

## THE U.K. SUPREME COURT AT WAR

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*Abstract:* This article contends that the underlying normative assumptions of civil libertarians and national security “executive unilateralists” are premised on a variant of the “nirvana fallacy.” In other words, civil libertarians generate a best-case scenario for rigorous judicial oversight over executive action during emergencies and compare it to the worst-case scenario for executive action; the reverse holds true for executive unilateralists. In practice, the Supreme Court of the United Kingdom has been cognizant of the institutional advantages and limitations of its office when it adjudicates national security disputes, and has not succumbed to the criticisms of scholars in either camp. Instead, since the September 11th terrorist attacks, there has been a strong correlation between the degree of judicial deference displayed to the executive on national security matters and the information made available to the Court. In other words, the intensity of the judicial oversight of various counter-terrorism measures increases when an emergency wanes and the Court receives credible information that the impugned governmental measures are ineffective or unnecessary in addressing the perceived national security threats.

### I. INTRODUCTION

In the wake of the September 11th terrorist attacks (“9/11”) and similar tragedies across the globe, governments around the world have responded by passing a slew of legislative sanctions that seek to combat this global national security threat.<sup>1</sup> The United Kingdom’s government, like many of its foreign counterparts, has frequently contended that, in times of national crisis, democracies must recalibrate their institutional processes and reinterpret their legal norms to accept more intrusive encroachments on personal liberty that would usually be considered unacceptable during “normal” times.<sup>2</sup> The British judiciary, in particular the Supreme Court (and the Appellate Committee of the House of Lords), has also entered the fray as they are tasked to review and rule on the legality of several contentious governmental measures.<sup>3</sup> However, as these judges sit at trial, they too also

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<sup>1</sup> See generally KENT ROACH, *THE 9/11 EFFECT: COMPARATIVE COUNTER-TERRORISM* (Cambridge 2011).

<sup>2</sup> See *id.* at 241-44.

<sup>3</sup> See *A & Ors v. Secretary of State for the Home Department*, [2004] UKHL 56, [2005] 2 A.C. 68 (H.L.); *A v. Secretary of State for the Home Department (No. 2)*, [2005] UKHL 71, [2006] 2 A.C. 221 (H.L.); *Gillan, R v. Commissioner of Police for the Metropolis & Anor*, [2006] UKHL 12, [2006] 2 A.C. 307 (H.L.); *Secretary of State for the Home Department v. JJ*, [2007] UKHL 45, [2008] 1 A.C. 385 (H.L.); *Secretary of State for the Home Department v. E*, [2007] UKHL 47, [2008] 1 A.C. 499 (H.L.); *Secretary of State for the Home Department v. AF*, [2009] UKHL 28, [2010] 2 A.C. 269 (H.L.).

stand trial<sup>4</sup> when their decisions are judged in the court of public opinion and are critiqued within the walls of academia.

Unsurprisingly, commentators have published a plethora of academic literature on how courts should address these legal challenges against governmental counter-terrorism efforts.<sup>5</sup> However, this discourse on national security has been dominated by the assertions of two polarized factions. On one side, we have the “executive unilateralists”<sup>6</sup> who argue that courts—especially during emergencies or periods of crisis—should generally defer to governmental determinations on national security.<sup>7</sup> These scholars contend that delay and uncertainty would result from the judicial review of national security disputes and impose unacceptable costs on executive power. Furthermore, “judicial deference is both desirable and predictable, given the high stakes and the judges’ limited information and competence.”<sup>8</sup> On the other side, we have the civil libertarians who insist that judges should never acquiesce to governmental intrusions on human rights, even in times of public emergencies, and that courts must be vigilant and provide robust oversight over state action at all times.<sup>9</sup> They believe that public bodies tend to overreact and that “the government’s own assessment may be colored by fear of the electoral response and—less charitably—by calculations of electoral advantage,”<sup>10</sup> such that it is vital for the courts to subject the assertions of the executive to “searching examination.”<sup>11</sup>

A central purpose of this article is to show why both opposing, strident views are normatively untenable and unsustainable, and why it is unsurprising that neither viewpoint has been accepted in practice by the

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<sup>4</sup> See Aharon Barak, *Some Reflections on the Israeli Legal System and Its Judiciary*, 6.1 ELECTRONIC J. OF COMP. L. (2002), <http://ejcl.org/61/art61-1.html>.

<sup>5</sup> See Fiona de Londras & Fergal F. Davis, *Controlling the Executive in Times of Terrorism: Competing Perspectives on Effective Oversight Mechanisms*, 30 OXFORD J. LEGAL STUD. 19 (2010); David Feldman, *Human Rights, Terrorism and Risk: The Role of Politicians and Judges*, PUB. L. 364 (2006); Allen Kavanagh, *Judging the Judges under the Human Rights Act: Deference, Disillusionment and the ‘War on Terror’*, PUB. L. 287 (2009).

<sup>6</sup> See Samuel Issacharoff & R. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime*, 5 THEORETICAL INQUIRIES L. 1 (2004).

<sup>7</sup> See John Finnis, *Nationality, Alienage and Constitutional Principle* (University of Oxford Faculty of Law Legal Studies Research Paper Series, Working Paper No. 08, 2008); David Campbell, *The Threat of Terror and the Plausibility of Positivism*, PUB. L. 501 (2009).

<sup>8</sup> ERIC POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS* 91 (2007).

<sup>9</sup> See Feldman, *supra* note 5; FIONA DE LONDRA, *DETENTION IN THE WAR ON TERROR: CAN HUMAN RIGHTS FIGHT BACK?* (2011); Cora Chan, *Proportionality and Invariable Baseline Intensity of Review*, 33(1) LEGAL STUD. 1 (2013).

<sup>10</sup> E. Metcalfe, *Terror, Reason and Rights*, in *CIVIL LIBERTIES, NATIONAL SECURITY AND PROSPECTS FOR CONSENSUS* 178 (E. Reed and M. Dumper eds., 2012).

<sup>11</sup> See Feldman, *supra* note 5, at 379.

House of Lords and its succeeding body, the Supreme Court (hereinafter referred to collectively as “the Court”) in the post-9/11 cases. It is my contention that the underlying normative assumptions of scholars in both camps are premised on a variant of the “nirvana fallacy.” Civil libertarians generate a best-case scenario for rigorous judicial oversight of executive action during emergencies and compare it to the worst-case scenario for executive action, while the reverse holds true for executive unilateralists. Realistically, judges on the Court are insulated from the political winds and are arguably more impartial in reviewing challenges to governmental action. However, they are comparatively more limited in their access to the requisite national security information and lack the training to make the predictive risk assessments on the necessity of national security measures. On the other hand, while it is equally true that, in times of crisis, the executive branch possesses the “speed, secrecy, flexibility, and efficiency that no other governmental institution can match,”<sup>12</sup> the need to assuage public fear and moral panics may distort the objectivity of the executive’s assessments. The main trade-off in the institutional design of security policy is between freedom from bias and information.<sup>13</sup>

This article contends that the Court has been generally cognizant of the institutional advantages and limitations of its office when adjudicating national security disputes, and has not succumbed to criticisms. Instead, there has been an inverse correlation between the degree of judicial deference displayed to the executive on national security matters and the information made available to the Court since 9/11. In other words, the intensity of the judicial oversight over various counter-terrorism measures increases when an emergency wanes, and the Court receives credible information that the impugned governmental measures are ineffective or unnecessary in addressing the perceived national security threats. As time passes, the Court often acquires more information, thereby narrowing the epistemic gap between the judges and the executive. Conversely, where the Court was not privy to the intelligence on which executive anticipatory risk-assessments were based, and where the costs of judicial errors were particularly high, the judiciary generally erred on the side of caution and deferred to the executive’s national security determinations.

This article’s central argument is that there exists an inverse relationship between the amount of information the Court has, and the level of judicial deference it affords the government. While many civil

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<sup>12</sup> See HAROLD KOH, *THE NATIONAL SECURITY CONSTITUTION* 119 (1990).

<sup>13</sup> ADRIAN VERMEULE, *LAW AND THE LIMITS OF REASON* 86 (2008).

libertarians such as Fiona de Londras,<sup>14</sup> Fionnuala Ni Aoláin, and Oren Gross<sup>15</sup> have also argued for a “sliding scale” of judicial deference, their arguments are premised solely on rights-based concerns: the judicial review of state action must become more rigorous over time because of the adverse impact on the individual, as the length of his or her rights-deprivation increases.<sup>16</sup> This article’s argument is different and novel so far as it explains and justifies this inverse relationship between time and judicial deference on informational grounds.

