



JUDGES KEEP OUT OFF-THE-BENCH INFLUENCE ON THE UK'S ANTI- TERROR REGIME

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Executive summary

- This research provides the first systematic review of judicial impact on the UK's anti-terrorism policies off-the-bench. The anti-terror regime has evolved rapidly over the last 15 years, and the judiciary have had to adjudicate on this evolving body of legislation in the courts. Much has been written about these court decisions, with claims that the judiciary has increasingly overstepped the boundaries of their constitutional role. Much less attention has been paid to judges' potential influence beyond their decisions in court, where this reports finds that fears of judicial over-reach are unfounded.
- Extra-judicial contributions are, by definition, difficult to trace. Only some of these are on the public record. This report is based on analysis of parliamentary debates, evidence to committees and judicial speeches on anti-terrorism over the last 15 years, since 2000. This was supplemented by interviews with ten senior judges, politicians, civil servants and academics.
- The first part of the report explores the impact of extra-judicial comments on anti-terrorism policy. The second part explores judicial involvement in administering the anti-terrorism regime.
- Judges are primarily interested in elements of anti-terrorism which directly intersect with their areas of expertise, namely, the role of the judiciary, the administration of justice, and their relations with the executive.
- The report's key finding is that, even in these arenas, judicial figures have limited tangible impact on anti-terror policy. Outside of parliamentary debates, they have not sought to initiate any changes to the regime. Within parliamentary debates, the large majority of their proposed amendments have not been accepted. Their few successes have been on small technical points within much broader policies.
- More intangibly, the judiciary do influence the civil service in the development of anti-terrorism policies and legislation. Civil servants are keenly aware of potential judicial reactions to unconventional measures, although it is difficult to measure the extent of this, and to disentangle the relative impacts of judicial commentary on or off the bench.
- Judicial expertise is not being utilised as effectively as it might. This could change if the new Investigatory Powers Commission helps to provide a more effective collective voice for the judges involved in the supervision of the UK's anti-terror regime.

1. Introduction

Brief overview: anti-terror regime

The purpose of this report is to explore the judiciary's off-the-bench involvement in the United Kingdom's anti-terror regime. The UK is notable amongst liberal Western democracies for the rapid evolution of its anti-terror regime in the early 21st century.¹ Many ascribe this to the terrorist attacks of September 2001, and there is clear evidence that 9/11 directly inspired the introduction of anti-terrorist legislation in many European nations.²

For the UK however, this is not the whole story. Since the early 1800s, political strife in Northern Ireland has led to a focus on terrorism and measures to combat this. The United Kingdom's legislative response can be traced to the 1930s, with the Prevention of Violence Act 1939 (Temporary Provisions). This was repealed in 1973 and the ensuing series of Prevention of Terrorism Acts largely governed the state's engagement with terrorism in Northern Ireland in the latter part of the 20th century. These emergency pieces of legislation were temporary – they were initially subject to six-monthly, and later annual, renewal by parliament.³ They were designed to bolster the security forces' investigative and coercive powers in cases where they suspected terrorism, introducing measures such as indefinite internment, special arrest, search and detention powers, exclusion orders and the suspension of habeas corpus.⁴ These were then codified and made permanent with the Terrorism Act 2000.⁵

Against this legislative backdrop, individual members of the judiciary were involved in the construction of the anti-terror regime. Usually in response to a particular event or concern, judges have led inquiries and produced targeted recommendations. The 'Diplock Courts' are one well-known example, and were born out of Lord Diplock's recommendation in the 1972 Diplock Report that certain kinds of terrorism offences should be tried in ordinary courts but without a jury. Lord Widgery's assessment of Bloody Sunday is similarly famous, and debate still abounds as to whether this was a thorough analysis of events or a 'Widgery Whitewash' which aimed to vindicate the British army.⁶ Lord Parker provides another instance of direct judicial involvement. His examination of the legality of British interrogation techniques – more specifically the 'five techniques' of hooding, subjection to noise, prolonged wall-standing, deprivation of sleep and deprivation of food and drink – fed into government deliberations on the topic.⁷ The events of 9/11 certainly built on this strong legacy – the ensuing Anti-terrorism, Crime and Security Act 2001 is significant for its swift three-day passage through parliament and ECHR Article 5 derogation

¹ See, for example, M. Epifanio, 'Legislative Response to International Terrorism', *Peace Research* 48:3 (2011), pp.399–411; D. Haubrich, 'September 11, Anti-Terror Laws and Civil Liberties: Britain, France and Germany Compared', *Government and Opposition* 38:1 (2003), pp.3–28; J. Huysmans and J. Buonfino, 'Politics of Exception and Unease: Immigration, Asylum and Terrorism in Parliamentary Debates in the UK', *Political Studies* 56:4 (2008), pp.766–788.

² Mariaelisa Epifanio has created the dataset 'Legislative Response to International Terrorism' (LeRIT) which compares the regulatory response to international terrorism across 20 Western democracies (Epifanio, 'Legislative Response to International Terrorism').

³ D. Bonner, 'United Kingdom: The United Kingdom response to terrorism', *Terrorism and Political Violence* 4:4 (1992), p.179

⁴ M. Freeman, 'Terrorism and Civil Liberties in the United States: How to Have Both Freedom and Security', *Democracy and Security* 2:2 (2006), p.241.

⁵ C. Walker, *Blackstone's Guide to the Anti-Terrorism Legislation* (Oxford: Oxford University Press, 2014), pp.28–29.

⁶ See, for example, S. Ganderup, 'How White Was the Wash?: Bloody Sunday, 1972, and Memory in the Creation of the Widgery Report', *Chapman University Historical Review* 2:2 (2010).

⁷ S. Newbery, *Interrogation, Intelligence and Security: Controversial British Techniques* (Manchester: Manchester University Press, 2015).

on the grounds that the United Kingdom was indeed experiencing ‘times of war or other public emergencies’.⁸ This has been followed by the passing of further, and somewhat reactive, anti-terrorism legislation over the last 15 years.⁹ The overall effect is the Home Affairs Committee’s comment, as early as 2001, that ‘this country has more anti-terrorism legislation on its statute books than almost any other developed democracy’.¹⁰ This statement held true in 2008 when Lord Lloyd of Berwick told the House of Lords that ‘no other country in the world ... has had anything like the same plethora of [anti-terrorism] legislation that we have had’, and this is still accurate today.¹¹

If terrorism is defined simply as ‘the application of violence for political ends’ then, at their heart, anti-terror regimes aim to stop this.¹² The United Kingdom’s strategy CONTEST is fourfold and is usually known by the ‘4 Ps’:

- Pursue: To stop terrorist attacks
- Prevent: To stop people becoming terrorists or supporting violent extremism
- Protect: To strengthen our protection against terrorist attacks
- Prepare: Where an attack cannot be stopped, to mitigate its impact

Such measures can be categorised into three broad groups – civil methods, criminal justice approaches and special executive powers. Civil methods – primarily found in the ‘Protect’ and ‘Prepare’ strands – seek to strengthen the response to terrorist related emergencies. Criminal justice approaches and special executive powers focus more on terrorist perpetrators and suspects. Criminal justice aims to counter terrorism by tackling it within the broader criminal justice system, without ascribing a special status to terrorist offenders. They are therefore charged with offences from outside of the specific anti-terrorist legislative framework, for example, homicide under the Explosive Substances Act 1883.¹³ The difficulty here lies in the criminal justice system’s retrospective approach – evidence of criminal activity is evaluated after the event in order to determine whether an offence has been committed. By contrast, the nature of terrorism requires a preventative and risk-based approach. Many argue that special executive powers – succinctly defined by David Bonner as ‘the empowerment through law of the executive branch of government to take action affecting the rights of legal individuals’ – better meet these specific requirements.¹⁴ To take some recent examples, these include stop and search powers, various surveillance and detention measures, and procedural changes (closed material procedures). They are provided for through a specific body of anti-terrorism legislation, and it is this that forms the core body of legislative material for this report.

These powers are often based on pre-emptive intelligence rather than concrete evidence of terrorist activity, and have thus caused much controversy within legal academia and broader civil society. Clive Walker argues that the criminal justice system is preferable to executive disposals – a ‘focus on the Old Bailey rather than Belmarsh remains attractive’ – but notes that a risk-based approach is more appropriate

⁸ ECHR Art 15.

⁹ Walker, *Blackstone’s Guide*, pp.26–27.

¹⁰ Home Affairs Committee, *Report on the Anti-terrorism, Crime and Security Bill 2001*, HC 351 2001-02, November 2001, para 1.

¹¹ House of Lords Debates, 5th ser., vol. 703, col. 700, 8 July 2008.

¹² Walker, *Blackstone’s Guide*, p.1

¹³ *Ibid.*, p.211

¹⁴ D. Bonner, *Executive Measures, Terrorism and National Security: Have the Rules of the Game Changed?* (Aldershot: Ashgate, 2007), p.21.

in the context of terrorism.¹⁵ Both he and Lucia Zedner moreover note that the fundamental values of the criminal justice system more broadly are in danger of being ‘diluted by the normalisation of measures developed in respect of terrorism’.¹⁶

Anti-terrorist legislation has accordingly been the subject of much controversy in the courts. To take the most prominent example, the *Belmarsh* case ruled that executive powers under the Anti-terrorism Crime and Security Act 2001 were disproportionate, discriminatory and irrational. Part IV of this Act granted government ministers the power to order the indefinite detention of foreign nationals who were suspected of being an international terrorist without charge or trial. The minister would issue a certificate under s21 ATCSA 2001, declaring that the individual posed a threat to national security. If they could not be deported or removed for legal or practical reasons, the Act authorised their detention. The House of Lords found these powers to be disproportionate, discriminatory and irrational, and detention without trial was replaced by control orders under the Prevention of Terrorism Act 2005.¹⁷

Court judgments have therefore been influential in determining the United Kingdom’s anti-terror regime, and scholars have examined this extensively.¹⁸ Similarly, civil society organisations have undertaken exhaustive analyses of the regime and its impact on civil liberties, more often than not arguing that they unduly impinge upon the freedom of those individuals that the state suspects of terrorist activities.¹⁹ Most significantly, the Independent Reviewer of Terrorism Legislation is statutorily obligated to undertake annual reviews of key anti-terror measures and often compiles extra topical reports alongside these. This report does not seek to replicate such work and it engages with specific anti-terror measures only where they are relevant to the question of extra-judicial involvement.

Report outline

Judges are usually considered in their role as impartial decision makers – they interpret the law in light of a specific set of facts and produce a judgment. This report finds that judges have engaged with the United Kingdom’s evolving body of anti-terror legislation in a much broader sense in the last 15 years – through formal and informal channels, directly and indirectly. This extra-judicial, off-the-bench involvement has not yet been explored in any systematic way.

More specifically, the report delineates the various channels for extra-judicial engagement through words and actions. Chapter three outlines the avenues for direct extra-judicial statements on the anti-terror regime as a whole, and codes relevant judicial contributions according to their topic, nature and import. This allows the chapter to conclude that the judiciary’s interests focused primarily on their own areas of expertise, and that they had a minimal impact in formulating anti-terror policy. Chapter four examines extra-judicial involvement in administering the anti-terror regime, in relation to closed material procedures

¹⁵ Walker, *Blackstone’s Guide*, p.242

¹⁶ L. Zedner, ‘Securing Liberty in the Face of Terror: Reflections from Criminal Justice’, *Law and Society* 32:4 (2005), p.507.

¹⁷ *A and others v Secretary of State for the Home Department* [2004] UKHL 56

¹⁸ See, for instance, C. Gearty, ‘11 September 2001, Counter-terrorism and the Human Rights Act’, *Law and Society* 32:1 (2005), pp.18–33.

¹⁹ See, for instance, Liberty, ‘Overview of terrorism legislation’, <https://www.liberty-human-rights.org.uk/human-rights/countering-terrorism>, last accessed 4 October 2016.

(CMPs) and as judicial commissioners in the oversight of surveillance. It similarly finds that there was low judicial impact in the determination of these specific policy areas, but that judges have inadvertently influenced surrounding procedures and operations.

As well as contributing to an important gap in the literature, the practical value of this research is twofold. Its unconventional focus means that it uncovers a number of factors which are quietly influencing the anti-terror regime; but which, if better harnessed, have the capacity for much greater influence. As Clive Walker notes, as the state perceives itself ‘to live in an extraordinarily and increasingly threatening epoch, terrorism laws can anticipate a long and active life’.²⁰ Focus should therefore rest with producing legislation of a high quality. This means utilising all constitutionally viable resources, particularly when some – as will be discovered – are currently on offer from unexpected sources.

Moreover, this report builds on recent studies of political and judicial engagement in the United Kingdom.²¹ It provides a targeted case study of these interactions in a pertinent context and touches on broader constitutional questions around the function of the judiciary in a modern political climate.

The judiciary’s constitutional role

The judiciary’s function in relation to other branches of state is a matter of public debate, more specifically the extent to which the judiciary overstep their constitutional boundaries. The advent of judicial review means that political decisions are now entering the courtroom and Kate Malleson notes that whilst ‘judges are not politicians in wigs ... they are increasingly required to reach decisions...which cannot be resolved without reference to policy questions’.²² In his 2011 FA Mann Lecture, Lord Sumption was wary of this extended remit.²³ In his view, it has caused significant constitutional changes at the hands of the judiciary ‘which were not necessarily noticed or intended by their authors’.²⁴

The converse is also true – the judiciary must be free from any control by the executive and the legislature in order to achieve judicial independence.²⁵ Judges must be in a personal and professional position where they are able to impartially decide disputes, and this, it is argued, relies on a separation of powers.²⁶ Their situation, moreover, must inspire public confidence in this independence.²⁷

Opinions differ on how this independence is practically realised, and to what extent it should be.²⁸ Diana Woodhouse notes that beyond these somewhat theoretical requirements, there is ‘no agreed upon model

²⁰ C. Walker, *Terrorism and the Law*, (Oxford: Oxford University Press, 2011), p.51

²¹ G. Gee *et al.*, *The Politics of Judicial Independence in the UK’s Changing Constitution* (Cambridge: Cambridge University Press, 2015).

²² K. Malleson, ‘Rethinking the Merit Principle in Judicial Selection’, *Law and Society* 33:1 (2006), p. 126.

²³ Lord Sumption, ‘Judicial and Political Decision Making: The Uncertain Boundary’, FA Mann Lecture, 2011, *Judicial Review* 16:4 (2011), pp. 301–315.

²⁴ A. Horne, ‘The Changing Constitution: A Case for Judicial Confirmation Hearings?’, *Study of Parliament Group*, Paper No. 1 (2010).

