrorist activity--

- (i) described in subclause (IV)(bb), (V)(bb), or (VI)(cc) of section 212(a)(3)(B)(iv) of such Act (as so amended) with respect to a terrorist

organization at any time when such organization was designated by the Secretary of State under section 219 of such Act or otherwise designated under section 212(a)(3)(B)(vi)(II) of such Act (as so amended); or (ii) described in subclause (IV)(cc), (V)(cc), or (VI)(dd) of section 212(a)(3)(B)(iv) of such Act (as so amended) with respect to a terrorist organization described in section 212(a)(3)(B)(vi)(III) of such Act (as so amended).

(4) EXCEPTION.--The Secretary of State, in consultation with the Attorney General, may determine that the amendments made by this section shall not apply with respect to actions by an alien taken outside the United States before the date of the enactment of this Act upon the recommendation of a consular officer who has concluded that there is not reasonable ground to believe that the alien knew or reasonably should have known that the actions would further a terrorist activity.

(c) DESIGNATION OF FOREIGN TERRORIST ORGANIZATIONS. Section 219(a) of the Immigration and Nationality Act (8 U.S.C. 1189(a)) is amended--

(1) in paragraph (1)(B), by inserting “or terrorism (as defined in section 140(d)(2) of the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989 (22 U.S.C. 2656f(d)(2)), or retains the capability and intent to engage in terrorist activity or terrorism” after “212(a)(3)(B)”;

(2) in paragraph (1)(C), by inserting “or terrorism” after “terrorist activity”;

(3) by amending paragraph (2)(A) to read as follows:

“(A) NOTICE.

(i) TO CONGRESSIONAL LEADERS. Seven days before making a designation under this subsection, the Secretary shall, by classified communication, notify the Speaker and Minority Leader of the House of Representatives, the President pro tempore, Majority Leader, and Minority Leader of the Senate, and the members of the relevant committees of the House of Representatives and the Senate, in writing, of the intent to designate an organization under this subsection, together with the findings made under paragraph (1) with respect to that organization, and the factual basis therefor.

(ii) PUBLICATION IN FEDERAL REGISTER. The Secretary shall publish the designation in the Federal Register seven days after providing the notification under clause (i).”;

(4) in paragraph (2)(B)(i), by striking “subparagraph (A)” and inserting “subparagraph (A)(ii)”;

(5) in paragraph (2)(C), by striking “paragraph (2)” and inserting “paragraph (2)(A)(i)”;

(6) in paragraph (3)(B), by striking “subsection (c)” and inserting “subsection

(b)”;

(7) in paragraph (4)(B), by inserting after the first sentence the following: “The Secretary also may redesignate such organization at the end of any 2-year redesignation period (but not sooner than 60 days prior to the termination of such period) for an additional 2-year period upon a finding that the relevant circumstances described in paragraph (1) still exist. Any redesignation shall be effective immediately following the end of the prior 2- year designation or redesignation period unless a different effective date is provided in such redesignation.”;

(8) in paragraph (6)(A)-

(A) by inserting “or a redesignation made under paragraph (4)(B)” after “paragraph (1)”;

(B) in clause (i) -

(i) by inserting “or redesignation” after “designation” the first place it appears; and

(ii) by striking “of the designation”; and

(C) in clause (ii), by striking “of the designation”;

(9) in paragraph (6)(B) –

(A) by striking “through (4)” and inserting “and (3)”; and

(B) by inserting at the end the following new sentence: “Any revocation shall take effect on the date specified in the revocation or upon publication in the Federal Register if no effective date is specified.”;

(10) in paragraph (7), by inserting, “or the revocation of a redesignation under paragraph (6),” after “paragraph (5) or (6)”; and

(11) in paragraph (8)—

(A) by striking “paragraph (1)(B)” and inserting “paragraph (2)(B), or if a redesignation under this subsection has become effective under paragraph (4)(B)”;

(B) by inserting “or an alien in a removal proceeding” after “criminal action”; and

(C) by inserting “or redesignation” before “as a defense”.