This article will focus only on the case law of the Court and the judicial approach it adopts vis-à-vis national security. While Adam Tomkins has published an illuminating article on how courts at first instance have scrutinized national security determinations by the government more intensely than the Court has,<sup>17</sup> this article argues that the more activist stance taken by the lower courts should not affect how the Court behaves. These courts of first instance—i.e., the Administrative Court, the Special Immigration Appeals Commission (“SIAC”), and the Proscribed Organisations Appeal Commission—are all specialized tribunals, while the Court is a generalist one.<sup>18</sup> Specialist judges who routinely deal with national security issues would naturally build up a considerable body of experience and expertise in the area, and they would—over time—become very seasoned at assessing the credibility of the State’s national security claims.<sup>19</sup> Judges on the Court generally do not have such security expertise or specialized on-job training, and deference is thus a rational response to these epistemic conditions of uncertainty associated with such adjudication. Furthermore, courts of first instance have the “luxury” of having their errors corrected by the appellate courts, whereas the Court shoulders the burden of having the last (judicial) word. If aggressive judicial review, which hampers counter-terrorism efforts, can (rightly or wrongly) incur the government’s wrath or public outrage, then prudential constraints may counsel the Court’s

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<sup>14</sup> See Fiona de Londras, *Can Counter-terrorist Internment Ever be Legitimate?*, 33 HUM. RTS. Q. 593 (2011).

<sup>15</sup> See Fionnuala Ni Aoláin and Oren Gross, *A Skeptical View of Deference to the Executive in Times of Crisis*, 41 ISR. L. REV. 545 (2008).

<sup>16</sup> See de Londras, *supra* note 14, at 596; Aoláin and Gross, *supra* note 15, at 559.

<sup>17</sup> See Adam Tomkins, *National Security and the Role of Court: A Changed Landscape?*, L. Q. REV. 543 (2010).

<sup>18</sup> *Id.* at 545.

<sup>19</sup> One may note that for the SIAC, in particular, an expert on security matters would usually be a member of the panel. See *Appeal to the Special Immigr. Appeals Comm’n*, HM COURTS & TRIBUNAL SERV. (Nov. 13, 2014), <http://www.justice.gov.uk/tribunals/special-immigration-appeals-commission>.

judicial restraint.<sup>20</sup> This is so because the Court always bears the ultimate responsibility for any unintended consequences of judicial mistakes.

Part II of this article begins with an examination of the case for judicial deference as advanced by renowned executive unilateralists such as John Yoo,<sup>21</sup> Eric Posner,<sup>22</sup> and Adrian Vermeule.<sup>23</sup> In addition, Part II explores the normative arguments in favor of robust judicial review over national security matters, as commonly advanced by eminent civil libertarians such as David Feldman<sup>24</sup> and Fiona de Londras.<sup>25</sup> The aim in Part II is to explain how scholars in both camps have viewed their preferred public institution through rose-tinted glasses, as they only see the institutional advantages that their preferred institution enjoys in national security determinations, while failing to account for the institutional disadvantages inherent in the office. Next, in Part III, this article illustrates and elaborates on how, since 9/11, the Court has sought to mediate the polarized demands of the executive unilateralists and the civil libertarians by increasing the level of judicial scrutiny over state action as it acquires more information over time.

## II. THE NATIONAL SECURITY POLARITY: EXECUTIVE UNILATERALISM AND CIVIL LIBERTARIANISM

Professor John Yoo is a strident executive unilateralist.<sup>26</sup> Central to the case for judicial deference in times of national emergencies is his argument that the judiciary is ill-equipped to acquire, investigate, and process information on national security. As he observes:

The executive branch, by contrast, can collect information through agency experts, a national and global network of officials and agents, and connections with outside groups and foreign governments . . . Courts do not operate the broad network of information sources that is available to the executive branch, nor can it benefit from the informal methods of information collection the legislature has at its disposal.<sup>27</sup>

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<sup>20</sup> See A. Kavanagh, *Deference or Defiance? The Limits of the Judicial Role in Constitutional Role in Adjudication*, in *EXPOUNDING THE CONSTITUTION* 209 (Grant Huscroft ed., 2008).

<sup>21</sup> See J. Yoo, *Courts at War*, 91 *CORNELL L. REV.* 573 (2006).

<sup>22</sup> See POSNER & VERMEULE, *supra* note 8.

<sup>23</sup> See *id.*

<sup>24</sup> See Feldman, *supra* note 5.

<sup>25</sup> See DE LONDRAS, *supra* note 9.

<sup>26</sup> See Yoo, *supra* note 21.

<sup>27</sup> *Id.* at 593.

Furthermore, once the judiciary has made a decision based on the information available to it at a given time, it generally cannot reverse itself—until another case raising the same issue arises again—even if the additional information would lead the court to change its mind.<sup>28</sup> If the disputed decision is from a court of final resort, it may be years before this new information can be addressed by that same body. In the meantime, the executive would be hamstrung by this delay, and time is of the essence when the government is seeking to combat threats to national security.

In the same vein, Professors Eric Posner and Adrian Vermeule have emphasized the informational deficits from which the courts suffer.<sup>29</sup> More significantly, however, they attempt to eviscerate the arguments oft-advanced by civil libertarians that, during emergencies, governments tend to panic and exaggerate the severity of national security threats, and inflict the costs of increased security measures on unpopular minorities.<sup>30</sup> Not only do these learned scholars disbelieve that unpopular minorities would be subject to “scapegoating” during emergencies, they actually argue that emergencies would enhance the political position of these minorities: “[B]ecause emergencies capture the attention of the public, it will be more difficult for the government to conceal oppressive or redistributive policies, making it easier to mobilise opposition to such policies.”<sup>31</sup>

More incredulously, these scholars present a rosy picture of why states would not engage in greater discrimination against foreigners during periods of emergencies. In such an event, the voting majority would want foreigners to come to its country and contribute to its economy and workforce, and the good treatment of one’s nationals abroad is dependent on each state extending due process to aliens on its own soil.<sup>32</sup>

Firstly, one must note that the question of whether the political status of weak or unpopular minorities is actually enhanced during emergencies is an empirical one, for which the authors have conceded that they provide no such evidence.<sup>33</sup>

Secondly, while the authors’ conjectures are not patently false, they are undeniably viewing state action through rose-tinted glasses. More plausible and realistic are scenarios where, in times of crisis, fear prevails and emotions run high. In such times, the general public is willing to condone immeasurably more draconian measures, especially if the

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<sup>28</sup> See *id.*

<sup>29</sup> See POSNER & VERMEULE, *supra* note 8, at 31.

<sup>30</sup> See *id.* at 87.

<sup>31</sup> *Id.* at 110-11.

<sup>32</sup> *Id.* at 125.

<sup>33</sup> *Id.* at 32.

externalities of such measures are only foisted upon unpopular segments of society perceived to be responsible for the crisis. In times of emergencies, governments have every incentive to overreact, for the general public would be comparatively less forgiving if another terrorist attack were to occur very soon. Therefore, the government's assessments of national security may be colored by its fear of the electoral response or even by calculations of electoral advantage.<sup>34</sup> It is true that in most countries, including the United Kingdom, the protection of their nationals abroad is dependent on some measure of reciprocity. However, foreign governments may also condone a state's use of draconian counter-terrorism measures against their own nationals if the foreign governments themselves are domestically applying similar measures against this same group of perceived terrorists. Therefore, as Professor de Londras rightly observed, the analyses of Posner and Vermeule do not properly take into account "either the historical patterns of expansionism in counter-terrorist laws and policies or the ballot-box effect of a traumatised, panicked and collectively victimised populace"<sup>35</sup> during emergencies.

Thirdly, executive unilateralists tend to give short shrift to the very real possibility that governments rarely relinquish the emergency powers that they have been conferred, even after the crisis in question has waned or abated.<sup>36</sup> It is one thing to acknowledge that there is a liberty-security trade-off that one must accept in a time of crisis; it is another thing altogether to sustain the executive's use of such emergency powers indefinitely. If courts were to never scrutinize governmental claims on national security, the (supposed) emergency may never come to a close. Substantive research into the use of emergency powers globally has always shown that such extraordinary powers persist, and they are rarely "short term appearances on the legal landscape of states."<sup>37</sup> Their endurance or permanent entrenchment will spell the end and dissolve the rule of law on which these extraordinary measures were justified.<sup>38</sup>

Therefore, while the executive unilateralists are not wrong in emphasizing that the judiciary is institutionally less equipped than the executive branch to acquire and process national security information, these scholars give too little credence to the very real risks of bias when the executive engages in national security determinations.

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<sup>34</sup> See Metcalfe, *supra* note 10, at 178.

<sup>35</sup> See DE LONDRA, *supra* note 9, at 225.

<sup>36</sup> See POSNER & VERMEULE, *supra* note 8; see Yoo, *supra* note 21.