²⁵ See, for instance, F. Cross, ‘Thoughts on Goldilocks and Judicial Independence’, *Ohio State Law Journal* 64:1 (2003), 195, pp.1 – 14; C. Saunders, ‘Separation of Powers and the Judicial Branch’, *Judicial Review* 11:4 (2006), pp. 337–347.

²⁶ Cross, ‘Thoughts on Goldilocks and Judicial Independence’, p.196.

²⁷ Judicial Office for Scotland, ‘Judicial Independence’, http://www.scotland-judiciary.org.uk/Upload/Documents/JudicialIndependence_2.pdf, last accessed 5 October 2016.

²⁸ Judicial independence is a contestable notion with ‘unusually wide’ scope for disagreement. For more information see Gee *et al.*, pp. 14 - 16

of judicial independence' and Frank Cross regards the concept as a 'dynamic' one.²⁹ Recent research from the Constitution Unit has taken this further, arguing that judicial independence is a product of the interactions between judges and politicians. Judicial independence does not exist despite engagements with the political arena, but because of it.³⁰ This understanding is implicit throughout this report; it does not seek to discredit judicial independence by highlighting extra-judicial involvement in the anti-terror framework. It instead highlights ways in which this independence can support and justify extra-judicial activities, often positively.

The report also utilises the distinction between individual and institutional judicial independence, in so much as it is relevant to the topic at hand. Broadly speaking, the former relates to a judge's impartial state of mind whilst the latter requires that the institutional operation of the judiciary as a body preserves their autonomy (for example, through salaries and pension arrangements).³¹ A former Lord Chief Justice Lord Phillips succinctly described it as such: 'In order to be impartial a judge must be independent; personally independent, that is free of personal pressures and institutionally independent, that is free of pressure from the State'.³²

The Constitution Unit's Politics of Judicial Independence project has charted the relative weight of these two approaches in recent British politics. Its output argues that the 2005 Constitutional Reform Act (CRA), which was intended by the government to 'redraw the relationship between the judiciary and the other branches of government and put it on a modern footing', led to a more formal separation of powers in England and Wales.³³ This placed a greater emphasis on institutional rather than individual judicial independence.³⁴

²⁹ D. Woodhouse, 'United Kingdom: The Constitutional Reform Act 2005 – Defending Judicial Independence the English Way', *International Journal of Constitutional Law* 5:1 (2007), p.164; Cross, 'Thoughts on Goldilocks and Judicial Independence', p. 196.

³⁰ Gee *et al.*, p.1.

³¹ See, for instance, Gee *et al.*; Judicial Office for Scotland, 'Judicial Independence'; J. Ferejohn, 'Dynamics of Judicial Independence: Independent Judges, Dependent Judiciary', speech at Stanford University, November 1998, <http://www.usc.edu/dept/law/symposia/judicial/pdf/ferejohn.pdf>, last accessed 5 October 2016.

³² Lord Phillips, 'Judicial Independence and Accountability: A View from the Supreme Court', speech at the Constitution Unit, London, February 2011, <http://www.ucl.ac.uk/constitution-unit/events/judicial-independence-events/lord-phillips-transcript.pdf>, last accessed 5 October 2016.

³³ Department for Constitutional Affairs, *Constitutional Reform: A Supreme Court for the United Kingdom*, Session 2002- 03, CP11/03, July 2003, para 1.

³⁴ Gee *et al.*, p. 5.

2. Methodology

The United Kingdom is notable amongst liberal western democracies for the rapid evolution of its anti-terrorism regime.³⁵ I selected key pieces of anti-terror legislation from the 21st century to analyse in detail:

- Terrorism Act 2000
- Anti-terrorism, Crime and Security Act 2001
- Prevention of Terrorism Act 2005
- Terrorism Act 2006
- Justice and Security (Northern Ireland) Act 2007
- Counter-Terrorism Act 2008
- Terrorist Asset-Freezing etc. Act 2010
- Terrorism Prevention and Investigation Measures Act 2011
- Justice and Security Act 2013
- Counter-Terrorism and Security Act 2015
- Draft Investigatory Powers Bill 2015

Where subsequent legislation amends these anti-terror measures, I analysed the relevant elements of these. The forthcoming Investigatory Powers Bill 2016 is discussed in the commentary but could not be analysed so systematically as, at the time of writing, it has not yet passed through parliament. My research focused on relevant committee reports and debates. The analysis was qualitative, particularly focusing on discussions about the role of judges in administering the anti-terror regime and judicial contributions to the debates themselves (during parliamentary debates in the House of Lords and in the form of committee evidence). I also coded these judicial contributions for their policy area and whether they were positive or negative about the government's approach. Where a judicial peer moved or vocally supported an amendment, I noted the eventual result of this amendment in order to better assess their impact.

As will be seen in the body of this research, the UK's anti-terror regime statutorily incorporates some key figures – an Independent Reviewer of Terrorism and three judicial commissioners (an Intelligence Services Commissioner, Chief Surveillance Commissioner and Interception of Communications Commissioner). This research engages where relevant with the parliamentary debates and committee reports around their appointment, in addition to these figures' annual reports.

To complement this data, I conducted ten semi-structured interviews with senior judges, politicians, civil servants and academics between October and December 2015. The focus was on leadership figures, and most had been directly involved in terrorism related endeavours as part of their career. The primary purpose of these confidential interviews was to help understand their contribution to the legislation, as well as to discover more hidden forms of judicial involvement and influence within the UK's anti-terror regime.

³⁵ See LeRIT data from Epifanio, 'Legislative response'; see also Home Affairs Committee, *Report on the Anti-terrorism, Crime and Security Bill 2001*.

This is not intended to be an exhaustive analysis of the UK's anti-terror regime, but an investigation of extra-judicial engagement with it. The legislative examples were chosen to facilitate the analysis of these judicial and political interactions, rather than to provide a self-sufficient and complete account of the United Kingdom's anti-terrorism regime. Where there are omissions in the dataset and subsequent discussion – for example, with regards to immigration legislation, devolved governments or powers such as pre-charge detention – this particular focus should be borne in mind.

3. Extra-judicial statements on anti-terror policy

Extra-judicial statements on government policy pose a constitutional risk, jeopardising key principles such as judicial independence and the separation of powers. This becomes even more challenging in the high profile context of the UK's anti-terror regime, and this chapter explores this in more detail.

The chapter firstly outlines those arenas that provide avenues for the expression of extra-judicial opinions. It then examines these in more detail – where information is available, I have coded judicial contributions according to their topic and nature. This allows for an assessment of extra-judicial interests and impact, and the chapter concludes that, on both counts, this is largely restricted to areas of the judges' expertise. More specifically, judges have the most interest in the administration of justice and the role of the judiciary in administering the anti-terror regime. This translates to relative impact – the judiciary have the most influence in these areas, but this does not necessarily mean that they have had much of an effect overall. In conducting this analysis, the chapter also identifies greater reticence from serving judges than their retired counterparts and seeks to briefly explain this.

It is worth noting that these contributions are, by definition, not the most clearly documented. Many of them take place between individuals and their existence is unlikely to be widely known, let alone recorded in an official manner. A portion of evidence for this chapter must therefore be anecdotal, and my interviewees were particularly integral here in disclosing information and providing wider background.

Avenues for extra-judicial engagement

Whilst judges strongly express their legal views from the bench, they tend to be much more circumspect in extra-judicial commentary for fear of recusal.³⁶ If a judge is biased, or gives rise to an apprehension of bias in a particular case, the doctrine of recusal can require them to stand down³⁷. The 'social logic of the courts' is called into question – the understanding that independent judges should be appropriately prepared to decide cases in an impartial manner based on nothing more than the relevant law and facts.³⁸ There are, nonetheless, a number of forums which make possible extra-judicial engagement on the question of terrorism.

Speeches

The question of what is appropriate for a judicial speech has been interpreted differently over time. The 1955 Kilmuir Rules dictated that judges maintain their impartial reputation by remaining silent on the 'controversies of the day'.³⁹ This position changed in 1987 – Lord Mackay felt that the Kilmuir rules were

³⁶ L. McNamara, 'Judicial Perspectives on Open Justice and Security', The Bureau of Investigative Journalism, October 12 2012, <https://www.thebureauinvestigates.com/2012/10/16/judicial-perspectives-on-open-justice-and-security/>, last accessed 5 October 2016.

³⁷ For further discussion, see Jasmin Moran, 'The Problems Caused by Extrajudicial Speech', *VUW Law Review* 46:2 (2015), pp. 453–494, and R. G. Hammond, *Judicial Recusal: Principles, Process and Problems* (London: Hart, 2009).

³⁸ Gee *et al.*, p. 10.

³⁹ Letter from Lord Kilmuir to Sir Ian Jacob K.B.E., 12 December 1955, reprinted in A. W. Barnett, 'Judges and the media – the Kilmuir rules', *Public Law* 383 (1986), p.385.

inconsistent with the principle of individual judicial independence and argued that ‘those who have been given her Majesty’s Commission for the discharge of judicial office should have the judgment to decide such matters for themselves’.⁴⁰

Lord Neuberger’s comments in March 2012 are the latest addition to this framework. He argues that the removal of judges from the legislature under the Constitutional Reform Act 2005 means that judges have fewer avenues to present their views. On topics where it is appropriate to do so – in particular the ‘functioning of the judicial branch of the State’ – they therefore have a duty to give their opinion in the form of extra-judicial speeches and the like. Nonetheless, he believes that these interactions should display ‘mutual respect’, particularly with regards to the executive, and outlines seven principles for extra-judicial comments.⁴¹ Broadly speaking, judges should have an awareness of judicial expertise, publicity, independence (individual and institutional), and the impact and currency that their comments hold over other branches of state and broader audiences.⁴² Key for the question of anti-terrorism, however, is Lord Neuberger’s continued insistence that judges ‘cannot comment on political matters or matters of public policy, but can rather comment on the practical consequences of policy choices’.⁴³

At this early stage, it is worth noting the constitutional distinction between retired and serving judges. They are not governed by such codes – no longer bound by the institutional separation of powers and the aforementioned individual fear of recusal, they are vocal and opinionated. One retired judge who currently sits in the House of Lords told me that ‘we don’t have much inhibition about intervening and expressing our views’.

Within the ranks of serving judges, interviewees further highlighted the importance of personality. The very decision to speak publicly or not – although it may be charted up to either constitutional caution or duty – is also influenced in part by individual preferences. There is large scope for individuals to develop their own reading of constitutional suggestions such as Lord Neuberger’s. One interviewee stated outright that ‘personalities are very important’ in this regard, whilst another more flippantly joked that ‘it is also just possible that some of us like to hear the sound of our own voice’. They also cited the correlation between those judges who had formerly worked as academics – who are accustomed to speaking and writing – and those who were most prolific in their extra-judicial speaking engagements.

Evidence to select committees

Judicial appearances before select committees can raise similar difficulties, and it is considered inappropriate for judges to contribute in a manner which could jeopardise their judicial activities. They are nonetheless a valuable resource and the level of judicial appearances before select committees is high. The Constitution Unit’s Politics of Judicial Independence project identified 148 records of oral evidence by 72 salaried UK judges between January 2003 and December 2013 (not necessarily related to the anti-terror regime).⁴⁴

⁴⁰ Lord Mackay (1993), *The Administration of Justice* (London: Stevens & Son/ Sweet & Maxwell, 1994), pp.25–26.

⁴¹ Lord Neuberger, ‘Where Angels Fear to Tread’, Holdsworth Club Presidential Address, March 2012, para 37, <https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Speeches/mr-speech-holdsworth-lecture-2012.pdf>, last accessed 5 October 2016.

⁴² *Ibid.*, paras 46–52.

⁴³ *Ibid.*, para 29.

⁴⁴ Gee *et al.*, p. 101.

House of Lords debates

In the past, the UK has been notable for the inclusion of serving senior judges as members of the legislature. They were strongly bound by convention to keep from expressing their personal views in legislative debates, and their participation had largely fallen away by the 21st century. Indeed, between 2000 and 2004 judicial contributions averaged four per year.⁴⁵ The Constitutional Reform Act 2005 has formalised the separation of powers, and there is now less overlap between the judiciary and legislature. The Act established a Supreme Court that assumed the jurisdiction of the Appellate Committee of the House of Lords, and serving judges are precluded from sitting in the legislative House of Lords. The House has nonetheless contained a number of retired judges throughout this period and their input is worth investigating.

Research

Judicial participation in research, albeit usually confidential, provides another avenue for engagement. Researchers discuss such topics in a rather more informal setting, encouraging a more forthcoming response from judicial interviewees, and their views find public readership in the final output. To take one example, a number of judges participated in the three-year Law, Terrorism and the Right to Know project, a number of whom had direct experience presiding over terrorism trials. The project explored, amongst other questions, the balance between national security, open justice, the rule of law and public accountability, and its outputs can be freely accessed.⁴⁶ On a much smaller scale, this piece of research has been conducted with input from similar quarters.

In this same vein, a number of my non-judicial interviewees noted that judges had also attended academic events. Often a judge will be giving the speech, although there is no such example on the record for anti-terrorism. One interviewee explained that the judicial presence in such settings was unlikely to be documented:

‘One may go a seminar organised by a think tank, and find that sitting around the table you have senior civil servants and you’ve got judges who are participating in the same event. It will be under Chatham House rules, but it offers an opportunity for a dialogue and exchange of ideas on topics that may have some sensitivity ... and politicians may attend such meetings as well.’

Training forums

There is also some evidence of judges meeting with other branches of state, namely the executive, for training and information sharing purposes. Again, it is more difficult to capture the outputs of such work. The most famous incident here is of course Charles Clarke’s 2005 invitation to the judiciary following the *Belmarsh* decision to discuss detention powers. Lord Bingham refused, saying that the judiciary ‘should not discuss with anyone – least of all a minister – a question that may compromise them if the same question should come before them judicially’.⁴⁷ This position is not clear cut however, displayed for example by the shift between the Kilmuir rules and Lord Neuberger’s more recent comments. In the context of training,

⁴⁵ *Ibid.*, p.94

⁴⁶ See ‘Law, Terrorism and the Right to Know’, University of Reading, <http://www.reading.ac.uk/LTRK/>, last accessed 5 October 2016.