**SEC. 412. MANDATORY DETENTION OF SUSPECTED TERRORISTS; HABEAS CORPUS; JUDICIAL REVIEW.**

(a) IN GENERAL. The Immigration and Nationality Act (8 U.S.C. 1101 et seq.) is amended by inserting after section 236 the following:

**“MANDATORY DETENTION OF SUSPECTED TERRORISTS;  
HABEAS CORPUS; JUDICIAL REVIEW**

**SEC. 236A. (a) DETENTION OF TERRORIST ALIENS**

(1) CUSTODY. The Attorney General shall take into custody any alien who is certified under paragraph (3).

(2) RELEASE.--Except as provided in paragraphs (5) and (6), the Attorney General shall maintain custody of such an alien until the alien is removed from the United States. Except as provided in paragraph (6), such custody shall be maintained irrespective of any relief from removal for which the alien may be eligible, or any relief from removal granted the alien, until the Attorney General determines that the alien is no longer an alien who may be certified under paragraph (3). If the alien is finally determined not to be removable, detention pursuant to this subsection shall terminate.

(3) CERTIFICATION.--The Attorney General may certify an alien under this paragraph if the Attorney General has reasonable grounds to believe that the alien—

(A) is described in section 212(a)(3)(A)(i), 212(a)(3)(A)(iii), 212(a)(3)(B), 237(a)(4)(A)(i), 237(a)(4)(A)(iii), or 237(a)(4)(B); or

(B) is engaged in any other activity that endangers the national security of the United States.

(4) NONDELEGATION. The Attorney General may delegate the authority provided under paragraph (3) only to the Deputy Attorney General. The Deputy Attorney General may not delegate such authority.

(5) COMMENCEMENT OF PROCEEDINGS. The Attorney General shall place an alien detained under paragraph (1) in removal proceedings, or shall charge the alien with a criminal offense, not later than 7 days after the commencement of such detention. If the requirement of the preceding sentence is not satisfied, the Attorney General shall release the alien.

(6) LIMITATION ON INDEFINITE DETENTION.--An alien detained solely under paragraph (1) who has not been removed under section 241(a)(1)(A), and whose removal is unlikely in the reasonably foreseeable future, may be detained for additional periods of up to six months only if the release of the alien will threaten the national security of the United States or the safety of the community or any person.

(7) REVIEW OF CERTIFICATION. The Attorney General shall review the certification made under paragraph (3) every 6 months. If the Attorney General determines, in the Attorney General's discretion, that the certification should be revoked, the alien may be released on such conditions as the Attorney General deems appropriate, unless such release is otherwise prohibited by law. The alien may request each 6 months in writing that the Attorney General reconsider the

certification and may submit documents or other evidence in support of that request.

**(b) HABEAS CORPUS AND JUDICIAL REVIEW.**

(1) **IN GENERAL.** Judicial review of any action or decision relating to this section (including judicial review of the merits of a determination made under subsection (a)(3) or (a)(6)) is available exclusively in habeas corpus proceedings consistent with this subsection. Except as provided in the preceding sentence, no court shall have jurisdiction to review, by habeas corpus petition or otherwise, any such action or decision.

**(2) APPLICATION.**

(A) **IN GENERAL.** Notwithstanding any other provision of law, including section 2241(a) of title 28, United States Code, habeas corpus proceedings described in paragraph (1) may be initiated only by an application filed with--

(i) the Supreme Court;

(ii) any justice of the Supreme Court;

(iii) any circuit judge of the United States Court of Appeals for the District of Columbia Circuit; or

(iv) any district court otherwise having jurisdiction to entertain it.

(B) **APPLICATION TRANSFER.**--Section 2241(b) of title 28, United States Code, shall apply to an application for a writ of habeas corpus described in subparagraph (A).

(3) **APPEALS.**--Notwithstanding any other provision of law, including section 2253 of title 28, in habeas corpus proceedings described in paragraph (1) before a circuit or district judge, the final order shall be subject to review, on appeal, by the United States Court of Appeals for the District of Columbia Circuit. There shall be no right of appeal in such proceedings to any other circuit court of appeals.