<sup>37</sup> Fionnuala Ni Aoláin, *Terror Conflated*, 25 CONST. COMMENT. 131, 134 (2008).

<sup>38</sup> Mark Tushnet, *Emergencies and the Idea of Constitutionalism*, in THE CONSTITUTION AT WARTIME: BEYOND ALARMISM AND COMPLACENCY 45, 45 (Mark Tushnet ed., 2005).

Civil libertarians, on the other hand, present a dismal view of the governmental use of national security measures during national emergencies. Professor David Feldman has emphasized that it is important to subject the security of the police and the security service on risk levels to “searching examination.”<sup>39</sup> Public bodies generally do not want to face the public obloquy and legal liabilities that might follow from various terror-related events. In turn they would have every incentive to overestimate security risks and be overly defensive in their responses to them.<sup>40</sup>

In the same vein, Professor Fiona de Londras has been extremely sanguine about the judiciary’s capacity to review security-related laws and policies.<sup>41</sup> According to de Londras, the sensitive nature of national security secrets should not pose a barrier to judicial review because mechanisms can be developed to allow for their careful, considered release to the courts.<sup>42</sup> In the United Kingdom, this has taken the form of Special Advocates, who have some access to such confidential information and may make pleadings on behalf of suspected terrorists, subject to control orders issued under the Prevention of Terrorism Act 2005.<sup>43</sup> Furthermore, de Londras considers that arguments concerning the limited institutional competence of courts are simply fallacious; judges constantly make legal decisions on matters they have little expertise on, such as medical treatment, tax arrangements, and the environment.<sup>44</sup> There is therefore no reason why the judiciary is incapable of doing the same on security matters.<sup>45</sup>

The civil libertarians usually strengthen their case for robust judicial review by pointing to the spectacular debacles of the executive’s national security determinations—e.g., the failure to uncover weapons of mass destruction in Saddam Hussein’s Iraq and the wrongful killing of Jean Charles de Menezes by the police in the London Underground. They also point out that judicial deference during many periods of major national security emergencies has only led to the continuous and unnecessary repression of minorities—e.g., the internment of Japanese Americans<sup>46</sup> or the detention of alleged Nazi sympathizers during World War II.<sup>47</sup>

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<sup>39</sup> See Feldman, *supra* note 5, at 379.

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

<sup>41</sup> See Fiona de Londras, *Guantanamo Bay: Towards Legality?*, 71 MOD. L. REV. 36 (2008).

<sup>42</sup> *See id.*

<sup>43</sup> Aileen Kavanagh, *Special Advocates, Control Orders and the Right to a Fair Trial* 73(5) MOD. L. REV. 824, 838 (2010).

<sup>44</sup> See de Londras, *supra* note 41, at 50-51.

<sup>45</sup> *Id.*

<sup>46</sup> See *Korematsu v. United States*, 323 U.S. 214 (1944).

<sup>47</sup> *Liversidge v. Anderson*, [1941] UKHL 1, [1942] A.C. 206 (H.L.).



One must also note that the civil libertarians' claims are often tainted with "hindsight bias."<sup>48</sup> Once a national emergency has abated, or where new information is revealed, the judicial deference displayed by courts can be easily characterized as unjustified *ex post*.<sup>49</sup> But when judges are *ex ante* confronted with an emergency, and where they are operating under conditions of epistemic uncertainty as to the outcome of the war and the necessity of the impugned security measures in meeting a particular national security threat, it is unfair to review their actions through the lens of calmer times.<sup>50</sup> As Professor Mark Tushnet has astutely observed, the "glow of success reflects backward and affects our evaluations."<sup>51</sup>

Civil libertarians may point to specific monumental failures of the executive, but they have not demonstrated how judges generally, *vis-à-vis* the executive, are better at acquiring, processing, and evaluating national security information. De Londras, as discussed above, may argue that courts routinely deal with matters that they are not experts of, which may well be true; however, assessing national security is qualitatively different from determining culpability in medical malpractice or environmental claims. Determinations made in the national security arena are usually anticipatory; they are based on risk-assessments and factual predictions of what people might or might not do in the future.<sup>52</sup> Such disputes are unlike claims in torts or contracts, complicated as they maybe, where judges are assessing liability for past actions. This is not to say that generalist judges never engage in anticipatory assessments in their daily routine. However, predictive appraisals in the realm of family law, and the scale of adverse consequences that may follow from judicial errors, make such decisions qualitatively different from the specialized nature of national security determinations; the former task is more within the ken of generalist judges on the Court.

Furthermore, national security information is often derived from classified sources. The government may reasonably fear that the disclosure of such evidence in litigation will adversely affect its ability to use it in the future, thereby compromising the flow of valuable counter-terrorism intelligence.<sup>53</sup> This argument is not based on a fanciful, imaginary projection of some right-wing zealot, but is actually premised on the realities

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<sup>48</sup> See POSNER & VERMEULE, *supra* note 8, at 147.

<sup>49</sup> *Id.* at 44.

<sup>50</sup> Mark Tushnet, *Defending Korematsu? Reflections on Civil Liberties in Wartime*, in *THE CONSTITUTION AT WARTIME: BEYOND ALARMISM AND COMPLACENCY* 125, 125 (Mark Tushnet ed., 2005).

<sup>51</sup> *Id.*

<sup>52</sup> See Kavanagh, *supra* note 20.

<sup>53</sup> See Robert M. Chesney, *National Security Fact Deference*, 95 VA. L. REV. 1361 (2009).

of national security. It is now known that as a consequence of Omar Abdel-Rahman's prosecution for the World Trade Center bombing in 1993, the United States government was required to hand over a list of unindicted co-conspirators to his defense team, which had included Osama bin Laden's name.<sup>54</sup> Within ten days of the release of this list, bin Laden was alerted to the fact that his involvement in the terrorist bombing had been uncovered.<sup>55</sup> During Ramzi Yousef's trial for the same bombing, testimonial evidence presented in court about the delivery of a cell phone battery tipped off the other terrorists still at large that one of their communication links had been compromised.<sup>56</sup> The government lost an extremely valuable source of intelligence as a consequence.<sup>57</sup>

Civil libertarians may respond, as has De Londras, that classified, sensitive information may be disclosed only to Special Advocates that represent terrorist suspects in the "closed materials" hearings.<sup>58</sup> This is an important concession, but one must note that many civil libertarians are highly critical of this Special Advocate "closed materials" system.<sup>59</sup> In any case, within the United Kingdom, the Supreme Court has on several occasions refused to examine the "closed" materials, even when this opportunity was offered to the Law Lords.<sup>60</sup> One does wonder whether it is possible for the Court to make accurate national security determinations, vis-à-vis the executive, if it insists on adjudicating behind a veil of ignorance.

Unfazed by the abovementioned epistemic disadvantages inherent in the judicial office, Cora Chan has argued that the government must always prove why the judiciary should defer to them on second-order grounds.<sup>61</sup> According to Chan, "claims of second-order expertise usually take the form of the government, generally, having expertise in deciding the type of issue in question"<sup>62</sup>—i.e., the fact that the government was usually correct in deciding this type of issue in the past is a reason for deference this time. Therefore, for Chan, second-order claims of superior expertise in national security can "only be validly established if the government body can adduce

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<sup>54</sup> See PHILIP BOBBITT, *TERROR AND CONSENT* 284 (2008).

<sup>55</sup> *Id.* at 284.

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

<sup>57</sup> *Id.*

<sup>58</sup> See de Londras, *supra* note 41, at 50.

<sup>59</sup> See Helen Fenwick & Gavin Phillipson, *Covert Derogations and Judicial Deference: Redefining Liberty and Due Process Rights in Counterterrorism Law and Beyond*, 56 MCGILL L. J. 863 (2011).

<sup>60</sup> See *RB (Algeria) v. Secretary of State for the Home Department*, [2009] UKHL 10, [2010] 2 A.C. 110 (H.L.).

<sup>61</sup> See Chan, *supra* note 9.