⁴⁷ J. Rozenberg, ‘Not the usual channels’, *Daily Telegraph*, 10 November 2005, <http://www.telegraph.co.uk/news/uknews/1502611/Not-the-usual-channels.html>, last accessed 5 October 2016.

there does appear to be some basis for suggesting that the judiciary and government do in fact engage. One interviewee told me of his 2009 attempts to engineer a more direct conversation about the anti-terror regime between the judges and ministers out of court – ‘I tried to persuade some members of the Court of Appeal to be briefed by Ministers about national security and the way it functions’. Although the judges refused in that instance, the interviewee went on to tell me that ‘I am led to believe that [in December 2015] there was a meeting between a number of senior judges and the Secret Intelligence Services (SIS, formerly known as MI6) at MI6 HQ for a briefing’.

Informal gatherings

There are also more informal gatherings where the judiciary will meet with other branches of the state. These include, but are of course not restricted to, events such as Inns of Court dinners and events, law firms and universities.⁴⁸ There is every chance that individuals from similar professions and social circles will find themselves working on the same issue within different branches of the state – to take one example, the civil service is home to many barristers, who admit friendships with judges. There is care to maintain constitutional boundaries, but as several of my interviewees speculated, nobody can know what is said during a game of squash or a casual dinner arrangement.

Anti-terror regime

It is therefore impossible to assess all extra-judicial interactions regarding anti-terrorism, and it might be invasive to attempt to do so. There are nonetheless a number of avenues – namely, parliamentary debates in the House of Lords, judicial speeches and judicial evidence to committees – where the open record does allow for in depth analysis. Using these sources, supplemented by informed commentary from my interviewees, I assessed which elements of the UK’s anti-terror regime were of particular interest to the judiciary, their overarching opinions on relevant government policies, and their consequent levels of impact.

Areas of interest

Lords debates

With the exception of the Justice and Security (Northern Ireland) Act 2007, all key parliamentary debates on anti-terrorism legislation since 2000 in the House of Lords have included a contribution from at least one retired judicial peer, and two thirds have included substantially more. As mentioned in the methodology, I first coded these contributions according to the anti-terror policy they addressed (see Figure 1 below). These policies are then further broken down in Figure 1 into their component parts. Where the comment relates to the specific policy principle itself, the sub-topic has been left blank. For coding purposes, a judicial contribution refers to a point of argument or discussion, and a judge may include a number of such contributions within the body of one speech.

It is worth highlighting the retired status of these judges. Aside from the fact that their serving counterparts do not sit in the House of Lords, their relative freedom with regards to extra-judicial commentary has already been noted.

⁴⁸ Gee *et al.*, *The Politics of Judicial Independence*, p. 4.

Figure 1: Number of judicial contributions on anti-terror legislation in relevant Lords debates

Policy	N/% of judicial contributions	Sub-topic	N/% of judicial contributions	Contributing judges (Lords)
Asset-freezing	2; 1.4%	-		Lloyd
Attendance at a place used for terrorist training	1; 0.7%	-		Cameron
Closed Material Procedures – administration of justice	17; 12%	Independent judicial commissioner involvement	1; 0.7%	Lloyd
		Principles	8; 5.6%	Ackner, Lloyd, Woolf, Phillips, Brown
		Proper roles of the judiciary and executive, regarding judicial discretion	8; 5.6%	Lloyd, Woolf, Phillips, Brown, Carswell
Control orders	20; 17.6%	Administration of justice	7; 4.9%	Lloyd, Ackner, Donaldson
		Principles	5; 3.5%	Lloyd
		Prior police arrest	1; 0.7%	Lloyd
		Proper roles of the judiciary and executive in making control orders	10; 7%	Ackner, Donaldson, Lloyd
		Relocation	2; 1.4%	Lloyd
Definition of terrorism	2; 1.4%	-		Lloyd
Devolved issues	14; 9.9%	-		Cameron, Hope
Dissemination of information about the armed forces	1; 0.7%	-		Lloyd
Dissemination of terrorist publications	3; 2.1%	Administration of justice	2; 1.4%	Lloyd
		Proper roles of judiciary and executive in issuing a notice	1; 0.7%	Cameron
Glorification of terrorism	13; 9.2%	Administration of justice	4; 2.8%	Ackner, Lloyd
		Definition	5; 3.5%	Ackner, Cameron, Slynn
		Method of giving notice	1; 0.7%	Lloyd
		Principles	3; 2.1%	Lloyd
Independent Reviewer of Terrorism legislation	1; 0.7%	-		Lloyd
Overview of surveillance	1; 0.7%	Intelligence and Security Committee	1; 0.7%	Lloyd
Parliamentary process	6; 4.2%	Fast track legislation	6; 4.2%	Ackner, Donaldson, Lloyd
Police power to seize documents	1; 0.7%	-		Lloyd
Post-charge questioning	6; 4.2%	-		Lloyd, Cameron
Power of entry without warrant	1; 0.7%	-		Lloyd

Pre-charge detention – 7 days	2; 1.4%	Proper roles of the judiciary and executive in determining detention	2; 1.4%	Lloyd
Pre-charge detention – 28 days	3; 2.1%	Proper roles of the judiciary and executive in determining detention	1; 0.7%	Lloyd
		Principles	2; 1.4%	Lloyd
Pre-charge detention – 42 days	5; 3.5%	Proper roles of the judiciary and executive in maintaining legitimate safeguards	3; 2.1%	Lloyd
		Principles	2; 1.4%	Lloyd
Preparing to commit terrorism	4; 2.8%	-		Lloyd, Cameron
Proscription	3; 2.1%	-		Lloyd
Provision of intercept evidence for terrorism enquiries	3; 2.1%	-		Lloyd
Seizure of passports etc. from persons suspected of involvement in terrorism and Temporary Exclusion Orders (TEO)	6; 4.2%	-		Butler Sloss, Lloyd, Hope
Special Immigration Appeals Commission (SIAC)	3; 2.1%	Role of the judiciary in appointing the Commission	2; 1.4%	Ackner
		Judicial review to decide indefinite detention without trial?	1; 0.7%	Donaldson
Specific body of terror legislation	1; 0.7%			Lloyd
Stop and search powers	1; 0.7%			Lloyd
Terrorism as an offence	2; 1.4%			Lloyd
Terrorism Prevention and Investigation Measures (TPIMs)	13; 9.2%	Administration of justice	7; 4.9%	Lloyd, Brown, Hope
		Principles	1; 0.7%	Lloyd
		Proper roles of the judiciary and executive in making the order	2; 1.4%	Lloyd
		Sunset clauses	1; 0.7%	Lloyd
		Renewal	1; 0.7%	Lloyd
		Relocation	1; 0.7%	Brown
University requirements to prevent radicalisation	2; 1.4%	-		Brown, Hope

Nonetheless, the above results overstate the breadth of judicial peers' engagement in the anti-terror regime in one way. Lord Lloyd is the only one who spoke on a number of key topics – such as pre-charge detention, stop and search powers, asset-freezing and the Independent Reviewer of Terrorism Legislation – which is perhaps unsurprising given his 1996 Inquiry into Legislation Against Terrorism and strong subsequent engagement with the topic.⁴⁹ If his contributions are excluded, the judiciary would have in fact spoken on 13 rather than 28 terrorism policies.

Moreover, a table does not have the capacity to bring out the judges' 'explanatory' role in the House, as it has been described by one interviewee. Their previous judicial career means that they are well placed to try to ensure that draft legislation will achieve the desired policy end and to explain how it will play out in litigious circumstances. There are numerous examples of this throughout the Lords' debates on anti-terror legislation. To take one example, much of the judicial discussion around the proposed 'glorification' of terrorism offence in 2006 was in fact the explication of a future court's reaction. Lord Slynn of Hadley (who retired as a Law Lord in 2002) told the House that 'if you take out "direct" and "indirect", you leave simply "an encouragement". A court is bound to be asked to decide whether indirect encouragement is sufficient for this purpose'.⁵⁰

Even with these caveats, it is clear that these peers, like their non-judicial counterparts, focus the most on those policy areas which are particularly controversial. To highlight some examples, control orders account for 17.6 per cent of judicial contributions and their successor Terrorism Prevention and Investigation Measures (TPIMs) for 9.2 per cent. Whilst the Special Immigration Appeals Commission (SIAC) received less attention than expected (2.1 per cent), this is because much of what would have been relevant was instead discussed under the broader banner of closed material procedures (CMPs). The particular significance of these policies will be discussed in greater depth in chapter four.

Distinctive to the judicial peers however, and a key research finding here, is that they focus on anti-terror policy in as much as it relates to, firstly, the respective roles of the judiciary and the executive and, secondly, the administration of justice. This makes sense when considered in light of specific judicial areas of expertise and subsequent interests. Taking the aforementioned example of control orders, it is only Lord Lloyd who discusses the policy principle and questions of prior police arrest and relocation. Other judicial peers focus on this contentious topic purely from these two lenses – that of the administration of justice and the respective roles of the judiciary and executive in making control orders. Taken together, these two topics account for 41 per cent of all judicial comments on various anti-terrorism policies (if CMPs are considered to come under the administration of justice, which makes sense as they are a 'secret' method of conducting a trial). No other topic engaged the same level of interest, with the rest of judicial time divided across many other topics.

The strong focus on CMPs – which have been alluded to as a point of intersection between the anti-terror regime and the administration of justice – further highlights this. Twelve per cent of judicial comments relate to this policy which, although controversial, is still one of many. CMPs as a single policy in fact receive the second largest number of judicial comments in Lords debates, following control orders. Moreover, retired judges have not just debated CMPs as individuals but have organised and lobbied in

⁴⁹ Lord Lloyd of Berwick, *Inquiry into Legislation Against Terrorism*, Cm 3240, October 1996.

⁵⁰ House of Lords Debates, 5th ser., vol. 676, col. 433, 5 December 2005.

groups. During the passage of the Justice and Security Bill 2013, Lord Woolf (who retired as Lord Chief Justice in 2005) wrote an open letter supporting the bill in its most recent form. At least one other retired judge, Lord Phillips, was invited to put his name to this letter.⁵¹

Speeches

This focus on CMPs is made clearer through an analysis of judicial speeches – of the ten public speeches, articles and book chapters since 2008 on the anti-terror regime, five have been dedicated to this one topic (50 per cent). Four speeches were delivered by serving judges – Lord Sumption, Lord Kerr, Lord Neuberger and Sir Brian Leveson – and Lord Phillips gave speeches and wrote articles on the matter in April 2014 following his retirement from being President of the Supreme Court.⁵²

That CMPs are an area of interest for judicial speechmakers is again directly linked to the fact that they come under the administration of justice. It is for this reason that serving judges feel able to discuss the matter through extra-judicial channels; it would not be viewed as a constitutional breach with regards to the separation of powers. A judge is indeed free to discuss a whole range of issues under Lord Neuberger's aforementioned comments, particularly 'the functioning of the legal system and access to justice', and my judicial interviewees agreed with this.⁵³ Its privileged position with regards to extra-judicial comment is underscored by Neuberger's further insistence that the administration of justice was in fact 'the most significant true exception' to the Kilmuir requirement of silence. Senior judges could, according to Lord Neuberger, 'comment on matters which affect the proper administration of justice; that is to say on matters which impinge on the judicial branch of the State; on the court's ability to fulfil, as Lord Diplock put it, its constitutional function of doing justice'.⁵⁴ Lord Neuberger himself displays a sharp awareness of this constitutional position in this specific context, and in his introductory remarks states that:

'[CMP] is a fit topic for a judge; indeed, it is just the sort of topic on which a judge has a duty to speak sometimes. But it is also a topic with clear no-go areas for a judge.'

Lord Neuberger's comments also explain the paucity of judicial material on anti-terrorism more broadly. As mentioned, an extensive trawl of judicial speech archives and various other resources has yielded only five pieces of extra-judicial commentary on the topic. Of these, three (60 per cent) are book chapters from Lady Justice Arden where she reflects upon specific terrorism trials and, importantly, how the *courts* should best balance human rights and national security.⁵⁵ Indeed, she remarks explicitly that she will not engage with 'the political response to terrorism'.⁵⁶ Of the remaining two commentaries, one is Sir Adrian Fulford's reflection on his experience as a High Court judge presiding over the 21 July 2005 London bombings trial and the other is comprised of Lord Bingham's thoughts on the balance between the rule of law and anti-

⁵¹ Lord Phillips, 'Judicial Independence and Accountability: A View from the Supreme Court'.

⁵² Lord Sumption, 'The right to a court: Article 6 of the Human Rights Convention', James Wood Lecture, University of Glasgow, November 2015, <https://www.supremecourt.uk/docs/speech-151113.pdf>, last accessed 5 October 2016; Lord Kerr, 'Human Rights Law and the "War on Terror"', Lord MacDermott Lecture, Queen's University Belfast, May 2013, <https://www.supremecourt.uk/docs/speech-130502.pdf>, last accessed 5 October 2016; Lord Neuberger, 'Justice and Security', speech at the Northern Ireland Judicial Studies Board, February 2014, <https://www.supremecourt.uk/docs/speech-140227.pdf>, last accessed 5 October 2016; Sir Brian Leveson, 'Security and Justice', Isaiah Berlin Lecture, November 2015, <https://www.judiciary.gov.uk/wp-content/uploads/2015/11/berlin-lecture-nov-2015.pdf>, last accessed 5 October 2016; Lord Phillips, 'Closed Material', *London Review of Books* 36:8 (2014), pp. 29–32.

⁵³ Lord Neuberger, 'Where Angels Fear to Tread', para 46.

⁵⁴ *Ibid.*, para 17.

⁵⁵ M. Arden, *Human Rights and European Law: Building New Legal Orders* (Oxford: Oxford University Press, 2014).

⁵⁶ *Ibid.*, p. 148.

terrorism.⁵⁷ Whilst intriguing, the focus is primarily legal. He puts forward a detailed comparison of UK and US legislation and engages with the legality of such anti-terror measures. Such political reticence on the part of the judiciary supports the view that they are not overstepping their constitutional boundaries.

Select committees

Evidence to committees

Judges' appearances before select committees further support these findings – their contributions here focus again on the role of the judiciary in administering the anti-terror regime. The Constitution Unit's Politics of Judicial Independence project found that the general level of judicial appearances before select committees is high – it identified 148 records of oral evidence by 72 salaried UK judges between January 2003 and December 2013.⁵⁸ By contrast, no serving judges and only three retired judges spoke to select committees on the topic of anti-terrorism between 2000 and 2015, and these few contributions were focused solely on judicial commissioners as overseers of surveillance (see Figure 2 below).