(4) **RULE OF DECISION.**--The law applied by the Supreme Court and the United States Court of Appeals for the District of Columbia Circuit shall be regarded as the rule of decision in habeas corpus proceedings described in paragraph (1).

(c) **STATUTORY CONSTRUCTION.**--The provisions of this section shall not be applicable to any other provision of this Act.”.

**(b) CLERICAL AMENDMENT.**--The table of contents of the Immigration and Nationality Act is amended by inserting after the item relating to section 236 the following:

“Sec. 236A. Mandatory detention of suspected terrorist; habeas corpus; judicial review.”.

**(c) REPORTS.** Not later than 6 months after the date of the enactment of this Act, and every 6 months thereafter, the Attorney General shall submit a report to the Committee on the Judiciary of the House of Representatives and the Committee on the Judiciary of the Senate, with respect to the reporting period, on—



- (1) the number of aliens certified under section 236A(a)(3) of the Immigration and Nationality Act, as added by subsection (a);
- (2) the grounds for such certifications;
- (3) the nationalities of the aliens so certified;
- (4) the length of the detention for each alien so certified; and
- (5) the number of aliens so certified who—
  - (A) were granted any form of relief from removal;
  - (B) were removed;
  - (C) the Attorney General has determined are no longer aliens who may be so certified; or
  - (D) were released from detention.

## Appendix B

### **PART 4**

#### IMMIGRATION AND ASYLUM

##### *Suspected international terrorists*

## **21 Suspected international terrorist: certification**

(1) The Secretary of State may issue a certificate under this section in respect of a person if the Secretary of State reasonably-

(a) believes that the person's presence in the United Kingdom is a risk to national security, and

(b) suspects that the person is a terrorist.

(2) In subsection (1)(b) "terrorist" means a person who-

(a) is or has been concerned in the commission, preparation or instigation of acts of international terrorism,

(b) is a member of or belongs to an international terrorist group, or

(c) has links with an international terrorist group.

(3) A group is an international terrorist group for the purposes of subsection (2)(b) and (c) if-

(a) it is subject to the control or influence of persons outside the United Kingdom, and

(b) the Secretary of State suspects that it is concerned in the commission, preparation or instigation of acts of international terrorism.

(4) For the purposes of subsection (2)(c) a person has links with an international terrorist group only if he supports or assists it.

(5) In this Part-

"terrorism" has the meaning given by section 1 of the Terrorism Act 2000 (c. 11), and

"suspected international terrorist" means a person certified under subsection

(1).

(6) Where the Secretary of State issues a certificate under subsection (1) he shall as soon as is reasonably practicable-

- (a) take reasonable steps to notify the person certified, and
- (b) send a copy of the certificate to the Special Immigration Appeals Commission.

(7) The Secretary of State may revoke a certificate issued under subsection (1).

(8) A decision of the Secretary of State in connection with certification under this section may be questioned in legal proceedings only under section 25 or 26.

(9) An action of the Secretary of State taken wholly or partly in reliance on a certificate under this section may be questioned in legal proceedings only by or in the course of proceedings under-

- (a) section 25 or 26, or
- (b) section 2 of the Special Immigration Appeals Commission Act 1997 (c. 68) (appeal).

## **22 Deportation, removal, &c.**

(1) An action of a kind specified in subsection (2) may be taken in respect of a suspected international terrorist despite the fact that (whether temporarily or indefinitely) the action cannot result in his removal from the United Kingdom because of-

- (a) a point of law which wholly or partly relates to an international agreement, or
- (b) a practical consideration.

(2) The actions mentioned in subsection (1) are-

- (a) refusing leave to enter or remain in the United Kingdom in accordance with provision made by or by virtue of any of sections 3 to 3B of the Immigration Act 1971 (c. 77) (control of entry to United Kingdom),
- (b) varying a limited leave to enter or remain in the United Kingdom in accordance with provision made by or by virtue of any of those sections,
- (c) recommending deportation in accordance with section 3(6) of that Act (recommendation by court),
- (d) taking a decision to make a deportation order under section 5(1) of that