<sup>62</sup> See Cora Chan, *Deference, Expertise and Information-Gathering Powers*, 33 LEGAL STUD. 598, 602 (2013).

evidence, such as its institutional features, qualifications, and past performance, to persuade the court that it indeed possess the said general expertise or useful intelligence.”<sup>63</sup> In particular, Chan has suggested as follows:

First, the government is to adduce positive evidence to show that the institution which it is asking the court to defer to had previously made correct judgments in the type of issues concerned and/or that its sources of information were reliable in the past. The litigant then has an evidential burden to expose negative records of the government’s body’s credibility and point out the institutional problems that these blunders expose . . . . If the litigant can discharge its evidential burden, the government must then try to show that the asserted institutional problems exposed by past mistakes have been solved or are not applicable in the present case.<sup>64</sup>

For Chan, the burden is on the government to prove this second-order comparative expertise on a balance of probability.<sup>65</sup>

This argument is untenable for national security matters. If courts judge the government’s comparative expertise on records that are already in the public domain, this stance will inevitably always disadvantage the government’s case, as the more compelling evidence for the government’s case on national security will be classified. Alternatively, if courts compel the government to declassify and disclose confidential information so that it can meet this onerous burden of proof—e.g., sources and intelligence revealed by covert operations—national security will generally be compromised. Chan may argue that it is not inevitable that the release of such secret information would jeopardize national security, but without the benefit of hindsight, judges would never *ex ante* know. Furthermore, Chan is not merely asking for the government to adduce “some evidence,”<sup>66</sup> as she purports to claim; she wants the State to prove its second-order comparative expertise on a balance of probability.<sup>67</sup> The implications flowing from her bold claims are indeed breathtaking.

More importantly, many civil libertarians, including Chan, often neglect the fact that, unlike judicial findings in torts or contractual disputes, decisions made in the realm of national security often have life and death

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<sup>63</sup> Chan, *supra* note 9, at 12.

<sup>64</sup> Chan, *supra* note 62, at 613.

<sup>65</sup> Chan, *supra* note 9, at 15.

<sup>66</sup> Chan, *supra* note 62, at 617.

<sup>67</sup> Chan, *supra* note 9, at 15.

consequences. In times of national emergencies—and in view of the sensitive nature of (covert) security operations and the potentially grave consequences of hampering speedy executive action—it is prudent for the judiciary to respond to these conditions of epistemic uncertainty by deferring to the political branches of the government. This is because courts neither have the requisite expertise to accurately assess the risks facing the country nor have the resources to address these threats.<sup>68</sup> Deference is a rational choice, especially during emergencies when time is at a premium and the consequences of erroneously obstructing necessary security measures are dire for the nation.

However, this is not to say that judges should always acquiesce to the government's purported claims of a national emergency. As the country moves away from a specific exigency, the courts should calibrate their degree of review and re-subject governmental actions to closer scrutiny. Logically, the national security threat that a country is under is no less serious immediately before a specific exigency than afterwards. Why, then, should the standard of review change with time? It changes because, when a crisis is fresh, time is at a premium.<sup>69</sup> Prudent judges, with limited information, would naturally defer to the government on how to respond to this new threat. As time passes, judges often acquire more information, thereby narrowing the epistemic gap between them and the executive.<sup>70</sup> This judicial re-calibration is also necessary as executive unilateralists tend to give short shrift to the staying power of emergencies, and opportunistic governmental officials have every incentive to retain these extraordinary powers even after the crisis has abated.

Therefore, it falls on the independent judiciary to re-assert control after the emergency has waned or where previously unavailable credible information surfaces that makes the government's argument for a specific national security measure untenable.

### III. NATIONAL SECURITY AND A VARIABLE STANDARD OF REVIEW

As discussed above, executive unilateralists and civil libertarians are viewing the national security decisions of their preferred branch of government through rose-tinted glasses. They only notice the institutional advantages their preferred branch enjoys in national security assessments and fail to account for the institutional disadvantages inherent in that office.

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<sup>68</sup> See Kavanagh, *supra* note 5, at 302.

<sup>69</sup> POSNER & VERMEULE, *supra* note 8, at 44.

<sup>70</sup> *Id.*

Fortunately, this is not the practice of the Court in the United Kingdom. Since the 9/11 attacks, the Law Lords are very cognizant of their epistemic advantages and limitations. They have always varied the standard of review that they apply vis-à-vis the executive's national security determinations according to the exigency of time and the requisite intelligence disclosed to them.

In *Secretary of State for the Home Department v. Rehman*,<sup>71</sup> the House of Lords unanimously ruled that the Home Secretary could deport a Pakistani national on the grounds that his deportation was conducive to the public good for national security reasons due to his association with Islamic terrorist groups.<sup>72</sup> More importantly, the Law Lords emphasized that “due weight”<sup>73</sup> and “proper deference”<sup>74</sup> must be accorded to the executive's determination of what would be in the interests of national security.<sup>75</sup>

This decision has been subject to academic criticism by civil libertarians.<sup>76</sup> In particular, Colin Harvey has so observed:

To defer mainly because it is an executive decision based on the assessments of the national security threat is problematic . . . . In the national security context, the rule of law is tested, both in the sense of protecting individual rights and ensuring that an effective regulatory framework exists. By according decisive weight to the views of the executive, judges are not discharging their responsibility to take a view on the meaning of law. If courts do this, they risk abandoning one of the values of the rule of law: the defence of the person against arbitrary power through an established legal framework properly interpreted and applied.<sup>77</sup>

However, what the rule of law means is contestable and can be upheld in a variety of ways.<sup>78</sup> Unfortunately, Harvey and many other civil libertarians do not demonstrate why the judges' first-order assessments in the national

<sup>71</sup> See *Secretary of State for the Home Department v. Rehman*, [2001] UKHL 47, [2003] 1 A.C. 153.

<sup>72</sup> *Id.* at [53].

<sup>73</sup> *Id.* at [26].

<sup>74</sup> *Id.* at [49].

<sup>75</sup> *Id.* at [26], [49].

<sup>76</sup> See Colin Harvey, *Our Responsibility to Respect the Rights of Others: Legality and Humanity*, in *GLOBAL ANTI-TERRORISM LAW AND POLICY* 228 (Victor Ramraj, Michael Hor, Kent Roach & George Williams eds., 2012).

<sup>77</sup> *Id.*

<sup>78</sup> See Jeffrey Goldsworthy, *Homogenising Constitutions*, 23 *OXFORD J. OF LEGAL STUD.* 483 (2003). See also Po Jen Yap, *Defending Dialogue*, *PUB. L.* 527 (2012).

security context will always be the correct determination, especially in light of the epistemic uncertainties inherent in the adjudication of such cases.

Fortunately, the Law Lords in *Rehman* were less sanguine about the institutional capabilities of the judiciary within the national security context.<sup>79</sup> Lord Hoffmann, who wrote the leading judgment, observed:

[I]n matters of national security, the costs of failure can be high. This seems to me to underline the need for the judicial arm of government to respect the decisions of ministers of the Crown on the question of whether support for terrorist activities in a foreign country constitutes a threat to national security. It is not only that the executive has access to special information and expertise in these matters. It is also that such decisions, with serious potential results for the community, require a legitimacy which can be conferred only by entrusting them to persons responsible to the community through the democratic process.<sup>80</sup>

As deferential as the judiciary may have been to the executive, we must read *Rehman* in context. This decision was handed down within a month of the 9/11 terrorist attacks, and, as recognized by a judge as liberal as Lord Steyn, “the tragic events of 11 September 2001 in New York reinforce compellingly that no other approach is possible.”<sup>81</sup> Without the benefit of any information on how vulnerable the United Kingdom was to similar terrorist attacks at that time, and acknowledging how salient the devastation of the terrorist attacks were, judicial deference would be a rational and reasonable response to the existing conditions of uncertainty. Furthermore, one must note that the House of Lords in *Rehman* had not conferred upon the government unbridled powers to pursue whatever national security measure they deemed fit. As observed by the House of Lords, the judiciary would still have intervened if “the decision to deport was not based on grounds of national security,”<sup>82</sup> or the decision to deport was “one which no reasonable minister advising the Crown could in the circumstances reasonably have held;”<sup>83</sup> however, both exceptions were inapplicable on the facts.

The House of Lords was next confronted with the legality of a national security measure in the landmark decision of *A & Ors v. Secretary*

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<sup>79</sup> Secretary of State for the Home Department v. Rehman, [2001] UKHL 47, [2003] 1 A.C. 153 (H.L.) [62], [26].

<sup>80</sup> *Id.* at [62].

<sup>81</sup> *Id.* at [29].

<sup>82</sup> *Id.* at [24].