Figure 2: Breakdown of judicial contributions on anti-terror regime in judicial evidence to committees

Policy	N/% of judicial contributions	Sub-topic	N/% of judicial contributions	Contributing judges (Lords)
Overview of Surveillance	20; 100%	Three bodied system	2; 5%	Judge, Waller
		Appointment of commissioners	3; 15%	Burnton, Judge, Waller
		Consolidated Structure	2; 10%	Judge, Waller
		Funding sources	2; 10%	Judge, Waller
		Judicial review	3; 15%	Burnton, Judge, Waller
		Prior authorisation	2; 10%	Judge, Waller
		Qualification/training for commissioners	3; 15%	Burnton, Judge, Waller
		Resources	3; 15%	Burnton, Judge, Waller

This means that 50 per cent of all judicial comments on anti-terrorism (in the House of Lords, speeches and select committees) are concerned with either the role of the judiciary, both themselves and in relation to the executive, or the administration of justice – a sizeable percentage.

In the context of select committees, it is worth noting that such an emphasis is a function of the committees' aims as well as judicial preferences. Select committees provide value by gathering and interpreting evidence from subject matter experts.⁵⁹ It is therefore obvious that a judge's main contributions would be about their own role. It is true that many of the committees' oral witnesses in these instances were more directly involved – they were leading bill teams on specific pieces of anti-terror legislation or were police commissioners who oversaw the enactment of these measures on the ground. From the judicial perspective, the reasons are threefold. Firstly, judges do not wish to be drawn into

⁵⁷ Sir A. Fulford, 'Terrorism trials in the new century: How have things changed since the IRA trials?', *Medicine, Science and the Law* 48:3 (2008), pp.185–188; T. Bingham, *The Rule of Law* (London: Penguin, 2010).

⁵⁸ Gee *et al.*, p. 101.

⁵⁹ M. Russell and M. Benton, *Selective Influence: The Policy Impact of House of Commons Select Committees* (London: The Constitution Unit, UCL, 2011), p. 82.

politically contentious debates; secondly, individual judges may express views that are not in line with the collective view of the judiciary; and thirdly, preparing for an appearance is time-consuming and likely to cost a day or two of court time.⁶⁰ Although these worries have been argued as overstated, reputation conscious judges are particularly wary of providing evidence on the highly contentious issue of anti-terrorism.⁶¹ As one judicial interviewee told me, judges are generally cautious on the grounds that ‘one’s whole ethos as a judge is to be balanced and not extreme. And so, I think the judges carry that through and so they might be a bit more cautious ... Namely, you are more reticent.’

Judges on committees

The committee system does, nonetheless, provide one indirect mechanism for extra-judicial input. The Lords Constitution Committee is a select committee which exists as a form of parliamentary ‘constitutional guardian’.⁶² The committee therefore scrutinises every forthcoming piece of legislation, including of course anti-terrorism bills, for constitutional issues. Its membership changes on an annual basis, but it has boasted a number of senior lawyers and retired judges. In those years where anti-terrorism legislation and a judicial presence overlap (see Figure 3 below), the judge will be one of those scrutinising the bill in its entirety and providing recommendations. Within these committee structures, however, it has unfortunately not proved possible to further distil the exact degree and nature of the judges’ contribution – in this case, that of Lord Woolf and Lord Cullen.

Figure 3: Retired judges’ contribution to Constitution Committee reports on anti-terror legislation

Lords Constitution Committee report	Retired judge on committee
<i>Justice and Security (Northern Ireland) Bill</i> , Session 2006–2007, 4th Report	Lord Woolf
<i>Counter-Terrorism Bill: The Role of Ministers, Parliament and the Judiciary</i> , Session 2007–2008, 10th Report	Lord Woolf
<i>Counter-Terrorism and Security Bill</i> , Session 2014–2015, 8th Report	Lord Cullen

Nature and impact of judicial comments

Nature

Judges therefore speak on a number of areas within the field of anti-terrorism, and their opinions on the government’s approach differ according to the topic and individual judge. Judges may be supportive, critical or neutral on government policy: see Figure 4 below for their views on specific policy areas.

⁶⁰ Gee *et al.*, p. 104.

⁶¹ *Ibid.*, p.105.

⁶² *Ibid.*, p.113.

Figure 4: Nature of judicial contributions on anti-terror policy in Lords' debates and evidence to committees

Policy	Positive about government policy	Negative about government policy	Neutral about government policy
Asset-freezing	-	-	2; 1.2% (Lloyd)
Attendance at a place used for terrorist training	-	1; 0.6% (Cameron)	-
Closed Material Procedures – administration of justice	9; 5.6% (Brown, Lloyd, Woolf)	7; 4.3% (Ackner, Brown, Carswell, Lloyd, Phillips)	1; 0.6% (Lloyd)
Control orders	2; 1.2% (Lloyd)	15; 9.3% (Ackner, Lloyd)	3; 1.9% (Lloyd)
Definition of terrorism	-	-	2; 1.2% (Lloyd)
Devolved issues	-	6; 3.7%(Cameron)	8; 4.9% (Cameron, Hope)
Dissemination of information about the armed forces	-	-	1; 0.6% (Lloyd)
Dissemination of terrorist publications	-	2; 1.2% (Lloyd)	1; 0.6% (Cameron)
Glorification of terrorism	1; 0.6% (Slynn)	10; 6.2% (Ackner, Cameron, Lloyd, Lochbroom)	2; 1.2% (Cameron)
Independent Reviewer of Terrorism Legislation	-	1; 0.6% (Lloyd)	-
Overview of surveillance	10; 6.2% (Judge, Waller, Burton)	5; 0.6% (Lloyd, Judge, Waller)	5; 0.6% (Judge, Waller)
Parliamentary process (fast-track legislation)	-	6; 3.7% (Ackner, Donaldson, Lloyd)	-
Police power to seize documents	1; 0.6% (Lloyd)	-	-
Post-charge questioning	-	5; 3.1% (Cameron, Lloyd)	1; 0.6% (Lloyd)
Power of entry without warrant	-	1; 0.6% (Lloyd)	-
Pre-charge detention – 7 days	-	2; 1.2% (Lloyd)	-
Pre-charge detention – 28 days	-	3; 1.9% (Lloyd)	-
Pre-charge detention – 42 days	-	5; 3.1% (Lloyd)	-
Preparing to commit terrorism	2; 1.2% (Lloyd)	2; 1.2% (Cameron, Lloyd)	-
Proscription	2; 1.2% (Lloyd)	1; 0.6% (Lloyd)	-

Provision of intercept evidence for terrorism enquiries	2; 1.2% (Lloyd)	-	1; 0.6% (Lloyd)
Seizure of passports etc. from persons suspected of involvement in terrorism and Temporary Exclusion Orders (TEO)	-	4; 2.5% (Hope, Lloyd)	2; 1.2% (Butler Sloss, Hope)
Special Immigration Appeals Commission (SIAC)	-	3; 1.9% (Ackner, Donaldson)	
Specific body of terror legislation	1; 0.6% (Lloyd)		
Stop and search powers		1; 0.6% (Lloyd)	
Terrorism as an offence		2; 1.2% (Lloyd)	
Terrorism Prevention and Investigation Measures (TPIMs)	1; 0.6% (Brown)	12; 7.4% (Brown, Hope, Lloyd)	
University requirements to prevent radicalisation		2; 1.2% (Brown, Hope)	

From the outset, one caveat should be made. Over the fifteen-year period under discussion, the UK's anti-terror regime has not remained static and individual policies have been subject to much revision. This leads to a risk that judicial peers appear to make both positive and negative comments on the same policy. Whilst this would be entirely legitimate – they may agree with some aspects but not others – in some instances this in fact results from a change in government policy. The only example which is relevant here regards the offence of ‘preparing to commit terrorism’. It initially appears that Lord Lloyd was both positive and negative about this offence – in actual fact, Lloyd lamented in the Terrorism Act 2000 debates that this was not an offence and then commented positively on the creation of this offence as part of the Prevention of Terrorism Act 2005.

Notwithstanding this particular issue, it is still evident that the judiciary are not a monolith body in terms of opinion. A senior judge told me that ‘there is no common view about legislation – we are all of us men and women with our own private views’, and this is clearly reflected in the research findings (see Figure 4 above). To highlight some examples, Lord Lloyd was negative about government policy on the dissemination of terrorist publications, whilst Lord Cameron was neutral. Lord Slynn was positive in 2006 Terrorism Act debates about the introduction of a glorification of terrorism offence, whilst the majority (Lord Ackner, Lord Cameron, Lord Lloyd and Lord Lochbroom) were negative. But overall, judicial contributions were much more likely to be critical than supportive of government policy; nearly 20 per cent of judicial contributions were positive whereas 60 per cent were negative.

Similar divisions are apparent in an analysis of judicial speeches. As has been mentioned, these are primarily on the topic of CMPs. Lord Phillips is one who speaks of his personal ‘grave misgivings’ anpit the provisions around CMPs in the Justice and Security Act 2013 – he uses clear language to tell the public

that there is ‘a danger that familiarity with the use of such a procedure will sedate those who use it against the abhorrence that the need to resort to such means should provoke’.⁶³ This can be juxtaposed with Lord Kerr’s different opinion – his ‘school report’ prediction on CMPs was that they are ‘good in parts, continued concentrated application required’.⁶⁴ This is reinforced by the findings from Lords debates – with nine positive and seven negative contributions, no other topic has split judicial peers to the same extent.

Nonetheless, some broad conclusions can be made on the judiciary’s approach to anti-terrorism. As mentioned, 60 per cent of their comments in Lords debates and as part of their evidence to committees have been negative. This is obviously not a uniform opinion – within this they were disproportionately positive and negative on individual policies. However, it still indicates that the judiciary have not generally approved of the government’s approach to anti-terrorism. Within this, the judiciary were overwhelmingly negative on a number of specific issues – namely, the glorification of terrorism office, control orders, TPIMs and fast-track legislation within parliament. Lord Lloyd’s range of disapproval was, as expected, particularly broad, and he also spoke negatively about government policy on pre-charge detention. Although not discussed as much, the judiciary have also spoken against the 2015 provisions for the seizure of passports and temporary exclusion orders (TEOs).

On the other hand, the overview of surveillance has largely received positive judicial commentary. As will be discussed in the next chapter, retired judges are intimately involved in administering this through their capacity as commissioners. Judicial approval is apparent in numerical terms (see Figure 4 above), and this is highlighted by further analysis of their comments. In their evidence to the recent Draft Investigatory Powers Bill committee, commissioners expounded at length upon their broad support for the system. The five negative comments, moreover, result from concerns such as funding and the three-bodied structure, rather than fundamental disapproval.

Judicial contributions are similarly divided when assessed with reference to how liberal or authoritarian they are. Conor Gearty has argued that, over the last few decades, the judiciary have displayed an increasing deference to the executive on questions of terrorism and national security.⁶⁵ He contends that the 1980s saw a period of state violence towards Northern Ireland, vindicated by a judiciary. The process of internment and subsequent Diplock courts are probably the key example of this, and one of my interviewees told me of internment orders given in hearsay situations ‘given by judges who I have appeared before who would never have done anything like that in an ordinary criminal court, which was their everyday job ... So that is some evidence that specialty legislation changes judicial behaviour, and we have to guard against that at a much more senior level’.

Gearty then charts the judiciary’s approach through the decades – the next generation ‘took to human rights as their penance for past sins’.⁶⁶ This generation has now largely moved on, and he argues that the

⁶³ Lord Phillips, ‘Closed Material’.

⁶⁴ Lord Kerr, ‘Human Rights Law and the “War on Terror”’.

⁶⁵ C. Gearty, ‘On Fantasy Island: British politics, English judges and the European Convention on Human Rights’, UK Constitutional Law Association blog, 13 November 2011, <https://ukconstitutionallaw.org/2014/11/13/conor-gearty-on-fantasy-island-british-politics-english-judges-and-the-european-convention-on-human-rights/>, last accessed 5 October 2016.

⁶⁶ *Ibid.*

new judiciary are ensuring that ‘truths are being constructed in a way that bears striking resemblance to that past’.⁶⁷

Whilst this argument is compelling in Gearty’s context of court decisions, it does not appear to extend to the judiciary’s extra-judicial contributions. There are few discernible authoritarian or liberal trends, and as indicated above, judges hold their opinions as individuals. To take one example, Lord Lloyd has tended to display a more liberal viewpoint than some of his judicial counterparts.

Impact

Both the judiciary’s areas of interest and diversity of opinion have clear implications for their impact on the UK’s anti-terror regime. In areas where they are broadly positive, such as the overview of surveillance, they are not seeking to alter government policy. Moreover, there are a number of areas where individual judges cancel out the opinion of others (see Figure 4 above for details), with some supporting and others denouncing a policy. This reduces or neutralises their overall impact.

Most telling, therefore, are the consequences when the judiciary is predominantly negative about a specific anti-terror policy. I therefore followed through amendments in the House of Lords which were proposed or vocally supported by a judicial peer, in order to assess their level of influence over anti-terror legislation. My findings in this regard suggest that they have had an impact on government policy, but that it has been strictly confined to areas where their particular interests and expertise as judges intersect with their proposed amendments. In other words, they have only been able to influence anti-terror policies which deal with the role of the judiciary in the administration of the anti-terror regime.

The most recent example of this can be found in the 2013 Lords debates around the Justice and Security Act, where, following a judicial amendment, it was agreed that judicial rather than executive discretion would determine whether a court hearing would be held in secret (i.e. whether it would be held as a CMP). Although the amendment was not itself carried, the government subsequently proposed an amendment which was clearly based on this.

The second (and last) example of a judicial amendment directly impacting anti-terror legislation is in the context of control orders. This relates to the procedure for making a non-derogating control order, which is a control order that does not risk breaching ECHR Article 5 protecting the right to liberty. A requirement for judicial rather than solely executive agreement was incorporated as a result of Lord Donaldson’s proposed amendment. Under the revised process, the Secretary of State had to apply to the High Court for leave to make a non-derogating control order. The court would then give permission to the Secretary of State to make the order. This would then be referred automatically to the court, which would arrange for the full hearing to take place soon after. Although, as before, Lord Donaldson’s amendment itself was not carried, the subsequent government amendment ‘in effect adopted the third way, or something very similar to it, proposed by the noble and learned Lord, Lord Donaldson of Lynton’.⁶⁸

⁶⁷ *Ibid.*

⁶⁸ House of Lords Debates, 5th ser., vol. 670, col. 857, 10 March 2005.