- Act (deportation by Secretary of State),
- (e) making a deportation order under section 5(1) of that Act,
- (f) refusing to revoke a deportation order,
- (g) cancelling leave to enter the United Kingdom in accordance with paragraph 2A of Schedule 2 to that Act (person arriving with continuous leave),
- (h) giving directions for a person's removal from the United Kingdom under any of paragraphs 8 to 10 or 12 to 14 of Schedule 2 to that Act (control of entry to United Kingdom),
- (i) giving directions for a person's removal from the United Kingdom under section 10 of the Immigration and Asylum Act 1999 (c. 33) (person unlawfully in United Kingdom), and
- (j) giving notice to a person in accordance with regulations under paragraph 1 of Schedule 4 to that Act of a decision to make a deportation order against him.

(3) Action of a kind specified in subsection (2) which has effect in respect of a suspected international terrorist at the time of his certification under section 21 shall be treated as taken again (in reliance on subsection (1) above) immediately after certification.

## **23 Detention**

(1) A suspected international terrorist may be detained under a provision specified in subsection (2) despite the fact that his removal or departure from the United Kingdom is prevented (whether temporarily or indefinitely) by-

- (a) a point of law which wholly or partly relates to an international agreement, or
- (b) a practical consideration.

(2) The provisions mentioned in subsection (1) are-

- (a) paragraph 16 of Schedule 2 to the Immigration Act 1971 (c. 77) (detention of persons liable to examination or removal), and
- (b) paragraph 2 of Schedule 3 to that Act (detention pending deportation).

## **24 Bail**

(1) A suspected international terrorist who is detained under a provision of the Immigration Act 1971 may be released on bail.

(2) For the purpose of subsection (1) the following provisions of Schedule 2 to the Immigration Act 1971 (control on entry) shall apply with the modifications specified in Schedule 3 to the Special Immigration Appeals Commission Act 1997 (c. 68) (bail to be determined by Special Immigration Appeals Commission) and with any other necessary modifications-

- (a) paragraph 22(1A), (2) and (3) (release),
- (b) paragraph 23 (forfeiture),
- (c) paragraph 24 (arrest), and
- (d) paragraph 30(1) (requirement of Secretary of State's consent).

(3) Rules of procedure under the Special Immigration Appeals Commission Act 1997 (c. 68)-

- (a) may make provision in relation to release on bail by virtue of this section, and
- (b) subject to provision made by virtue of paragraph (a), shall apply in relation to release on bail by virtue of this section as they apply in relation to release on bail by virtue of that Act subject to any modification which the Commission considers necessary.

## **25 Certification: appeal**

(1) A suspected international terrorist may appeal to the Special Immigration Appeals Commission against his certification under section 21.

(2) On an appeal the Commission must cancel the certificate if-

- (a) it considers that there are no reasonable grounds for a belief or suspicion of the kind referred to in section 21(1)(a) or (b), or
- (b) it considers that for some other reason the certificate should not have been issued.

(3) If the Commission determines not to cancel a certificate it must dismiss the appeal.

(4) Where a certificate is cancelled under subsection (2) it shall be treated as never having been issued.

(5) An appeal against certification may be commenced only-

- (a) within the period of three months beginning with the date on which the

certificate is issued, or

(b) with the leave of the Commission, after the end of that period but before the commencement of the first review under section 26.

## **26 Certification: review**

(1) The Special Immigration Appeals Commission must hold a first review of each certificate issued under section 21 as soon as is reasonably practicable after the expiry of the period of six months beginning with the date on which the certificate is issued.

(2) But-

(a) in a case where before the first review would fall to be held in accordance with subsection (1) an appeal under section 25 is commenced (whether or not it is finally determined before that time) or leave to appeal is given under section 25(5)(b), the first review shall be held as soon as is reasonably practicable after the expiry of the period of six months beginning with the date on which the appeal is finally determined, and

(b) in a case where an application for leave under section 25(5)(b) has been commenced but not determined at the time when the first review would fall to be held in accordance with subsection (1), if leave is granted the first review shall be held as soon as is reasonably practicable after the expiry of the period of six months beginning with the date on which the appeal is finally determined.