<sup>83</sup> *Id.* at [54].

of *State for the Home Department*.<sup>84</sup> In that case, the Government had derogated from Article 5 of the European Convention of Human Rights<sup>85</sup> (“ECHR”) and passed the Anti-terrorism, Crime and Security Act 2001,<sup>86</sup> which allowed for the indefinite detention without trial of suspected foreign terrorists. Nine detainees subsequently challenged the legality of these national security measures.<sup>87</sup> When the case came before the House of Lords, a majority on the nine-person panel accepted that a public emergency threatened the life of the nation, but they also ruled that the executive power to detain without trial was not “strictly required” by the emergency in question.<sup>88</sup> By an eight-to-one majority, the House of Lords invalidated the derogation order and declared that the impugned statutory provisions were incompatible with the Human Rights Act 1998 (“HRA”).<sup>89</sup>

This decision has engendered much celebration and criticism.<sup>90</sup> A few civil libertarians expressed disappointment that the majority did not go far enough, as it deferred to the Government’s assessment that the United Kingdom was in a state of public emergency even in the absence of clear and convincing evidence.<sup>91</sup> As Professor Adam Tomkins asked rhetorically: How did the House of Lords know that there was a public emergency threatening the life of the nation?<sup>92</sup> In the same vein, Tom Hickman lamented in the following terms: “Bizarrely, by his own tactical decision not to show his hand, the Attorney General was thus relieved from justifying his decision to the standard required.”<sup>93</sup> The learned scholars were not wrong to raise these concerns, but a crucial question is what alternative options the Law Lords had. The Attorney General expressly declined to ask the House of Lords to read the closed material; the SIAC had considered these materials and agreed that such an emergency existed.<sup>94</sup> As observed by Baroness Hale in *A & Ors*, while unwarranted declarations of emergency are a familiar tool of tyranny, the Law Lords herein were considering the

<sup>84</sup> *A & Ors v. Secretary of State for the Home Department*, [2004] UKHL 56, [2005] 2 A.C. 68 (H.L.).

<sup>85</sup> Convention for the Protection of Human Rights and Fundamental Freedoms art. 5, Apr. 11, 1950, 213 U.N.T.S. 221.

<sup>86</sup> Anti-terrorism, Crime and Security Act, 2001, c. 24 (Eng.).

<sup>87</sup> *A & Ors v. Secretary of State for the Home Department*, [2004] UKHL 56, [2005] 2 A.C. 68 (H.L.).

<sup>88</sup> *Id.* at [44].

<sup>89</sup> Human Rights Act, 1998, c. 42 (Eng.).

<sup>90</sup> See Adam Tomkins, *Readings of A v Secretary of State for the Home Department*, PUB. L. 259 (2005); TOM HICKMAN, PUBLIC LAW AFTER THE HUMAN RIGHTS ACT 339 (2010).

<sup>91</sup> See Tomkins, *supra* note 90.

<sup>92</sup> See *id.*

<sup>93</sup> HICKMAN, *supra* note 90.

<sup>94</sup> *A & Ors v. Secretary of State for the Home Department*, [2004] UKHL 56, [2005] 2 A.C. 68 (H.L.).

“immediate aftermath”<sup>95</sup> of the unforgettable events of 9/11. In view of how recent the attacks then were, how sensitive the intelligence on which the national security assertions were based, and how fatal the consequences could have been if the House of Lords had wrongly ruled against the government when the crisis was still fresh, should the House of Lords have ruled that there was no such public emergency merely because they were not invited to view the closed material? As opined by Baroness Hale:

But any sensible court, like any sensible person, recognises the limits of its expertise. Assessing the strength of a general threat to the life of the nation is, or should be, within the expertise of the Government and its advisers. They may, as recent events have shown, not always get it right. But courts too do not always get things right. It would be very surprising if the courts were better able to make that sort of judgment than the Government.<sup>96</sup>

On the other hand, some scholars have found “a trace of schizophrenia”<sup>97</sup> in the majority’s position, insofar as the Law Lords had subsequently ruled that the national security measures taken were not strictly required by the exigencies of the situation.<sup>98</sup> This view is also misconceived. The Law Lords in *A & Ors* were fully justified to rule against the Government because there was clear and convincing evidence available that underscored the irrationality of the impugned State measures.<sup>99</sup> Firstly, the Government conceded that the threat posed by international terrorism was not limited to foreigners; indeed almost 30 percent of the terrorist suspects in the year prior to the *A & Ors* decision had been British citizens.<sup>100</sup> If measures short of detention without trial were sufficient to deal with the threats posed by such a significant number of British terrorist suspects, it should equally suffice for foreign suspects.<sup>101</sup> More importantly, these foreign suspects, even if certifiably dangerous, were allowed to leave for other countries as near as France, where any surveillance of their actions

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<sup>95</sup> *Id.* at [226].

<sup>96</sup> *Id.*

<sup>97</sup> See Thomas Poole, *Courts and Conditions of Uncertainty in ‘Times of Crisis’*, PUB. L. 234 (2008).

<sup>98</sup> *A & Ors v. Secretary of State for the Home Department*, [2004] UKHL 56, [2005] 2 A.C. 68 (H.L.).

<sup>99</sup> *Id.*

<sup>100</sup> See PRIVY COUNSELLOR REVIEW COMMITTEE, ANTI-TERRORISM, CRIME AND SECURITY ACT 2001 REVIEW: REPORT, 2003-4, H.C. 100-I (Eng.), available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/251096/100.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/251096/100.pdf).

<sup>101</sup> See Tomkins, *supra* note 90, at 262.



would pose additional problems.<sup>102</sup> This possibility seriously undermined the State's case for indefinite detention. Unlike the previous question of whether the United Kingdom was in a state of public emergency, the House of Lords herein had access to sufficient evidence to make an informed determination against the Government. It is also important to note that the Law Lords in *A & Ors* did not forbid the executive from detaining terrorist suspects of *all* nationalities<sup>103</sup> (British or otherwise) indefinitely without trial. In view of the available information they had about the irrationality of the existing State measures, the House of Lords merely ruled against the Executive's choice to only detain indefinitely foreign suspects who could not be deported to other countries.<sup>104</sup> Seen under this light, the *A & Ors* decision neither encapsulated a "muscular approach"<sup>105</sup> to human rights nor did it mark the beginnings of a "much belated judicial awakening."<sup>106</sup> *A & Ors* is in fact a careful and rational judgment where the Law Lords took account of its institutional deficits and ruled according to the evidence they had.

The House of Lords continued to display this strand of judicial pragmatism in the sequel to the *A & Ors* decision. In *A v. Secretary of State for the Home Department (No. 2)*,<sup>107</sup> the Law Lords had to determine, *inter alia*, whether the UK courts could receive evidence which had (or could have) been procured by torture inflicted by foreign officials, without the complicity of the British authorities.<sup>108</sup> The House unanimously held that a common law exclusionary rule existed that would prohibit the admission of this foreign torture evidence.<sup>109</sup> However, one must examine closely what the Law Lords actually decided. The Law Lords did not state that it would be a violation of the HRA for the government to statutorily authorize the reception of such evidence. Instead, the Law Lords merely held that such evidence could not be judicially received "in the absence of express [statutory] language or necessary implication to the contrary."<sup>110</sup>

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<sup>102</sup> *A & Ors v. Secretary of State for the Home Department*, [2004] UKHL 56, [2005] 2 A.C. 68 (H.L.) [44].

<sup>103</sup> Arguably, among all of the Law Lords in *A*, only Lord Scott seemed to suggest that indefinite detention without trial would also have not been strictly required by the public emergency, even if British nationals were also detained. His Lordship opined that the Home Secretary would still have to show that monitoring arrangements or movement restrictions would not suffice. *Id.* at [155].

<sup>104</sup> *Id.* at [44].

<sup>105</sup> *See de Londras & Davis, supra* note 5.

<sup>106</sup> *Id.* at 263.

<sup>107</sup> *A v. Secretary of State for the Home Department (No. 2)*, [2005] UKHL 71, [2006] 2 A.C. 221 (H.L.).

<sup>108</sup> *Id.* at [1].

<sup>109</sup> *Id.* at [52].

<sup>110</sup> *Id.* at [51].

Furthermore, the government remained free to arrest, search, or detain persons on the strength of such foreign torture evidence.<sup>111</sup> The common law exclusionary rule would also not bar any judicial reliance on evidence that was procured by inhuman or degrading treatment, short of torture.<sup>112</sup>

The only rift between the Law Lords in *A (No. 2)* was over the test to be applied by the courts in determining whether the foreign evidence was tainted by torture.<sup>113</sup> In the end, Lord Hope's more conservative stance carried the day. The practical distinction between the majority approach (Lords Hope, Rodger, Carswell, and Brown) and minority position (Lords Bingham, Nicholls and Hoffmann) was summarized as follows: "[I]f the SIAC [Special Immigration Appeals Commission] is left in doubt as to whether the evidence was obtained [by torture], it should admit it . . . Lord Bingham's position . . . is that if it is left in doubt SIAC should exclude the evidence."<sup>114</sup>

The House of Lords' arguably equivocating approach toward human rights may lead some to view the Court's moral condemnation of torture as no more than the "vacuous sound of dutifully paid lip-service."<sup>115</sup> But one should examine more closely the rationale for the majority's position before one casts judgment. As observed by Lord Hope:

The circumstances in which the information [alleged foreign torture evidence] was first obtained may be incapable of being detected at all or at least of being determined without a long and difficult inquiry which would not be practicable. So it would be unrealistic to expect SIAC to demand that each piece of information be traced to its ultimate source and the circumstances in which it was obtained investigated so that it could be proved piece by piece, that it was not obtained under torture. The threshold cannot be put that high. Too often we have seen how the lives of innocent victims and their families are torn apart by terrorist outrages. Our revulsion against torture . . . must not be allowed to create an insuperable barrier for those who are doing their honest best to protect us.<sup>116</sup>

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<sup>111</sup> *Id.* at [47].