Judicial successes are thus clearly limited in number and extent. This is highlighted by the fact that both of the above examples are in fact subsets of broader policies on which the judiciary was generally negative – control orders and CMPs. Moreover, these are not the only two instances of attempted judicial amendments on the role of the judiciary. As Figure 5 (below) makes apparent, Lord Lloyd was unsuccessful in his amendment regarding the proper roles of the judiciary and executive in making the order for a TPIM. The above successes do not therefore mean that the judiciary has sanctioned the entirety of the judicial role in administering the UK’s anti-terror regime.

Figure 5: Judicial amendments in Lords debates on control orders and TPIMs

Policy	Sub-topic	Judicial amendments/ Amendments supported by a judicial speech	Amendment Result	Change to government policy?
Control Orders	Burden of proof	Lloyd – spoke in support of amendment	Amendment withdrawn, by leave	No
		TPIMs		
	Burden of proof	Lloyd – spoke in support of amendment	Amendment withdrawn, by leave	No
		Brown, moved 2 amendments	Amendments withdrawn, by leave	No
		Hope, spoke in support of Brown’s amendments		
	Proper roles of the judiciary and executive, in making the order	Lloyd – moved amendment	Amendment withdrawn, by leave	No
		Renewal	Lloyd – moved amendment	Amendment withdrawn, by leave

The judiciary’s low level of impact is illustrated by their lack of success where they moved amendments unrelated to the judicial role. Executive actions such as control orders and TPIMs are one of the most notorious and controversial examples of this – as can be seen from Figure 5, all judicial amendments on these topics were eventually withdrawn.

All judicial amendments/ judicially supported amendments on other policies which gained significant attention (five or more negative judicial contributions) had a similar end. Lord Lloyd moved one amendment on the topic of pre-charge detentions in the 2005 debates on the Prevention of Terrorism Bill and two in the Counter-Terrorism Bill 2008 debates, all of which were withdrawn by leave. He has a similar record with regards to post-charge questioning – he moved two amendments (one of which was vocally supported by Lord Cameron) on the policy principle and withdrew both. Moreover, his one amendment which sought to place further boundaries on the police’s questions in such circumstances was negated, on division.

The controversial glorification of terrorism offence was also subject to judicial amendments, all of which were unsuccessful and eventually withdrawn. Lord Lloyd and Lord Lochbroom moved three amendments between them with the aim to expunge the offence entirely from the Terrorism Bill 2006 (one and two

amendments respectively). Lord Lloyd moved a further amendment seeking to remove recklessness as a valid form of intent for the offence. It is therefore apparent that judicial amendments in the House of Lords have been largely unsuccessful in changing anti-terror policies. Where they have had limited success, it has only been in areas which directly relate to the role of the judiciary in administering the regime.

Judicial speeches contain no such indicators, and it is more difficult to judge their exact impact on policy debates. The serving judges' academic speeches and publications almost, by definition, produce intangible results. Their influence will be largely unrecorded, unspoken of and perhaps unrealised even by their audience.

This report does find that these comments are *reaching* the right audience, namely the executive, in order to have an impact on policy debates. A common feature of these avenues for extra-judicial comment is that, barring select committee reports and retired judges' statements in the Lords, the audience is voluntary. Nobody has to listen to a speech, read a research paper or attend a session at a think tank. Nonetheless, this report unsurprisingly finds that those with interest and influence in these areas are very attentive to the judiciary's views. Senior civil servant interviewees told me that civil service policy makers pay close attention to extra-judicial activity and factor possible judicial reactions into their policy decisions.

I also learnt that the relative scarcity of extra-judicial comments on the topic of terrorism has a dual impact. On the one hand, their scarcity ensures that each individual contribution is afforded extra attention. It also means, however, that any extra-judicial lobbies are not sustained. They will be mentioned by an individual figure, perhaps as part of a research interview or around a policy table, but there are no mechanisms to promote these ideas in any systematic way.

Ultimately however, the attention to the extra-judicial derives from respect for the judicial role. One of my interviewees staunchly argued that it is the importance of judicial decisions that lends significance to the judiciary as a body, and with this, their extra-judicial actions. He said:

‘Things like CMPs, the Binyan Mohamed – was about the extent to which they should open material that the government argued should be kept secret because it could have the impact of disrupting our relationship with the USA. And of course the eventual judgment did breach those rules. And all those things are hallmarks of a realisation on the successive governments' part that you can't just ignore the judicial element.’

Conclusions

The above statement makes sense in the context of this chapter – the judiciary are both more interested in, and more respected, with regards to questions which fall clearly within the realm of their judicial expertise. In terms of formulating anti-terror policy, therefore, they have had little broader impact. Their successful amendments have been confined to constitutional issues on the proper role of the judiciary in relation to the executive, and an ultimately intangible influence on civil servants' policy and legislative decisions.

4. Administering the anti-terror regime

Judges are involved in administering the anti-terror regime, specifically in relation to closed material procedures and as judicial commissioners in the oversight of surveillance. This chapter focuses on these measures, exploring the ways in which their individual characteristics allow for judicial influence.

In both arenas, it does not appear that the judiciary have sought to instigate change in relevant anti-terror policies. The judiciary are divided in their opinion on CMPs, but barring judicial speeches, this has not manifested in any public way. In the case of surveillance oversight, this is attributable to their satisfaction both with the process as it currently stands and with the proposed changes. However, the chapter delves into the practical operations of these judicial commissioners, and accordingly argues that their structure and processes present them with a degree of individual autonomy. This increases their scope for impact.

Extra-judicial oversight of surveillance

Overview

Surveillance has long been a feature in the state's anti-terror regime, and in such contexts is usually undertaken by law enforcement, security and intelligence services. By contrast, legislative oversight of this surveillance dates back only to the 1970s and is still beset with seminal challenges on both constitutional and practical levels.⁶⁹ Commentators suggest that these questions have 'become even harder in the wake of 9/11', and the heated debates regarding the extra-judicial oversight of surveillance techniques during the passage of the Investigatory Powers Bill 2016 (which is before the House of Lords at the time of writing) seem to confirm this.⁷⁰ Through their extra-judicial commissioner roles – discharged by senior judicial figures – they work as supervisory bureaucrats within the surveillance system.

The current system of judicial commissioners has been developed in a 'piecemeal' fashion, and its three-bodied structure reflects this.⁷¹ Judicial oversight of state surveillance activities is split between three commissioners and their respective offices – the Intelligence Services Commissioner, the Chief Surveillance Commissioner and the Interception of Communications Commissioner. Each position was created by separate legislation as need arose; the Intelligence Services Commissioner came out of a 1994 Act of the same name and the Chief Surveillance Commissioner was introduced in the Police Act 1997. The turning point came with the Regulation of Investigatory Powers Act (RIPA) 2000, which significantly amended the above Commissioners' roles and introduced the Interception of Communications Commissioner (after repealing the Interception of Communications Act 1985, which included a similar post). The importance of this point is underscored by their common grouping as the 'three RIPA commissioners', and their tasks are all largely defined by the duty to ensure that the surveillance safeguards outlined in Part IV of the Act are upheld.⁷²

⁶⁹ P. Gill, 'Evaluating Intelligence Oversight Committees: The UK Intelligence and Security Committee and the "War on Terror"', *Intelligence and National Security* 22:1 (2007), p. 14.

⁷⁰ For example, *Ibid*, p.15

⁷¹ Joint Committee on the Draft Investigatory Powers Bill, 'Oral Evidence', HL Paper 93 HC 651 2015–2016, February 2016, Q47.

⁷² For example, in Constitution Committee, *Surveillance, Citizens and the State*, HL Paper 18-I 2008–09, February 2009, para 248.

Nonetheless, each Commissioner has a particular function under this legislative framework. As one might expect, the Intelligence Services Commissioner focuses on the intelligence agencies: the Government Communications Headquarters (GCHQ), the Security Service (MI5), the Secret Intelligence Service (SIS, formerly MI6) and the Ministry of Defence (MOD)/ Armed Forces. The Commissioner keeps under review how these bodies exercise their powers and duties under the Security Services Act 1989 and the Intelligence Services Act 1994 ‘in relation to covert activities which are the subject of an internal authorisation procedure’, essentially ensuring that they do not abuse their surveillance powers.⁷³ The Commissioner also reviews the actions of the Home Office, the Foreign and Commonwealth Office and the Northern Ireland Office insofar as they relate to these intelligence agencies, specifically ‘the exercise by the Secretaries of State of their powers to issue warrants and authorisations to enable the intelligence services to carry out their function’.⁷⁴ The Justice and Security Act 2013 has further added to the remit of this role, requiring the Intelligence Services Commissioner to review any particular aspect of the Intelligence Services (or the MOD/ Armed Forces dealing in intelligence activity) as directed specifically by the Prime Minister.⁷⁵

The Chief Surveillance Commissioner’s role can be outlined almost in opposition to that of the Intelligence Services Commissioner. Broadly speaking, s/he reviews the use of covert surveillance by public authorities, excepting the intelligence agencies. These authorities are numerous – there are presently more than 500 public authorities with licence to use some or all of the state’s covert surveillance mechanisms, ranging from district councils to the large Department for Work and Pensions. These measures include property interference, intrusive surveillance, directed surveillance, covert human intelligence sources and protected electronic information.⁷⁶ The Chief Surveillance Commissioner inspects these public authorities on an annual basis, after which each receives a written report, a letter pointing out areas for improvement, and a visit from either the Chief Surveillance Commissioner or a member of his/her office.

The Interception of Communications Commissioner’s remit crosses both of these arenas, with an obvious focus on communications. S/he is ‘responsible for keeping under review the interception of communications and the acquisition and disclosure of communications data by intelligence agencies, police forces and other public authorities’.⁷⁷ This translates practically to inspections of all those public authorities – be they intelligence services or otherwise – who acquire communications data for surveillance purposes.

For the purposes of this research, one feature of the commissioner framework is particularly salient. There is a statutory requirement for all three posts to be filled by a senior judge – ‘a person shall not be appointed under this section ... unless he holds or has held a high judicial office (within the meaning of Part III of the Constitutional Reform Act 2005) or is or has been a member of the Judicial Committee of the Privy Council’. Given that these positions have ‘bureaucratic rather than legislative accountability’ – they take

⁷³ ‘The Commissioner’s Statutory Functions’, The Intelligence Services Commissioner’s Office, <http://www.intelligencecommissioner.com/content.asp?id=4>, last accessed 5 October 2016.

⁷⁴ *Ibid.*

⁷⁵ Justice and Security Act 2013, s59.

⁷⁶ ‘Home’, Office of Surveillance Commissioners, <https://osc.independent.gov.uk/>, last accessed 5 October 2016.

⁷⁷ ‘Home’, Interception of Communication Commissioner’s Office, <http://www.iocco-uk.info/>, last accessed 5 October 2016.

place outside of the court and fall under the remit of extra-judicial actions – it is interesting that this requirement was not contested in any relevant parliamentary debate.⁷⁸

The Investigatory Powers Bill will alter this system. The bill looks to update the state's powers of surveillance in an increasingly technological world, with according safeguards. It aims to 'consolidate in a clear and transparent way the law enabling all intrusive capacities' and can be recognised as a 21st century update to RIPA 2000.⁷⁹ Amongst other concerns, the bill has clearly been developed with the state's anti-terror activities in mind. The Draft Investigatory Powers Bill Joint Committee noted upfront the 'new challenges' that terrorists' sophisticated use of technology is posing for security, law and intelligence agencies, and the bill aims to provide these organisations with powers to deal with these.⁸⁰

This bill is a scaled down version of an earlier Draft Communications Data Bill, which was to be introduced in the 2012–2013 legislative session but was blocked by the Liberal Democrats, then in coalition, on the grounds that it was too intrusive. The new Investigatory Powers Bill includes many of the same provisions, albeit with enhanced safeguards and restricted powers. It seeks to enhance communications data retention by, for example, requiring web and phone companies to maintain a twelve-month record of every citizen's internet history for access by police, security services and other public bodies.

In light of this commissioner system, it is also worth mentioning the Investigatory Powers Tribunal and the Intelligence and Security Committee. The former hears complaints about the intelligence services, the interception and gathering of communications data, and the quality of state surveillance of these activities. The Intelligence and Security Committee was established under s10 of the Intelligence and Security Act 1994 and examines the administration and expenditure of the Security Service, Secret Intelligence Service (SIS, formerly known as MI6) and the Government Communication Headquarters (GCHQ). Although it is therefore relevant to the oversight of UK surveillance generally, its membership does not include past or present members of the judiciary. The committee is currently chaired by the former Attorney-General Dominic Grieve and is made up of seven members of the House of Commons and two from the Lords.⁸¹ It does not form a primary subject of study for this report and its contribution will be restricted to any relevant comments from its annual and special reports.

⁷⁸ Jon Moran, 'State Power in the "War on Terror": A comparative analysis of the UK and USA', *Crime, Law and Social Change* 44:4–5 (2005), p. 347. See relevant parliamentary debates: House of Commons, 6 March 2000; House of Lords, 25 May 2000; House of Lords, 28 June 2000 etc.

⁷⁹ Joint Committee on the Draft Investigatory Powers Bill, *Draft Investigatory Powers Bill – Report*, HL Paper 93 HC 651 2015–2016, February 2016, p. 5. The committee noted that one of the motivations for the legislation is that 'the nature and extent of internet activity has expanded exponentially since the coming into force of the Regulation of Investigatory Powers Act (RIPA) 2000.' For further *Ibid.*, p.5

⁸⁰ *Ibid.*, p.5

⁸¹ 'About the Committee', Intelligence and Security Committee of Parliament, <http://isc.independent.gov.uk/>, last accessed 5 October 2016.

Extra-judicial impact

Judicial opinion

It is not yet possible to comprehensively analyse opinion on the final version of the Investigatory Powers Bill, as it has not yet passed through parliament. The below table therefore combines current measures with the policies proposed in the Draft Investigatory Powers Bill in 2015. It is worth noting from the outset that witness contributions to a parliamentary committee are constrained by the questions being asked. It nonetheless results in a positive judicial attitude to the overview of surveillance, both as it is now and also with the direction it is travelling in. 75 per cent of contributions from previous and existing judicial commissioners to the Draft Investigatory Powers Bill Committee were either positive or neutral (see Figure 6, below). When they were critical, three out of five of their negative contributions did not engage with the system's principles, but were confined to logistical questions such as resources and sources of funding.

Moreover, the two remaining negative comments from Lord Judge and Sir Mark Waller – on the three bodied structure of the commissioner system and the consolidated structure respectively – cancel one another out. The new legislation would create an Investigatory Powers Commissioner to oversee the use of all investigatory powers, and this post would consolidate the duties of the Interception of Communications Commissioner, the Intelligence Services Commissioner and the Chief Surveillance Commissioner. They would head an Investigatory Powers Commission within which the other judicial commissioners – as many as the Prime Minister considers appropriate for the task – would sit. Therefore, Lord Judge and Sir Mark Waller's comments simply display differing preferences for the old and new structures.