(3) The Commission must review each certificate issued under section 21 as soon as is reasonably practicable after the expiry of the period of three months beginning with the date on which the first review or a review under this subsection is finally determined.

(4) The Commission may review a certificate during a period mentioned in subsection (1), (2) or (3) if-

(a) the person certified applies for a review, and

(b) the Commission considers that a review should be held because of a change in circumstance.

(5) On a review the Commission-

(a) must cancel the certificate if it considers that there are no reasonable grounds for a belief or suspicion of the kind referred to in section 21(1)(a) or (b), and

(b) otherwise, may not make any order (save as to leave to appeal).

(6) A certificate cancelled by order of the Commission under subsection (5) ceases to have effect at the end of the day on which the order is made.

(7) Where the Commission reviews a certificate under subsection (4), the period for determining the next review of the certificate under subsection (3) shall begin with the date of the final determination of the review under subsection (4).

## **27 Appeal and review: supplementary**

(1) The following provisions of the Special Immigration Appeals Commission Act 1997 (c. 68) shall apply in relation to an appeal or review under section 25 or 26 as they apply in relation to an appeal under section 2 of that Act-

- (a) section 6 (person to represent appellant's interests),
- (b) section 7 (further appeal on point of law), and
- (c) section 7A (pending appeal).

(2) The reference in subsection (1) to an appeal or review does not include a reference to a decision made or action taken on or in connection with-

- (a) an application under section 25(5)(b) or 26(4)(a) of this Act, or
- (b) subsection (8) below.

(3) Subsection (4) applies where-

- (a) a further appeal is brought by virtue of subsection (1)(b) in connection with an appeal or review, and
- (b) the Secretary of State notifies the Commission that in his opinion the further appeal is confined to calling into question one or more derogation matters within the meaning of section 30 of this Act.

(4) For the purpose of the application of section 26(2) and (3) of this Act the determination by the Commission of the appeal or review in connection with which the further appeal is brought shall be treated as a final determination.

(5) Rules under section 5 or 8 of the Special Immigration Appeals Commission Act 1997 (general procedure; and leave to appeal) may make provision about an appeal, review or application under section 25 or 26 of this Act.

(6) Subject to any provision made by virtue of subsection (5), rules under section 5 or 8 of that Act shall apply in relation to an appeal, review or application under section 25 or 26 of this Act with any modification which the Commission considers necessary.

(7) Subsection (8) applies where the Commission considers that an appeal or review under section 25 or 26 which relates to a person's certification under section 21 is likely to raise an issue which is also likely to be raised in other proceedings before the Commission which relate to the same person.

(8) The Commission shall so far as is reasonably practicable-

(a) deal with the two sets of proceedings together, and

(b) avoid or minimise delay to either set of proceedings as a result of compliance with paragraph (a).

(9) Cancellation by the Commission of a certificate issued under section 21 shall not prevent the Secretary of State from issuing another certificate, whether on the grounds of a change of circumstance or otherwise.

(10) The reference in section 81 of the Immigration and Asylum Act 1999 (c. 33) (grants to voluntary organisations) to persons who have rights of appeal under that Act shall be treated as including a reference to suspected international terrorists.

## **28 Review of sections 21 to 23**

(1) The Secretary of State shall appoint a person to review the operation of sections 21 to 23.

(2) The person appointed under subsection (1) shall review the operation of those sections not later than-

(a) the expiry of the period of 14 months beginning with the day on which this Act is passed;

(b) one month before the expiry of a period specified in accordance with section 29(2)(b) or (c).

(3) Where that person conducts a review under subsection (2) he shall send a report to the Secretary of State as soon as is reasonably practicable.

(4) Where the Secretary of State receives a report under subsection (3) he shall lay a copy of it before Parliament as soon as is reasonably practicable.

(5) The Secretary of State may make payments to a person appointed under subsection (1).



## **29 Duration of sections 21 to 23**

(1) Sections 21 to 23 shall, subject to the following provisions of this section, expire at the end of the period of 15 months beginning with the day on which this Act is passed.