<sup>112</sup> *Id.* at [53].

<sup>113</sup> *Id.* at [118].

<sup>114</sup> *Id.*

<sup>115</sup> Nathan Rasiyah, *A v Secretary of State for the Home Department (No 2): Occupying the Moral High Ground?*, 69(6) MOD. L. REV. 995, 1005 (2006).

<sup>116</sup> *A v. Secretary of State for the Home Department (No. 2)*, [2005] UKHL 71, [2006] 2 A.C. 221 (H.L.) [119].

The judiciary neither has the institutional advantage over the British intelligence agencies in acquiring and verifying the source of the disputed evidence, nor can it compel the executive to reveal the details of its processes and methods of inquiries. In light of all these epistemic conditions of uncertainty, it would have been foolhardy for the courts not to defer to the executive's assessment of the evidence's admissibility when judges are left in doubt as to whether it was obtained by foreign torture.

*Gillan, R v. Commissioner of Police for the Metropolis & Anor*,<sup>117</sup> another House of Lords decision, was subject to much academic criticism.<sup>118</sup> In that case, the Law Lords unanimously upheld Section 44 of the Terrorism Act 2000,<sup>119</sup> which provided that a senior police officer could authorize the use of blanket stop and search powers in a designated area if he or she considered it expedient for the prevention of terrorism, i.e. the police did not need to have reasonable grounds for suspecting that the person searched was involved in terrorist activity.<sup>120</sup>

Even though there were no allegations of discrimination in the particular stops and searches under challenge, a few Law Lords went on and addressed the issue of ethnic-profiling in the counter-terrorism context.<sup>121</sup> According to Lord Hope and Lord Brown, persons could not be stopped and searched merely because they appeared to be of Asian heritage; however, the police could rely on a person's ethnic origin as an indicator so long as other factors—*e.g.* age and behavior—were considered too.<sup>122</sup>

Civil libertarians, like Daniel Moeckli, accept that the prevention of terrorism is a legitimate governmental interest; for them the central issue was whether reliance on ethnic origin when determining whom to stop and search could be deemed a proportionate means to achieve that goal.<sup>123</sup> In determining this, Moeckli observed that the following questions are particularly relevant:

Does the use of ethnicity reflect specific intelligence or just unexamined assumptions? Are terrorist profiles based on

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<sup>117</sup> *Gillan, R v. Commissioner of Police for the Metropolis & Anor*, [2006] UKHL 12, [2006] 2 A.C. 307 (H.L.).

<sup>118</sup> See Daniel Moeckli, *Stop and Search Under the Terrorism Act 2000: A Comment on R (Gillan) v Commissioner of Police for the Metropolis*, 70(4) MOD. L. REV. 659 (2007).

<sup>119</sup> Terrorism Act, 2000, c. 2., § 44 (Eng.).

<sup>120</sup> *Gillan, R v. Commissioner of Police for the Metropolis & Anor*, [2006] UKHL 12, [2006] 2 A.C. 307 (H.L.) [64]-[65].

<sup>121</sup> *Id.* at [91].

<sup>122</sup> *Id.* at [45], [91].

<sup>123</sup> See Moeckli, *supra* note 118.

ethnic appearance accurate? . . . . Are stop and searches based on ethnic profiling effective?<sup>124</sup>

While these are very valid questions, Moeckli's subsequent criticisms of the Court missed the mark. He castigated the Law Lords for not providing evidence in support of the alleged link between Asian appearance and increased likelihood of involvement in terrorist activities. He also concluded that the use of such stop-and-search powers was unsuccessful because such stops had led to only five arrests in connection with terrorism.<sup>125</sup>

With regard to the first objection, one must note that the Home Office offered, subject to procedural safeguards, to explore with the claimants its reasons for authorizing the use of stop-and-search powers, but the latter had rejected this offer.<sup>126</sup> As Lord Scott observed, one could hardly expect the judiciary to invalidate the stop-and-search authorization on the basis of an alleged disproportionate nature of that response to a perceived threat of terrorism, without the court having had the chance to review the intelligence on which this assessment was based.<sup>127</sup> This is especially true since it was the claimants themselves who had effectively denied the Court this opportunity of reviewing the material in the first place.<sup>128</sup> Moreover, whether the police's use of ethnic-profiling was justified would depend on the circumstances of each case, and, since discrimination was not alleged by the claimants, there was no need for the Court to provide a more complete response on the issue. All the Court did was clarify that there was no per se rule against the police's use of ethnic origin as an indicator.

With regard to the second objection, Moeckli had wrongly assumed that a certain police measure was unsuccessful merely because the arrest rates were low. In deciding whether these stop-and search powers are effective, one must not discount the deterrent value of such measures in preventing crime in the first place.

Furthermore, it must be noted that this House of Lords decision was handed down within months of the London bombing in 2005. When a terror-related crisis has just occurred, it is not irrational for courts to be more deferential to the executive on national security determinations, as judges do not have the benefit of hindsight in assessing the severity of this new

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<sup>124</sup> *Id.* at 666.

<sup>125</sup> *Id.* at 667-68.

<sup>126</sup> *Gillan, R v. Commissioner of Police for the Metropolis & Anor*, [2006] UKHL 12, [2006] 2 A.C. 307 (H.L.) [64].

<sup>127</sup> *Id.* at [63].

<sup>128</sup> *Id.* at [64].

developing threat. The judicial choice to defer in *Gillan* was especially not unreasonable as these searches, though annoying or distressing to the persons concerned, were short-lived and were “not an interference of the same order as, for example, an indefinite detention on undisclosed grounds.”<sup>129</sup> One must note that the author is in no way trivializing the stigmatization and alienation certain ethnic groups may feel against law enforcement agents; the author’s only point herein is that the Law Lords’ choice in *Gillan* to defer on the specific facts before them was not wrong at law.<sup>130</sup>

Turning to the series of “control order” cases in 2007, while some may lament that the House of Lords had legitimized this system in general,<sup>131</sup> one must also note that the Law Lords were careful in scrutinizing whether the specific curfews in question were excessive. So whereas an eighteen-hour curfew was considered an unlawful deprivation of the controlled persons’ liberty,<sup>132</sup> twelve-hour<sup>133</sup> and fourteen-hour<sup>134</sup> curfews were held not to be. The House of Lords refused to accept that the absence of a realistic prospect of prosecution was a condition precedent to the issue of a non-derogating control order. Nevertheless, the Court held that there was an implicit continuing duty on the Secretary of State to periodically inquire whether this prospect had increased with time, and it was incumbent on the Secretary to provide the police with material that might be relevant to any reconsideration of prosecution.<sup>135</sup> In the same vein, a majority of the House of Lords in *Secretary of State for the Home Department v. MB*<sup>136</sup> also accepted that the right to a fair trial as protected under Article 6 of the European Convention of Human Rights did not impose a per se rule against the use of closed materials, and it would be up to the trial judge to decide whether the fair trial requirements were met in the circumstances of any particular control-order proceeding.<sup>137</sup> Central to all of these decisions was the Court’s fundamental concern about finding a

<sup>129</sup> *Id.* at [63].

<sup>130</sup> The ECHR ruled that Section 44 of the Terrorism Act was a violation of the claimants’ right to a private life, and it has been replaced by Section 47A of the Protection of Freedoms Act 2012, which requires a senior police officer to have a reasonable suspicion that an act of terrorism will take place before he or she can authorize stops and searches of vehicles and persons. *Gillan and Quinton v. UK*, 50 Eur. Ct. H.R. 45 (2010).

<sup>131</sup> See K. D. Ewing & J. Tham, *The Continuing Futility of the Human Rights Act*, PUB. L. 668 (2008).

<sup>132</sup> *Secretary of State for the Home Department v. JJ*, [2007] UKHL 45, [2008] 1 A.C. 385 (H.L.).

<sup>133</sup> *Secretary of State for the Home Department v. E*, [2007] UKHL 47, [2008] 1 A.C. 499 (H.L.).

<sup>134</sup> *Secretary of State for the Home Department v. AF*, [2009] UKHL 28, [2010] 2 A.C. 269 (H.L.).

<sup>135</sup> *Secretary of State for the Home Department v. E*, [2007] UKHL 47, [2008] 1 A.C. 499 (H.L.) [16]-[18].

<sup>136</sup> *Secretary of State for the Home Department v. MB* [2007] UKHL 46, [2008] 1 A.C. 440 (H.L.).