Hence, commissioners and their judicial colleagues have not found the commissioner regime problematic on the whole. Whilst they welcome most of the changes – particularly the requirement for prior authorisation, to be discussed in depth later – they have not been concerned to date with retired judges taking on these roles. If anything, my interviewees displayed approbation on the grounds that senior judges were well-equipped with the necessary faculties to undertake the endeavour. Any proposed changes, therefore, are not indicative of extra-judicial impact – it is not the commissioners or their judicial colleagues who have been driving this reform.

Figure 6: Nature of extra-judicial contributions on the overview of surveillance, from the Draft Investigatory Powers Bill Committee

Overview of surveillance – policies	Burnton	Judge	Waller
Three bodied structure of system	n/a	Negative	Positive
Appointment of commissioners	Positive	Positive	Neutral
Consolidated structure	n/a	Positive	Negative
Funding sources	n/a	Negative	Negative

Judicial review	Positive	Positive	Positive
Prior authorisation	n/a	Positive	Positive
Qualification/training for commissioners	Neutral	Positive	Neutral
Resources	Neutral	Neutral	Negative

Similarly, there appears to be little concern that it is the judiciary performing these roles. In other words, judicial commissioners are not being co-opted into performing a function that they deem the preserve of the executive. Rather than a constitutional discussion about the separation of powers between branches of state, any qualms from my interviewees were based on practical factors (which will be elaborated upon later). When specifically asked, interviewees either responded that they had not thought about the commissioner role in that context or that the commissioners were acting within their constitutional remit. As one interviewee told me, with direct reference to the proposal that commissioners should undertake judicial review:

‘... well the idea behind it is that the judicial review is carried out by somebody who is independent of the executive. On the face of it, it being a judge seems to make sense. Judges are individuals who can apply the relevant tests to the cases – which are ultimately legal tests’.

Such acquiescence does not, nonetheless, negate the commissioners’ impact on the system. These positions are in themselves, by definition, extra-judicial. They have ‘bureaucratic rather than legislative accountability’ – they take place outside of the court and fall under the remit of extra-judicial actions. Therefore, extra-judicial impact can also be ascertained through an assessment of these roles and how senior judges have carried them out.⁸²

Review vs. authorisation

In statutory terms, it is clear that these judges are currently restricted in their remit for oversight. Broadly speaking, the judicial commissioners have the power to review rather than to authorise surveillance activities. The relevant organisation or Secretary of State internally confirms the authorisation or warrant, and it falls to the judicial commissioner to review this after the event has taken place. The exact detail and timing of these reviews varies between instances, but the fundamental point is that the judge’s approval is not required in the first instance for the activity to take place. Sir Mark Waller, the current Intelligence Services Commissioner, provides a succinct description with his statement:

‘... I am the Intelligence Services Commissioner and have been for nearly five years. My primary role is to check, *after the event*, that the agencies have been obtaining warrants and authorisations to carry out some of the most intrusive activities that they do, and that they do it on a proper legal basis’⁸³

It is worth noting the one exception to this – there is a requirement for prior authorisation from the Chief Surveillance Commissioner’s office in cases of intrusive surveillance, certain types of property interference and long-term undercover operatives.⁸⁴

⁸² Moran, ‘State Power in the “War on Terror”: A comparative analysis of the UK and USA’.

⁸³ Joint Committee on the Draft Investigatory Powers Bill, ‘Oral Evidence’, Q 39, emphasis added.

⁸⁴ *Ibid.*, Q47.

This question was heavily debated during the Police Act and RIPA debates in 1997 and 2000 respectively (making the judiciary's own aforementioned satisfaction all the more intriguing). The crux of debate at this time was that review powers were inadequate – many felt them to be ‘merely rubber stamps’ and advocated for prior judicial authorisation.⁸⁵ The premise of this was constitutional – it was largely agreed that ‘legalism in the intelligence field is desirable, since law is a necessary condition for constitutionalism’ – and so there was concern that the review method weighted the balance between the executive and judiciary towards the former.⁸⁶ Prior judicial authorisation was deemed necessary for an effective separation of powers which maintained judicial independence. This is now, in essence, being realised to a degree. The legislation proposes a series of fundamental shifts to the role of judicial commissioners that gives them the power of prior authorisation that was so vehemently advocated for in RIPA debates. They would no longer be post-event auditors of the state's surveillance regime, but an integral mechanism in the approval process. Their sign off would be required for the activity to take place. There are, of course, exceptions to this.⁸⁷ The most notable is in the case of urgent authorisations, which the relevant minister will have the power to issue alone. However, a judicial commissioner will have to authorise this within the following days and they retain the power to immediately quash the authorisation if they deem it inappropriate.

The judicial commissioner's authorisation will take place after that of the relevant member of the executive in a ‘tandem process’ which the Home Office has termed a double-lock.⁸⁸ Both parties have to agree to the authorisation being approved. If a judicial commissioner disagrees, s/he must set out their reasoning in writing. The executive member is then permitted a discussion with the judicial commissioner to reach agreement and, if the two still disagree, the executive member can request that the Investigatory Powers Commissioner reviews the matter. If this Commissioner also disagrees with the authorisation, it will not come into force (or be immediately revoked if the matter had been deemed urgent).

Whilst there is still a segment which argues that this an infringement on executive functions – the Conservative MP Owen Paterson ‘strongly disapproves’ and believes that ‘the decision should be made by a democratically elected Minister, accountable to the House of Commons’ – mainstream opinion appears to have shifted towards judicial involvement since the Police Act and RIPA debates.⁸⁹ Intense debate now centres on the bill's clause 19(2) requirement for judicial commissioners to evaluate applications according to judicial review principles, which invites questions as to how much scope for disagreement this will actually afford the judges. Whilst the Home Office has not yet been entirely clear as to whether this review would be carried out on the basis of the *Wednesbury* principle – that no reasonable minister could have taken the decision – my interviewees thought this likely. Both Labour and Conservative MPs have criticised the use of the judicial review test on the grounds that it only relates to the process and not substance of decision making, and so limits judicial power to a rubber stamp of executive decisions.⁹⁰ For the most part, my interviewees felt similarly. One described the judicial review process as a ‘fig leaf’ whilst another stated that:

⁸⁵ House of Commons Debates, 6th ser., vol. 345, cols 793–794, 6 March 2000.

⁸⁶ C. Walker, ‘Intelligence and anti-terrorism legislation in the United Kingdom’, *Crime, Law and Social Change* 44:4–5 (2006), p.411

⁸⁷ It is intended that some less intrusive communications warrants will not be subject to prior judicial authorization.

⁸⁸ Joint Committee on the Draft Investigatory Powers Bill, ‘Oral Evidence’, Q 96.

⁸⁹ *Ibid.*, Q 99.

⁹⁰ *Ibid.*, Q 43.

‘You are going to take applications which are probably based on, in some circumstances, quite complex intelligence. And there won’t be anyone to put the other side of the picture forward. It seems to me it’s going to be a bit difficult for a judge to say no in that kind of context...it doesn’t seem that that exercise is likely to be a very meaningful one.’

Moreover, those in favour of judicial review usually focus on the basis of what they feel to be an appropriate position for the judicial commissioners. They do not deny that judicial review provided less scope than a more substantive approach – the subject matter expert Professor Christopher Forsyth suggests that you *would* end up with ‘more effective judicial control’ if the judicial review clause was removed, but regards it as a ‘reasonable compromise’ between the judiciary and executive.⁹¹

Such debates compellingly indicate that the judicial commissioners’ role – and subsequent impact on the surveillance oversight process – will be more limited if, as is looking likely, they will have to make evaluations on judicial review grounds. Nonetheless, they will still be overseeing the vast majority of decisions and their role will be one of authorisation rather than audit. On balance, therefore, this proposed role will allow for substantially more extra-judicial impact than there is at present.

Practical realities: institutional and individual impacts

Nonetheless, the existence of these debates does display the commissioners’ statutory limitations. This chapter now investigates the procedures, structure and personnel within the current three-pronged commissioner system, and finds that such restrictions are intensified by the institutional approach to resources. Individually however, these judicial commissioners inadvertently have more of an impact than is originally assumed.

Institutional factors

Judicial commissioners’ scope for impact within their position is limited by two institutional factors, both related to resources. Firstly, the three commissioners are on the Home Office payroll. They receive a pro rata salary which is in line with judicial salaries and they have therefore featured on various public official high earner lists over the past few years.⁹² In a very practical sense, this arrangement casts doubt on their abilities to criticise. Many regard protection of remuneration as a base requirement for judicial independence and, in the context of surveillance commissioners, Lord Judge has commented that this may cause an issue for the perception of independence.⁹³ Whilst he does not believe that this compromises the commissioners’ activities, it is problematic to be seen as directly connected to the Home Secretary and to ‘then go cap in hand to that same Minister’.⁹⁴ Somewhat more cynically, one of my interviewees describes a commissioner role as ‘a nice little job to do in retirement, supplementing their pension ... a temptation is to not rock the boat’.

⁹¹ *Ibid.*, QQ 217–218

⁹² M. Rosenbaum, ‘All highly paid public officials now disclosed’, BBC News, 25 July 2011, <http://www.bbc.co.uk/news/uk-politics-14280314>, last accessed 5 October 2016; see GOV.UK publication https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/60516/150k-decision-notice.pdf, last accessed 5 October 2016.

⁹³ Mentioned in Gee *et al.*, *The Politics of Judicial Independence*, p.4

⁹⁴ Joint Committee on the Draft Investigatory Powers Bill, ‘Oral Evidence’, Q 56.

Secondly, and by contrast, a lack of resources also impedes upon the commissioners' opportunities for oversight. As with the salaries, the Home Office sponsors the three offices' inspection activities, and there is a direct correlation between resources and how thoroughly operations can be carried out. Sir Christopher Rose, the former Chief Surveillance Commissioner, cited the 'small amount of resources at [my] disposal' as the reason why he could not further investigate specific cases of abuse which were brought to his attention.⁹⁵ To take another of his examples, his 2013–2014 annual report spoke of a refused bid for more resources that he felt were required in order to carry out the office's statutory duty for prior approval in some cases.⁹⁶

Conversely, the institutional structure of the judiciary provides an outlet for extra-judicial influence. As mentioned, the new structure will require a number of judicial commissioners. It is likely that the judiciary, more particularly the Lord Chief Justice, will substantially contribute to the introduction of these judicial commissioners from a managerial perspective. As background, the judiciary's institutional structure following the Constitutional Reform Act 2005 is relevant. This legislation revised the office of Lord Chancellor so that its holder is no longer head of the judiciary. These responsibilities have passed to the Lord Chief Justice, and although there are still regular lines of communication between the Lord Chief Justice and the Lord Chancellor, it is the former who now deals with the running of the courts and management of the judiciary.⁹⁷ The allocation of judges to act as judicial commissioners falls squarely within this set of duties.

Senior judges amongst my interviewees agreed on this point unanimously. One told me that:

'I think in discussion with the Minister for Justice it would be entirely appropriate for the Lord Chief Justice to draw attention to the implications that the proposed [Investigatory Powers] legislation would have on the demand for judges' time'.

Another considered the matter hypothetically, forecasting that:

'If the Lord Chief Justice is asked to provide three judges to be part of the commission – the supervisory element of it – he's going to say I need three new judges to do the judicial work. So that sort of conversation has to happen ... So there will be a discussion, I have no doubt about that, but it will be to do with how is the judiciary going to be worked into the system. How long should a judge be seconded to the Commission? How do you get a judge to volunteer to be one of the commissioners – this is all part of the Lord Chief Justice's role. In the old days that would have been the Lord Chancellor, but he doesn't exist for this purpose'.

Moreover, other parties feel it appropriate that this extra-judicial duty will rest with the Lord Chief Justice in his managerial role. Most cogent is the Joint Parliamentary Committee's recommendation that the Lord Chief Justice appoint the judicial commissioners, in consultation with the Judicial Appointments Commission. Under the bill as it stands, the Prime Minister will appoint such number of judicial

⁹⁵ Joint Committee on the Draft Investigatory Powers Bill, 'Oral Evidence', Q653.

⁹⁶ Office of Surveillance Commissioners, *Annual Report of the Chief Surveillance Commissioner to the Prime Minister and to the Scottish Ministers for 2013–2014*, HC SG/2014/92 2013–14, September 2014, para 3.25.

⁹⁷ The Lord Chancellor, his Permanent Secretary and Director-General have a monthly meeting with the Lord Chief Justice and his Chief Executive. The Lord Chancellor and Lord Chief Justice also speak on the phone when necessary. For more details see Gee *et al.*, p. 46; Woodhouse, p. 155.

commissioners that he feels necessary to carry out their function. This will most definitely form an agenda item during his bilateral meetings with the Lord Chief Justice, and indeed, is likely to have already been discussed in this setting.

Individual factors

This report also identifies a number of mechanisms through which the individual post holders personally impact the commissioner system. These avenues tend to be inadvertent – most result from omissions or are an unintended consequence of another decision.

Inspection procedures

All three commissioners perform general inspections on those bodies under their oversight. Given resource constraints, they usually carry out this function via dip samples where only a proportion of the paperwork is selected for review. In December 2015, the Interception of Communications Commissioner considered about 50 per cent of his warrants and authorisations and the Intelligence Services Commissioner looked at around 17 per cent.⁹⁸ Sir Christopher Rose, a former Chief Surveillance Commissioner, informed the House of Lords Constitution Committee in 2008 that his dip sample consisted of approximately 10 per cent of his public bodies' paperwork.⁹⁹

Whilst it is protocol for these samples to be selected randomly, individual commissioners have indicated that they do have a slight bearing on the process. The former Interception of Communications Commissioner, Sir Paul Kennedy, would inspect all interception warrants issued by the Home Secretary and randomly select law enforcement agencies' and public authorities' applications for communications data for inspection. Nonetheless, he would very reasonably select non-compliant institutions more frequently than compliant ones.¹⁰⁰ The next post holder Sir Anthony May then 'introduced a significant number of changes to the inspection procedures in the second series of inspections in 2013', such as a more formal audit and query based search mechanism.¹⁰¹ To take another example, the Intelligence Services Commissioner Sir Mark Waller allows more room for judgment in his inspection decisions. In response to the question 'who picks the warrants that you review?' he answered thus:

'I personally pick them. It is not a completely random pick, because I get a complete list of all the warrants and they have a subject-matter description, so, if I look and think, 'well, I wonder', I will pick that one. Otherwise I pick at random'¹⁰²

A similar logic applies to onsite inspections, where members of the relevant commissioner's office pre-arrange a visit to the premises of the body under scrutiny. The content of these visits is very much directed by the office rather than a predetermined checklist – organisations 'let them see whatever they wish to see' and speak to 'whoever they wish to speak to'.¹⁰³ It is of course difficult to measure the exact impact of these cumulative decisions, as there is no control scenario to compare against.