(2) The Secretary of State may by order-

- (a) repeal sections 21 to 23;
- (b) revive those sections for a period not exceeding one year;
- (c) provide that those sections shall not expire in accordance with subsection (1) or an order under paragraph (b) or this paragraph, but shall continue in force for a period not exceeding one year.

(3) An order under subsection (2)-

- (a) must be made by statutory instrument, and
- (b) may not be made unless a draft has been laid before and approved by resolution of each House of Parliament.

(4) An order may be made without compliance with subsection (3)(b) if it contains a declaration by the Secretary of State that by reason of urgency it is necessary to make the order without laying a draft before Parliament; in which case the order-

- (a) must be laid before Parliament, and
- (b) shall cease to have effect at the end of the period specified in subsection (5) unless the order is approved during that period by resolution of each House of Parliament.

(5) The period referred to in subsection (4)(b) is the period of 40 days-

- (a) beginning with the day on which the order is made, and
- (b) ignoring any period during which Parliament is dissolved or prorogued or during which both Houses are adjourned for more than four days.

(6) The fact that an order ceases to have effect by virtue of subsection (4)-

- (a) shall not affect the lawfulness of anything done before the order ceases to have effect, and
- (b) shall not prevent the making of a new order.

(7) Sections 21 to 23 shall by virtue of this subsection cease to have effect at the end of 10th November 2006.

### **30 Legal proceedings: derogation**

- (1) In this section "derogation matter" means-
- (a) a derogation by the United Kingdom from Article 5(1) of the Convention on Human Rights which relates to the detention of a person where there is an intention to remove or deport him from the United Kingdom, or
  - (b) the designation under section 14(1) of the Human Rights Act 1998 (c. 42) of a derogation within paragraph (a) above.
- (2) A derogation matter may be questioned in legal proceedings only before the Special Immigration Appeals Commission; and the Commission-
- (a) is the appropriate tribunal for the purpose of section 7 of the Human Rights Act 1998 in relation to proceedings all or part of which call a derogation matter into question; and
  - (b) may hear proceedings which could, but for this subsection, be brought in the High Court or the Court of Session.
- (3) In relation to proceedings brought by virtue of subsection (2)-
- (a) section 6 of the Special Immigration Appeals Commission Act 1997 (c. 68) (person to represent appellant's interests) shall apply with the reference to the appellant being treated as a reference to any party to the proceedings,
  - (b) rules under section 5 or 8 of that Act (general procedure; and leave to appeal) shall apply with any modification which the Commission considers necessary, and
  - (c) in the case of proceedings brought by virtue of subsection (2)(b), the Commission may do anything which the High Court may do (in the case of proceedings which could have been brought in that court) or which the Court of Session may do (in the case of proceedings which could have been brought in that court).
- (4) The Commission's power to award costs (or, in Scotland, expenses) by virtue of subsection (3)(c) may be exercised only in relation to such part of proceedings before it as calls a derogation matter into question.
- (5) In relation to proceedings brought by virtue of subsection (2)(a) or (b)-
- (a) an appeal may be brought to the appropriate appeal court (within the meaning of section 7 of the Special Immigration Appeals Commission Act 1997 (c. 68)) with the leave of the Commission or, if that leave is refused.

with the leave of the appropriate appeal court, and

(b) the appropriate appeal court may consider and do only those things which it could consider and do in an appeal brought from the High Court or the Court of Session in proceedings for judicial review.

(6) In relation to proceedings which are entertained by the Commission under subsection (2) but are not brought by virtue of subsection (2)(a) or (b), subsection (4) shall apply in so far as the proceedings call a derogation matter into question.

(7) In this section "the Convention on Human Rights" has the meaning given to "the Convention" by section 21(1) of the Human Rights Act 1998 (c. 42).

### **31 Interpretation**

A reference in section 22, 23 or 24 to a provision of the Immigration Act 1971 (c. 77) includes a reference to that provision as applied by-

(a) another provision of that Act, or

(b) another Act.

### **32 Channel Islands and Isle of Man**

Her Majesty may by Order in Council direct that sections 21 to 31 shall extend, with such modifications as appear to Her Majesty to be appropriate, to any of the Channel Islands or the Isle of Man.