<sup>137</sup> *Id.* at [74].

solution “which occupies the moral high ground but at the same time serves the public interest and is practicable.”<sup>138</sup>

As time has passed since the crisis mentality gripped the nation in 2005, one may now notice a gradual upsurge in judicial intervention. In *Secretary of State for the Home Department v. AF*,<sup>139</sup> the House of Lords overturned its central holding in *MB* and held that the fair trial requirements would never be satisfied if the case against the controlee was based to a decisive degree on closed materials, regardless of how cogent these closed materials were.<sup>140</sup> This judicial change of mind in 2009 largely hinged on two main factors: (1) in *AF*, for the first time in public, the House of Lords had the benefit of full submissions by the special advocates about the operations of closed control order hearing, and it was revealed that even the special advocates had very limited informational access to these closed materials; and (2) the Grand Chamber in *A v. United Kingdom*<sup>141</sup> had since ruled that the fair trial requirements would be violated in circumstances where the case against the controlled person was primarily based on closed materials.<sup>142</sup> As the Court receives new and more complete information about how a control order proceeding is conducted, and as the country continues to remain free from new attacks on British soil, the Court, with the passage of time, rightly recalibrates its intensity of review over executive action in such matters.

It is thus unsurprising that by 2010, the Supreme Court, in *Secretary of State for the Home Department v. AP*,<sup>143</sup> was ready to rule against a sixteen-hour curfew on a controlled person, coupled with an order of forced relocation to an address 150 miles from his family.<sup>144</sup> By then, the Court was also less prepared to accept at face value the Secretary’s claim that forced relocation was the only way of reducing the chances of the controlled person’s contact with his associates who may be Islamic extremists,<sup>145</sup> given that other options were not explored and because of the profound impact such social isolation had on the individual.<sup>146</sup> Even then, the Court has been equally cautious not to extend the *AF* principle to all statutorily authorized

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<sup>138</sup> *A v. Secretary of State for the Home Department* (No. 2), [2005] UKHL 71, [2006] 2 A.C. 221 (H.L.) [100].

<sup>139</sup> *See Secretary of State for the Home Department v. AF*, [2009] UKHL 28, [2010] 2 A.C. 269 (H.L.).

<sup>140</sup> *Id.* at [119].

<sup>141</sup> *A v. United Kingdom*, App. No. 3455/05, 49 Eur. H.R. Rep. 29 (2009).

<sup>142</sup> *See Kavanagh, supra* note 43.

<sup>143</sup> *Secretary of State for the Home Department v. AP*, [2010] UKSC 24, [2011] 2 A.C. 1.

<sup>144</sup> *Id.* at [7].

<sup>145</sup> *Id.* at [93].

<sup>146</sup> *Id.* at [10], [21].

“closed” material procedures (“CMPs”).<sup>147</sup> In *Tariq v. Home Office*,<sup>148</sup> the Supreme Court refused to impose an absolute requirement that the claimant, an immigration officer who was dismissed after his security clearance was withdrawn for national security reasons, be personally informed of the allegations made against him in sufficient detail when he sued the State before the Employment Tribunal, which had been statutorily authorized to use CMPs.<sup>149</sup> Unlike in *AF*, the Court in *Tariq* noted that the applicant was not faced with the prospect of severe restrictions on his personal liberty (unlike the claimants in *A & Ors*), as he was merely seeking damages against the State in a civil suit on discrimination.<sup>150</sup> The Court thus preferred to tilt the balance in favor of preserving the integrity of the security vetting process and protecting the State from potentially costly unmeritorious claims.<sup>151</sup>

Similarly, in the early years following the London bombing, the House of Lords was prepared to subject foreign terror suspects that were being deported to non-Member States of the Convention to lower standards of human rights protection. This is because the Court did not want to be “in the position to regulate the conduct of trials in the foreign countries from which aliens come and to which they may have to be deported.”<sup>152</sup> It is evident that the Law Lords, in light of the epistemic uncertainties we discussed earlier, were deferring to the State’s determination that these foreign nationals were national security threats and should be removed.<sup>153</sup>

By 2012, the Supreme Court was ready to secure a fairer hearing for such suspects before they were deported.<sup>154</sup> In *W (Algeria) v. Secretary of State for the Home Department*,<sup>155</sup> the Supreme Court held that, in order for courts to obtain all information needed to make a correct determination, SIAC could make an absolute and irreversible order of non-disclosure, prohibiting the Secretary of State from ever revealing the evidence or identity of a witness called by the applicant resisting deportation on the

<sup>147</sup> *A v. Secretary of State for the Home Department* (No. 2), [2005] UKHL 71, [2006] 2 A.C. 221 (H.L.) [31].

<sup>148</sup> *Tariq v. Home Office*, [2011] UKSC 35, [2012] 1 A.C. 452.

<sup>149</sup> *Id.* at [69], [83].

<sup>150</sup> *Id.* at [27], [81]-[82].

<sup>151</sup> *Id.* at [79], [81].

<sup>152</sup> *RB (Algeria) v. Secretary of State for the Home Department*, [2009] UKHL 10, [2010] 2 A.C. 110 (H.L.) [197].

<sup>153</sup> *Id.* at [153]; *but cf.* *Othman v. U.K.*, App. No. 8139/09, 55 Eur. H.R. Rev. 1 (2012) (In disagreement, the ECHR ruled that the foreign nationals’ right to a fair trial would be violated if they were deported.).

<sup>154</sup> *W (Algeria) v. Secretary of State for the Home Department*, [2012] UKSC 8, [2012] 2 A.C. 115.

<sup>155</sup> *Id.*

ground that the witness would be treated poorly back home.<sup>156</sup> But notwithstanding this laudable act of judicial moderation, pragmatism equally prevailed as the Court decided that such orders should be sparingly granted and that the Secretary, for national security reasons, may also seek to obtain a waiver from the non-disclosure order.<sup>157</sup> In a concurring opinion, Lord Dyson also emphasized that such a non-disclosure order would unlikely be granted in circumstances where breaches of other articles of the Convention that are perceived to be less fundamental in nature—*e.g.* the right to family life<sup>158</sup>—are alleged.<sup>159</sup>

This judicial sensitivity to national security considerations is most pronounced in disputes where the Court is asked to review the conduct of the government in the battlefield. In *Secretary of State for Defence v. Al-Skeini & Ors*,<sup>160</sup> the House of Lords held that five Iraqi applicants, who were allegedly killed by British troops on patrol in the U.K.-occupied territory of Basra, could not bring a Convention<sup>161</sup> claim against the British government because Basra was not within Britain's effective control for the applicants to be within the jurisdiction of the U.K.<sup>162</sup> In particular, Lord Rodger, who wrote the leading judgment, accepted the evidence of senior British officers on the ground that "the available British troops faced formidable difficulties due to terrorist activity, the volatile situation and the lack of any effective Iraqi security forces."<sup>163</sup> Nevertheless, the Court accepted that a sixth applicant, who was killed in a U.K. military detention facility in Basra, was within the UK's jurisdiction.<sup>164</sup> One must note that this jurisdictional point was first conceded by the government.<sup>165</sup> As astutely observed by Marko Milanovic, this case underscored the tensions in the policy considerations underpinning the law: the House of Lords did not want to open the floodgates of litigation by micromanaging the use of force in the battlefield; however, no national security concerns justified the killing of a defenseless

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<sup>156</sup> *Id.* at [18].

<sup>157</sup> *Secretary of State for the Home Department v. AP*, [2010] UKSC 24, [2011] 2 A.C. 1 [21].

<sup>158</sup> *Id.* at [38].

<sup>159</sup> For a critique of this case, see Hayley J. Hooper, *The Lesser of Two Evils*, 128 L. Q. REV. 511 (2012).

<sup>160</sup> *Secretary of State for Defence v. Al-Skeini & Ors*, [2007] UKHL 26, [2008] A.C. 153.

<sup>161</sup> *Convention for the Protection of Human Rights and Fundamental Freedoms*, 213 U.N.T.S. 221 (1950), Article 2(1). Article 2(1) states: "Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law."

<sup>162</sup> The ECHR has since ruled that all the applicants were under the United Kingdom's jurisdiction, as the British government had exercised public powers in Iraq. *Al-Skeini v United Kingdom*, App. No. 55721/07, 53 Eur. H.R. Rep. 18 (2011).

<sup>163</sup> *Id.* at 83.

<sup>164</sup> *Secretary of State for Defence v. Al-Skeini & Ors*, [2007] UKHL 26, [2008] A.C. 153 (H.L.) [83].