⁹⁸ Joint Committee on the Draft Investigatory Powers Bill, 'Oral Evidence', Q 40.

⁹⁹ Constitution Committee, *Surveillance, Citizens and the State*, para 253.

¹⁰⁰ *Ibid.*, para 254.

¹⁰¹ The Interception of Communications Commissioner's Office, *Report of the Interception of Communications Commissioner: March 2015 (covering the period January to December 2014)*, HC 1113 2014–15, March 2015. For further details on sampling methods, see paras 6.46–6.65.

¹⁰² Joint Committee on the Draft Investigatory Powers Bill, 'Oral Evidence', Q 45.

¹⁰³ *Ibid.*, Q 27.

Overlapping structures

As mentioned, the commissioner system has developed in a ‘piecemeal’ fashion into a three-bodied framework.¹⁰⁴ Past and present commissioners have granted that there ‘are areas of overlap, undoubtedly’ between their offices, which creates inefficiencies for the commissioners and for the organisations they are inspecting.¹⁰⁵ To take an example, the Intelligence Services Commissioner told a select committee in December 2015 that ‘under the present system, you may go and get a property warrant, which is ultimately going to lead to an interception [of communications] warrant. To that extent, in one sense, two commissioners are looking at the same exercise, so there is some overlap’.¹⁰⁶ Successfully navigating such situations implicitly relies on clear communication between commissioners, yet no legal duty exists to this end. The impetus rests with the individuals carrying out these roles, and there is indication that their approach to communication, or lack thereof, does significantly affect the organisations under review. The Association of Chief Police Officers feel that all three offices ‘adopt different methodologies, have different styles and do not co-ordinate their inspection activities’.¹⁰⁷ Commissioners’ views differ on this. Lord Igor Judge – admittedly a newcomer to the role – sees ‘potential for confusion’ whilst Sir Mark Waller does not think that there has been any confusion between the commissioners during his time in office.¹⁰⁸ The effect of any confusion is, of course, primarily a ‘bureaucratic cost’. Organisations spend their resources preparing for investigations from differing commissioners, which furthermore, often result in ‘conflicting advice which confuses staff’.¹⁰⁹

Competency

The statutory requirement for all three commissioners is that they must be or must have been a senior judge. This therefore incorporates both retired and serving judges, but only retired judges have taken up these roles in the recent past (see Figure 7, below). The common reason cited for using retired judges is that this part-time commissioner role would be difficult to balance with classic judicial functions.¹¹⁰

However, these post holder choices have unintended consequences. Schedules aside, one interviewee argued that retired judges were well suited for commissioner roles on the grounds that ‘they will have had a whole lifetime of considerable challenges of administrative action, and so if you’ve got to have scrutiny of surveillance or whatever, judges are independent persons bringing their mind to bear’. In contrast, another interviewee categorically stated:

‘... what would I want as a parliamentarian. A retired judge who has a nice little niche where he can earn an extra £60,000 to £70,000 a year, a serving judge who is involved in the cut and thrust of everyday judging, or even somebody very trusted who is not a judge. And I think on balance, my preference – although I have a huge admiration for some of the retired judges – but, on balance, I think that retired judges should only be doing these jobs at most in the three years after they retire.’

¹⁰⁴ *Ibid.*, Q 47.

¹⁰⁵ *Ibid.*, Q 40.

¹⁰⁶ *Ibid.*, Q 40.

¹⁰⁷ Constitution Committee, *Surveillance, Citizens and the State*, para 247.

¹⁰⁸ Joint Committee on the Draft Investigatory Powers Bill, ‘Oral Evidence’, QQ 40, 54.

¹⁰⁹ Constitution Committee, *Surveillance, Citizens and the State*, para 247.

¹¹⁰ House of Lords Debates, 5th ser., vol. 615, col. 1075, 19 July 2000; see also Joint Committee on the Draft Investigatory Powers Bill, ‘Oral Evidence’, HL Paper 93 HC 651 2015–16, Q 40.

Figure 7: Recent Commissioner post holders

Commissioner	Post Holders	Employment Status
Intelligence Services Commissioner	Sir Peter Gibson, 2006–2010	Retired as Lord Justice of Appeal, 2005
	Sir Mark Waller, 2011–present	Retired as Lord Justice of Appeal, 2010
Chief Surveillance Commissioner	Sir Christopher Rose, 2006–2015	Retired as Lord Justice of Appeal, 2006
	Lord Igor Judge, 2015–present	Retired as Lord Chief Justice, 2013
Interception of Communications Commissioner	Sir Paul Kennedy, 2006–2012	Retired as Lord Justice of Appeal, 2005
	Sir Anthony May, 2013–2015	Retired as President of the Queen’s Bench Division, 2011
	Sir Stanley Burnton, 2015–present	Retired as Lord Justice of Appeal, 2012

Reports

It is a statutory requirement for each commissioner to produce an annual report, comprised of their key findings and recommendations for the following year. Whilst the report is mandatory, there appears to be a large degree of individual discretion with regards to its content and structure. In quantitative terms, the Intelligence Service Commissioner’s reports vary drastically based on the post holder. The former commissioner, Sir Peter Gibson, produced annual reports with an average of 45 paragraphs. By contrast, the current commissioner Sir Mark Waller’s reports average 144 paragraphs. Even allowing for different styles of address, some of Waller’s reports are more than five times as long as Gibson’s and contain a considerably greater breadth and depth of information (see Figure 8, below). This individual scope is further highlighted by each commissioner’s structural choices – whilst all of Gibson’s reports followed the same overarching nine-part structure, Waller adapts this annually based on content.

Figure 8: Intelligence Services Commissioner Reports, 2006–2014

Intelligence Services Commissioner	Annual Report	Number of paragraphs
Sir Peter Gibson	2006	41
	2007	47
	2008	45
	2009	49
	2010	58
Sir Mark Waller	2011	105 (without appendices)
	2012	101 (without appendices)
	2013	199 (without appendices)
	2014	174 (without appendices)

Unfortunately, the same analysis could not be carried out for the Interception of Communications Commissioner or the Chief Surveillance Commissioner. Both roles recently changed hands in 2015 and so the relevant datasets do not yet exist.

These annual reports constitute the judicial commissioners' primary product, and so their broader reception is indicative of the commissioners' impact. The reports are not directly laid in parliament – they usually contain confidential information and, as such, are presented directly to the Prime Minister. Once he has redacted anything he believes necessary, it is the Prime Minister who lays the reports before both Houses. He will usually accompany this with a written statement and, in broad terms, these tend to commend the commissioners' work and highlight a few key areas. However, there is no ensuing parliamentary debate and there is little evidence of serious discussions following directly from these reports.

Moreover, the reports themselves do not often call for systemic changes. I analysed the annual reports of the three judicial commissioners between 2000/2001 and 2014/2015 (depending on the available dataset), in order to assess the nature of their recommendations and the degree to which they were followed. In this first respect, the Intelligence Services Commissioners have been particularly prudent. Rather than providing general suggestions, they highlight specific errors on the part of the intelligence services. Moreover, and understandably influenced by the particularly secret nature of their work, they are discreet about the exact details of these cases. To take one indicative example, Gibson outlined in his 2006 report that 'twelve errors in respect of RIPA authorisations and ISA and two breaches in the handling arrangements of one of the agencies were reported to me during the period of this report. It is not possible for me to say much about these errors without revealing information of a sensitive nature.'¹¹¹

His successor Waller is similar – whilst he provides more details about the errors, he still focuses on the specifics rather than broad recommendations. In 2011 he spoke of:

'a situation in relation to the MoD where the process set out in RIPA is not fully complied with, for reasons which I have been briefed on and understand. The situation in question related to the sub-delegation of intrusive surveillance authorisations at the MoD from the level of Secretary of State to members of the Armed Forces. I have seen the internal MoD directives that set out this authorisation process...'¹¹²

Whilst useful in terms of ensuring operational competence, such assessments do not engage with the underlying policy questions around surveillance. This somewhat limits the extra-judicial impact of the Intelligence Service Commissioners in this sense.

This is underlined through contrast with the annual reports of the Interception of Communications Commissioners. Although they too highlight individual errors, they supplement these with thematic, albeit operational, recommendations. The most sustained example of this is in relation to the prison service, where the judicial commissioner's inspections between 2004–2007 led directly to the National Intelligence Unit developing a new strategy for conducting the interception of communications within prisons in

¹¹¹ The Intelligence Services Commissioner's Office, *Report of the Intelligence Services Commissioner for 2006*, HC 253 2007–08, January 2008, para 36.

¹¹² The Intelligence Services Commissioner's Office, *Intelligence Services Commissioner: 2011 Annual Report*, HC 497 2012–13, July 2012, p. 12.

2007.¹¹³ Following this, the commissioners reported a gradual improvement in interception practices within prisons until 2015.

The issue of local authorities' requests for communications data is the second clear instance where judicial commissioners have gradually impacted on the surveillance regime. Kennedy noted in his 2007 annual report that local authorities were not complying well with the relevant Code of Practice, and by 2008 he was able to report that the 'Home Office and ACPO DCG have now stepped in to provide more help to the local authorities to enable them to achieve a better level of compliance with the legislation'.¹¹⁴ In 2009 he noted that 'the recommendations from the previous inspections had always been fully implemented' and concluded in 2010 that '89% of the local authorities inspected achieved a good or satisfactory level of compliance with the Act and Code of Practice'.¹¹⁵

Nonetheless, these are two success stories out of a number of recommendations. Whilst they should not be overlooked, it is clear that judicial commissioners' suggestions are not taken on board as a matter of course. This is indeed reinforced by the fact that local authorities' requests are a subset of public authorities' data collecting powers, which the Interception of Communications Commissioners have commented upon less successfully over the years. They have consistently expressed concern over the fact that public authorities apply for data sharing powers and do not then use them, but this has not been addressed. As with judicial peers' amendments regarding CMPs and control orders, the Interception of Communications Commissioners have only been able to impact one element of a broader surveillance policy.

Analysis of the annual reports from the Chief Surveillance Commissioner's office displays a similar situation. Whilst there have been small examples of judicial impact – Sir Andrew Leggatt reported in 2004 that parish councils had been removed from Schedule 1 of RIPA at his recommendation – these are not necessarily the norm.¹¹⁶ Authorisation applications and Covert Human Intelligence Sources (CHIS) have gained significant attention from judicial commissioners over the years, and neither issue has yet been resolved to judicial satisfaction. The Chief Surveillance Commissioners from 2005 to 2012 (Leggatt and Rose) consistently commented on law enforcement and public authorities' poor drafting of applications for authorisations, finding them to be repetitive, rambling and frequently inaccurate. In a similar vein, they reported on a number of occasions that 'inspections reveal poor tradecraft in managing CHIS'.¹¹⁷

¹¹³ The Intelligence Services Commissioner's Office, *Report of the Intelligence Services Commissioner for 2007*, HC 948 2007–08, July 2008, para 4.5.

¹¹⁴ The Interception of Communications Commissioner's Office, *Report of the Interception of Communications Commissioner for 2008*, HC 947 2008–09, July 2009, para 3.41.

¹¹⁵ The Interception of Communications Commissioner's Office, *Report of the Interception of Communications Commissioner for 2009*, HC 341 2010–12, July 2010, para 3.31; The Interception of Communications Commissioner's Office, *2010 Annual Report of the Interception and Communications Commissioner*, HC 1239 2010–2012, June 2011, para 7.42.

¹¹⁶ Office of Surveillance Commissioners, *Report of the Chief Surveillance Commissioner for 2003 to 2004*, HC 668 2003–04, June 2004, p.13

¹¹⁷ See, for example, Office of Surveillance Commissioners, *Report of the Chief Surveillance Commissioner for 2010 to 2011*, HC 1111 2010–22, June 2011, p.13

Closed Material Procedures

Overview

The judiciary also participates in the administration of the anti-terror regime by sitting as judges in CMPs. CMPs are closely associated with the imposition of a series of executive powers aimed at terrorist suspects within the last 15 years – indefinite detention, control orders and TPIMs. Colloquially known as ‘secret courts’, the procedure allows the court to sit in closed hearings to consider information. The reasoning behind this is that this information would be damaging to national security if it were made public, as due process dictates. CMPs will not necessarily apply to the entirety of a case – a court hearing can be divided into open and closed sessions based on the sensitivity of the specific evidence being used in each part.

Particularly notable is that the suspects themselves are often unaware of the case details against them. The closed material is not shared with them and they, alongside their chosen legal representative if they have one, are excluded from the hearing. Following a series of court judgments that such proceedings sometimes violate the right to a fair trial (which will briefly be discussed later), this is now mitigated by the practice of ‘gisting’. Suspects are provided with a summary or ‘gist’ of the information against them, although this does not always happen in cases with an immigration or citizenship element.¹¹⁸

A Special Advocate is responsible for formulating this ‘gist’ in a way that is acceptable to the Secretary of State, and providing it to the individual. Special Advocates are an independent body of security-cleared lawyers who are given access to the secret evidence and represent the suspect during the closed proceedings. The Special Advocate has a twofold role – s/he has a disclosure function and a representation function.¹¹⁹ The first element requires that they test the Home Secretary’s case for non-disclosure, and often argue for greater disclosure of evidence to the suspect. Many Special Advocates have, nonetheless, noted the ‘inability to effectively challenge non-disclosure by the government’, citing practical reasons such as an inability to call independent witnesses due to security issues.¹²⁰

The Special Advocates’ representation function in closed adversarial proceedings is limited in certain ways. The Prevention of Terrorism Act 2005 specifically provides that the Advocate is ‘not to be responsible to the person whose interests he is appointed to represent’ and, in a practical sense, restrictions on the relationship prevent it from assuming the qualities of a client and lawyer.¹²¹ S/he is prohibited from seeing the suspect after seeing the closed evidence and, according to one Special Advocate, this ‘preclusion of communication frequently limits the essence of the function, because you may have no idea what the real case is until you have gone closed, and therefore there has been nothing provided to you by way of prior statement’.¹²²

¹¹⁸ H. Hooper, ‘The Counter-Terrorism and Security Bill: A Potential Further Erosion of Citizenship Rights in the UK’, Constitution Unit blog, 26 January 2015, <https://constitution-unit.com/2015/01/26/the-counter-terrorism-and-security-bill-potential-further-erosion-of-citizenship-rights-in-the-united-kingdom/>, last accessed 5 October 2016.