### *Refugee Convention*

### **33 Certificate that Convention does not apply**

(1) This section applies to an asylum appeal before the Special Immigration Appeals Commission where the Secretary of State issues a certificate that-

(a) the appellant is not entitled to the protection of Article 33(1) of the Refugee Convention because Article 1(F) or 33(2) applies to him (whether or not he would be entitled to protection if that Article did not apply), and

(b) the removal of the appellant from the United Kingdom would be conducive to the public good.

(2) In this section-

"asylum appeal" means an appeal under section 2 of the Special Immigration

Appeals Commission Act 1997 (c. 68) in which the appellant makes a claim for asylum (within the meaning given by section 167(1) of the Immigration and Asylum Act 1999 (c. 33)), and

"the Refugee Convention" has the meaning given by that section.

(3) Where this section applies the Commission must begin its substantive deliberations on the asylum appeal by considering the statements in the Secretary of State's certificate.

(4) If the Commission agrees with those statements it must dismiss such part of the asylum appeal as amounts to a claim for asylum (before considering any other aspect of the case).

(5) If the Commission does not agree with those statements it must quash the decision or action against which the asylum appeal is brought.

(6) Where a decision or action is quashed under subsection (5)-

(a) the quashing shall not prejudice any later decision or action, whether taken on the grounds of a change of circumstance or otherwise, and

(b) the claim for asylum made in the course of the asylum appeal shall be treated for the purposes of section 15 of the Immigration and Asylum Act 1999 (interim protection from removal) as undecided until it has been determined whether to take a new decision or action of the kind quashed.

(7) The Secretary of State may revoke a certificate issued under subsection (1).

(8) No court may entertain proceedings for questioning-

(a) a decision or action of the Secretary of State in connection with certification under subsection (1),

(b) a decision of the Secretary of State in connection with a claim for asylum (within the meaning given by section 167(1) of the Immigration and Asylum Act 1999) in a case in respect of which he issues a certificate under subsection (1) above, or

(c) a decision or action of the Secretary of State taken as a consequence of the dismissal of all or part of an asylum appeal in pursuance of subsection (4).

(9) Subsection (8) shall not prevent an appeal under section 7 of the Special Immigration Appeals Commission Act 1997 (appeal on point of law).

(10) Her Majesty may by Order in Council direct that this section shall extend, with such modifications as appear to Her Majesty to be appropriate, to any of the Channel

Islands or the Isle of Man.

### **34 Construction**

(1) Articles 1(F) and 33(2) of the Refugee Convention (exclusions: war criminals, national security, &c.) shall not be taken to require consideration of the gravity of-

(a) events or fear by virtue of which Article 1(A) would or might apply to a person if Article 1(F) did not apply, or

(b) a threat by reason of which Article 33(1) would or might apply to a person if Article 33(2) did not apply.

(2) In this section "the Refugee Convention" means the Convention relating to the Status of Refugees done at Geneva on 28th July 1951 and the Protocol to the Convention.

#### *Special Immigration Appeals Commission*

### **35 Status of Commission**

At the end of section 1 of the Special Immigration Appeals Commission Act 1997 (c. 68) insert-

"(3) The Commission shall be a superior court of record.

(4) A decision of the Commission shall be questioned in legal proceedings only in accordance with-

(a) section 7, or

(b) section 30(5)(a) of the Anti-terrorism, Crime and Security Act 2001 (derogation)."

#### *Fingerprints*

### **36 Destruction of fingerprints**

(1) In section 143 of the Immigration and Asylum Act 1999 (c. 33) (destruction of fingerprints)-

(a) subsections (3) to (8) (requirement to destroy fingerprints on resolution of asylum and immigration cases) shall cease to have effect,

(b) in subsection (9) (dependants) after "F" insert "(within the meaning of section 141(7))", and

(c) subsection (14) (interpretation) shall cease to have effect.

(2) Subsection (1)-

(a) shall have effect in relation to fingerprints whether taken before or after the coming into force of this section, and

(b) in relation to fingerprints which before the coming into force of this section were required by section 143 to be destroyed, shall be treated as having had effect before the requirement arose.