<sup>165</sup> *Id.* at [61].



prisoner detained in a British facility.<sup>166</sup> In the same vein, in *Al-Jedda v. Secretary of State for Defence*,<sup>167</sup> the House of Lords accepted that the UN Security Council Resolution 1546 could qualify a detainee's Convention rights.<sup>168</sup> Professor Kent Roach has since expressed concern that the House of Lords allowed the Security Council Resolution to displace human rights obligations in the Convention;<sup>169</sup> however, the Law Lords' ruling was in fact more minimalistic and narrower than Roach had perceived it to be. As observed by Lord Bingham—who wrote the leading judgment—the Resolution authorized the UK government to lawfully detain persons, where it was necessary, for imperative reasons of security, but their Convention rights could not be “infringed to any greater extent than is inherent in such detention.”<sup>170</sup> Their Lordships were silent on whether the specific detention in question was no more than necessary.<sup>171</sup> The judicial choice to reserve judgment on this important issue was most emphatically underscored by Baroness Hale in the following terms:

We have devoted little attention to the precise scope of the authorisation. There must still be room for argument about what is precisely covered by the resolution and whether it applies on the facts of this case. Quite how that is to be done remains for decision in the other proceedings.<sup>172</sup>

In the same vein, the House of Lords in *R (Gentle) v. The Prime Minister*<sup>173</sup> unanimously rejected the argument that the right to life as protected under Article 2 of the Convention imposed a duty on the State to take timely steps to obtain reliable legal advice before committing its troops to armed conflicts overseas.<sup>174</sup> In particular, Lord Bingham, who wrote the leading judgment, emphasized as follows: “Thus the restraint traditionally shown by the courts in ruling on what has been called high policy—peace and war, the

<sup>166</sup> See Marko Milanovic, *Al-Skeini and Al-Jedda in Strasbourg*, 23 EUR. J. INT'L L. 121 (2012).

<sup>167</sup> *Al-Jedda, R v. Secretary of State for Defence*, [2007] UKHL 58, [2008] 1 A.C. 332.

<sup>168</sup> *Id.* at [152].

<sup>169</sup> See ROACH, *supra* note 1, at 296.

<sup>170</sup> *Al-Jedda, R v. Secretary of State for Defence*, [2007] UKHL 58, [2008] 1 A.C. 332 [39].

<sup>171</sup> The ECHR held that the applicant was unlawfully detained, as the presumption that the Security Council does not intend to impose any obligation on Member States to breach fundamental principles of human rights had not been rebutted, and hence the House of Lords was wrong to assume that the Resolution required the use of internment. *Al-Jedda v. United Kingdom*, App. No. 27021/08, 53 Eur. H.R. Rev. 23 (2011)

<sup>172</sup> *Al-Jedda, R v. Secretary of State for Defence*, [2007] UKHL 58, [2008] 1 A.C. 332 [129].

<sup>173</sup> *R (Gentle) v. The Prime Minister*, [2008] UKHL 20, [2008] 1 A.C. 1356.

<sup>174</sup> *Id.* at [60].

making of treaties, the conduct of foreign relations—does tend to militate against the existence of the right.”<sup>175</sup>

As the national security emergency wanes with time, like the control-order disputes, the Court has become comparatively more assertive vis-à-vis the executive.<sup>176</sup> In *Secretary of State for Foreign and Commonwealth Affairs v. Yunus Rahmatullah*,<sup>177</sup> the Supreme Court unanimously held in late 2012 that the British government was required to request the return of Rahmatullah, a Pakistani captured by British forces in Iraq, from the Americans, who had transferred him to Afghanistan without the United Kingdom’s approval.<sup>178</sup> Interestingly, the Court did not consider this intervention as a form of judicial intrusion into foreign affairs. Instead, Lord Kerr, who wrote the leading judgment, observed that the grant of habeas corpus did not require the British government “to act in any particular way in order to demonstrate whether they could or could not exert control”<sup>179</sup> over Rahmatullah, as the government was merely required to establish whether such control existed in fact.<sup>180</sup> However, as Professor Kent Roach has pointed out, this argument is unconvincing, as the only realistic way for the United Kingdom to establish whether it had effective control over Rahmatullah was for the courts to actively require the British government to request the United States to return him to U.K. custody.<sup>181</sup> Nevertheless, by a five-to-two majority, the Court refused to further review the adequacy of Britain’s subsequent diplomatic moves and accepted that the U.K. government had made a bona fide—albeit unsuccessful—attempt to secure Rahmatullah’s return from the United States.<sup>182</sup> While some critics may lament that the light of the rule of law has not penetrated far enough into the dark and murky waters of national security,<sup>183</sup> one must concede that *Rahmatullah* is ground-breaking so far as the Court has indeed treaded into the traditionally forbidden terrains of foreign relations.

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<sup>175</sup> *Id.* at [8].

<sup>176</sup> See *Secretary of State for Foreign and Commonwealth Affairs v. Rahmatullah*, [2012] UKSC 48, [2013] 1 A.C. 614 (S.C.).

<sup>177</sup> *Id.*

<sup>178</sup> *Id.* at [63].

<sup>179</sup> *Id.* at [60].

<sup>180</sup> *Id.* at [63].

<sup>181</sup> See Kent Roach, *Substitute Justice? Challenges to American Counterterrorism Activities in Non-American Courts*, 82 *Miss. L. J.* 907 (2013).

<sup>182</sup> *Secretary of State for Foreign and Commonwealth Affairs v. Rahmatullah*, [2012] UKSC 48, [2013] 1 A.C. 614 [85].

<sup>183</sup> See Hayley J. Hooper, *Shining Light on the Darkness?*, *PUB. L.* 213 (2013).

## IV. CONCLUSION

In the foregoing analysis, this article attempts to account for why the Court has been seemingly inconsistent on national security policy. In essence, the Court, like all other appellate courts, is cognizant of the institutional advantages and disadvantages of its office.<sup>184</sup> While the Court understands that it has the advantage of independence from the immediate political environment, which makes it less likely to be biased against unpopular claimants, this insulation also poses an institutional problem for the Court. The judiciary is limited by its access to the information possessed by the executive and an under-appreciation of the interlocking consequences of individual decisions, as well as its inability to react swiftly to changing circumstances.<sup>185</sup> This institutional dilemma is inherent in all disputes, but it is particularly heightened in national security controversies, where the consequences of any judicial errors can be catastrophic for the nation.

Critics of judicial deference in times of war often frame the problem as a character failing (i.e. judges need to have more courage), but in truth, there are deeper institutional reasons for deference that consistently lead judges to define their roles in specific ways during times of crisis.<sup>186</sup> On the other hand, executive unilateralists overvalue the informational handicap of the courts and pay insufficient credence to the incentives the executive has in prolonging the length of an emergency measure or exaggerating its necessity. In reality, the Court has avoided either extreme position.<sup>187</sup> When a new emergency surfaces, judges defer, as they are aware that the stakes are high and their information limited; this need to defer diminishes when the observable events giving rise to the crisis recedes and the Court obtains more information that narrows the epistemic gap between the judiciary and the executive.<sup>188</sup> Therefore, in practice, the Court is neither “awestruck by the mantra of national security,”<sup>189</sup> nor is it oblivious to the dangers of applying no deference in the review of national security disputes.

In the final analysis, the false belief that either the legislature or the judiciary may singularly and sufficiently defend the constitutional values of a society imposes a burden that neither branch of government can bear.<sup>190</sup> It

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<sup>184</sup> See *supra* Part III.

<sup>185</sup> POSNER & VERMEULE, *supra* note 8, at 44.

<sup>186</sup> See Samuel Issacharoff & Richard H. Pildes, *Emergency Contexts without Emergency Powers: The United States' Constitutional Approach to Rights During War Time*, INT'L J. CONST. L. 296, 332 (2004).

<sup>187</sup> See *supra* Part III.

<sup>188</sup> See *supra* Part III.

<sup>189</sup> See Kavanagh, *supra* note 20, at 207.

<sup>190</sup> See Yap, *supra* note 78.

sets up unrealistic expectations that only invite disappointments or, worse, court disasters.<sup>191</sup> Constitutional interpretation relies on “judgment, not algorithm; it requires judicial self-discipline, located within a particular community’s interpretive traditions, and [is] based on an appreciation for the limited but important role of judges in a democracy.”<sup>192</sup> In seeking to meet the evolving challenges of national security while protecting the fundamental values of a civilized society, the Court must continue to weave this legal narrative that conjoins the best in both administration and adjudication.

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<sup>191</sup> See NEAL E. DEVINS & LOUIS FISHER, *THE DEMOCRATIC CONSTITUTION* 239 (2004).

<sup>192</sup> Vicki C. Jackson, *Multi-Valenced Constitutional Interpretation and Constitutional Comparisons: An Essay in Honor of Mark Tushnet*, 26 QUINNIPIAC L. REV. 599, 637 (2008).