¹¹⁹ A. Kavanagh, ‘CASES: Special Advocates, Control Orders and the Right to a Fair Trial’, *The Modern Law Review* 73:5 (2010), pp. 836–857.

¹²⁰ Amnesty International, *Left in the Dark: The Use of Secret Evidence in the United Kingdom* (London: Amnesty International, 2012).

¹²¹ Prevention of Terrorism Act 2005, s7(5).

¹²² D. Barak-Erez and M. Waxman, ‘Secret Evidence and the Due Process of Terrorist Detentions’, *Columbia Journal of Transnational Law* 48:1 (2009), p. 31.

CMPs, therefore, engage with the often precarious balance between justice and security. They have received challenges from some on the grounds of common law traditions of natural justice and open justice, and ECHR principles of due process and the right to a fair trial (Article 6).

Where this balance should lie is a difficult question with many different stakeholders and opinions. As one of my interviewees told me, ‘terrorism is where government legitimately must test the limits of the legal framework in which we operate’, and this process is apparent in the constant debates and rectifications of the raft of 21st century anti-terror legislation when it is examined through the lens of CMPs.

Evolution of anti-terrorism and CMP legislation

The origin of CMPs can actually be located in the Special Immigrations Appeal Commission Act of 1997, which established a tribunal of the same name. This is commonly referred to as SIAC – it is a superior court of record and a High Court judge, assisted by two other panel members, presides over it. It was initially set up to deal with the relatively specific issue of deportation cases with a national security element. It acted as a classified forum for these individuals to appeal their case in situations where the government deemed it dangerous and inappropriate to openly reveal all the evidence influencing its decision.

Nonetheless, such instances were rare. Before September 11 2001, only three cases had been heard by SIAC using a CMP. In the aftermath of the attacks however, the government introduced a raft of executive powers aimed at terrorist suspects that incorporated provisions for CMPs. The first of these was the Anti-Terrorism, Crime and Security Act (ATCSA) 2001, of which Part IV famously granted government ministers the power to order the indefinite detention of foreign nationals who were suspected of being an international terrorist without charge or trial. The minister would issue a certificate under s21 ATCSA 2001, declaring that the individual posed a threat to national security. If they could not be deported or removed for legal or practical reasons, the Act authorised their detention. Suspects were given recourse to appeal to SIAC where much of the case would take place in the closed settings described above. If not appealed, the Act obliged SIAC to review these s21 certificates after six months and to then review them again every three months.

These powers were found to be disproportionate, discriminatory and irrational in the 2004 *Belmarsh* case.¹²³ The case was a legal landmark in many respects – but the judgment paid scant attention to SIAC’s closed appeal methods or review mechanisms. CMPs therefore carried through to the subsequent Prevention of Terrorism Act (PTA) 2005, which replaced indefinite detention with control orders. These allowed ministers to significantly restrict the activities of those they suspected of terrorist activity without detaining them and, for the purposes of appeals, transferred the use of CMPs to the High Court. The Counter-Terrorism Act 2008 further extended CMPs to situations where the Treasury suspected individuals of financing terrorism or nuclear proliferation, in cases before both the High Court and the Court of Appeal. The CMP approach also remained in place in 2011 when control orders were replaced by the less restrictive Terrorism Prevention and Investigation Measures (TPIMs). Controversy reached a peak with the Justice and Security Act 2013, which drastically extended the scope for CMPs to civil proceedings more generally. The proposal emerged from a case against the state from Guantanamo detainees (*Al Rawi v The Security*

¹²³ *A and others v Secretary of State for the Home Department* [2004] UKHL 56.

Services), which the government declared it could not adequately defend itself against unless able to rely on national secrets in a closed setting.

The Investigatory Powers Tribunal

The Investigatory Powers Tribunal (IPT) sits alongside this raft of anti-terrorism measures. It was established at the turn of the century by the Regulation of Investigatory Powers Act (RIPA) 2000 and hears complaints about the intelligence services, the interception and gathering of communications data, and the quality of state surveillance of these activities. The Tribunal's use of CMPs is most relevant here. The Tribunal is more open than others in a number of ways, as the ECtHR noted in the 2010 *Kennedy* judgment, which referred to:

‘the breadth of access to the IPT enjoyed by those complaining about interception within the United Kingdom and the absence of any evidential burden to be overcome in order to lodge an application with the IPT’.¹²⁴

Nonetheless, the Tribunal's rules permit closed hearings as the normal approach and its decisions often only consist of whether it has found in favour, or against, the complainants. Providing reasons would disclose the facts of the specific case.

Court challenges

CMPs and the broader anti-terrorism legislation within which they sit have therefore long been a focus of the courts. A detailed analysis of court judgments in this arena is not within the scope of a report focusing on extra-judicial activities. Nonetheless, the development of the ‘gisting’ practice in response to the *Home Secretary v AF (No 3)* case is one useful example of the reactive, or indeed ‘collaborative’ way (as one interviewee told me), in which the judges and politicians have developed CMPs. It gives an illustration of judicial and executive approaches to this question, and so informs the forthcoming discussion of extra-judicial approaches.

In this particular appeal, the Lords held that, although the Special Advocate system helped to mitigate the effect of non-disclosure, an individual still had to be given the ‘gist’ of the allegations against them for the process to be compatible with Article 6 ECHR. A senior civil servant interviewee said of this decision and subsequent executive activity:

‘Judges give good lawyers lots of stuff to take away [from their decisions]. They are political, they are clever, they know what they are doing ... I think an interesting example of the judges and politicians working together, not physically together, but talking through megaphones at each other but in a constructive way is in the secret courts, closed material procedures, special advocates thing ... [Judges] never say ‘why don't you have special advocates’ but they say ‘it must be possible to test the evidence in a way that is fair’. Like gisting – I mean where did gisting come from – it's interesting, one day I've never heard of the word, and the next day it's the only word I was using. Week after week after week. We're going to gist this, we're going to gist that.’

¹²⁴ [2010] ECHR 26839/05.

Extra-judicial impact

Judicial opinion

Due to the subject matter, it is not possible to determine exactly how many judges have presided over CMP trials – case findings remain secret and names are unpublished. Voluntary judicial speeches are therefore the key avenue through which to assess opinion, and this is strongly divided. As mentioned in the previous chapter, only five speeches have been devoted to the topic. Although it is not possible to reach an exact figure of judges who have overseen CMPs, it is without doubt far greater than this.

This is a self-selecting group – these senior judges are the only ones that have chosen to speak publicly on what is a controversial and politically divisive topic. It is therefore fair to assume that they have pronounced views in comparison to their contemporaries. Even then, the nuance and division in their assessments was clear, and there is no evidence of public resignation, protest or rebellion. It is not that the judges have tried and failed to prevent or restrict CMPs, it is that they have not felt strongly enough as a professional body to attempt to do so. Albeit with some disquiet on the part of individuals – notably Lord Phillips – the judiciary has accepted CMPs.

This muted approach to CMPs is worth comparing with the reaction of many Special Advocates. By contrast, many lawyers have refused to take up Special Advocate positions or have prematurely resigned from their posts. In their consultation response to the Justice and Security Green Paper, Special Advocates scathingly suggested that ‘CMPs are inherently unfair; they do not “work effectively”, nor do they deliver real procedural fairness’.¹²⁵

The prominent QC Dinah Rose, upon signing Liberty’s petition against the Justice and Security Bill in 2013, similarly argued that:

‘Closed material procedures are alien to British justice and will distort civil trials beyond recognition. What may look and sound like a trial is in fact nothing of the sort. Judges will be asked to decide cases on the basis of “secret evidence” that would not withstand legal challenge and hand down judgments in secret.’¹²⁶

Conclusions

It is possible to reach one general conclusion about judicial advocacy efforts – that they do not exist in these contexts. There is a slight variation in their approach to overseeing surveillance activities and sitting as judges in CMPs, in that a number of judges have made speeches on the latter. By contrast, there are no similar voluntary comments on the surveillance regime.

Nonetheless, this chapter has unearthed one small area of influence for judicial commissioners as administrators of the anti-terror regime. Whilst they are not seeking to instigate changes, individual commissioners bring their personal preferences and approaches to the job. This is more concerned with the way they carry out the job than fundamental policy principles.

¹²⁵ Quoted in Lord Kerr, ‘Human Rights Law and the “War on Terror”’.

¹²⁶ B. Sankey, ‘Lawyers unite against Secret Courts’, Liberty, 28 February 2013, <https://www.liberty-human-rights.org.uk/news/blog/lawyers-unite-against-secret-courts>, last accessed 6 October 2016.

5. Conclusion and recommendations

Conclusion

The level of extra-judicial impact on the anti-terrorism regime is, ultimately, low. Although judges have spoken on a range of anti-terror policies, they have examined these primarily with reference to the judiciary's own role, or the administration of justice, and left untouched broader policy principles. Of the amendments that judicial peers have proposed within this limited sphere, most have been disregarded by the executive. All of their amendments outside of these categories have been similarly ignored. There is, moreover, little to no evidence of judicial advocacy outside of the House of Lords, even in relation to the judiciary's own role in administering the anti-terror regime. It has been stated that an awareness of the judiciary influences civil servants at the level of policy making, and whilst this is convincing, it is difficult to quantify in any meaningful way.

In their commissioner roles, judges might be expected to have had greater impact. But in reality, this impact is untargeted and analogous to that of any head of an organisation. Commissioners have brought their personal preferences and methodologies to bear on their offices, and their reporting styles; but they have not had any discernible impact on the government's anti-terrorism policy.

Recommendations

Formulation of anti-terror policy

Extra-judicial contributions are potentially beneficial to the formulation of anti-terror policies; but that potential has not been realised. Interviewees have mentioned that policies in this controversial arena are more likely to push constitutional boundaries, and this has been confirmed by the litigious history of executive actions such as control orders and TPIMs. Acting in their judicial capacity, it is the judges who will ultimately hear these cases. It would be helpful if their expertise could be drawn upon in a manner which is neither constitutionally threatening nor too burdensome for an already overburdened judiciary.

In the current circumstances, it is understandable that the judges keep their heads down. As one of my interviewees noted, 'it is very rare that you catch one of [the judges] out, getting the constitutionality of it wrong'. The judiciary are rightly respectful of the democratic legitimacy of government and parliament; and there are few avenues for judges to criticise anti-terrorism policy in ways which will not themselves lay the judges open to criticism. Therefore, **our first recommendation is that parliamentary committees should more systematically draw upon judicial contributions.** Although judges frequently provide evidence to such committees, only three instances were identified where they did so on the topic of anti-terror legislation. When scrutinising anti-terror legislation, bill committees should make a point to decide whether judicial expertise will be of value.

Serving judges are right to be wary of constitutional boundaries when discussing anti-terrorism. This report does not therefore suggest that they increase their contribution to public discourse. However, **the report has consistently identified the substantial contributions of retired judges in this arena. These efforts could be better organised, so as to have a more targeted impact. Instead of retired judges**

making discrete and ad hoc contributions, they could perhaps come together in an advisory body made up of retired judges. The new Investigatory Powers Commission could fulfil this role, providing sustained evaluation and reflections on areas of the UK's anti-terror policy, offering commentary and occasional reports in the same manner as select committees.

This has a number of potential advantages. At present, judges tend to confine their more detailed extra-judicial comments to those areas within their professional expertise. However, the judiciary as a body (and especially those with experience of terrorism trials) are knowledgeable on many of the questions which policy advisers debate in the context of anti-terror. For example, what is the appropriate balance between criminal justice measures and executive controls? An advisory body with a wider remit would allow for sustained and more deeply considered suggestions from judges. It would also help to reduce any confusion between the opinion of the judiciary, and that of individual judges.

The report also identified a lack of capacity within the executive to monitor the judiciary's position on these issues. Although my interviewees confirmed that this was a topic of high interest, there is no organised approach to receiving judicial opinions (such as speeches) when they are offered. This could be **remedied by an official point of information for extra-judicial (and likely also judicial) comments on anti-terrorism. An official within the Home Office's Office of Security and Counter-Terrorism could monitor judicial contributions and dispense them to those with an interest.** Dealing with judicial amendments in the House of Lords is a broader parliamentary question, which falls outside the scope of this study.

Administration of the anti-terror regime

Recommendations on the topic of judicial commissioners are particularly salient given the Investigatory Powers Bill. It is an improvement on the current system, and encapsulates many of the recommendations that would have otherwise featured in this report (such as a more streamlined commissioner system and prior judicial authorisation). It is nonetheless **important to highlight the importance of an independent source of funding.** At the time of writing, this has not yet been determined. All three commissioners and their offices are currently funded by the Home Office, undermining their independent powers of oversight. The current Chief Surveillance Commissioner Lord Judge feels that it would be wrong for the new Investigatory Powers Commission to be on the Home Office's payroll, as part of its remit is to independently authorise decisions made within this department. Funding could come from Cabinet Office, which supports the Intelligence and Security Committee; or from the Ministry of Justice, which funds the judiciary through the Courts and Tribunals Service.

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The UK's anti-terror regime has evolved rapidly over the last 15 years, and the judiciary have had to adjudicate on this body of legislation in the courts. Much has been written about these court decisions, with claims that the judiciary has increasingly overstepped the boundaries of their constitutional role. Far less attention has been paid to judges' potential influence beyond their decisions in court. This report explores the judiciary's off-the-bench involvement in the anti-terror regime through an analysis of parliamentary debates, evidence to committees and judicial speeches on anti-terrorism over the last 15 years. It is concluded that fears of judicial over-reach are unfounded. Outside of parliamentary debates judicial figures have not sought to initiate any changes to the anti-terror regime. Within parliamentary debates, the large majority of their proposed amendments have not been accepted. Their few successes have been on small technical points within much broader policies. The report suggests that the substantial expertise of retired judges in this area could be better utilised. The new Investigatory Powers Commission could help to provide a more effective collective voice for the judges involved in the supervision of the UK's anti-terror regime.

About the author

Anisa Kassamali worked as a Civil Service Fast Streamer in the Home Office and HMRC, following degrees at Oxford and SOAS. She took time out to do this research at the Constitution Unit, working with Professor Robert Hazell. Next year she joins Herbert Smith Freehills as a trainee solicitor.

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