

State power in the war on terror: A comparative analysis of the UK and USA

JON MORAN

School of Legal Studies, University of Wolverhampton, Wolverhampton, West Midlands, WV1 1SB, UK

(e-mail: jonm@wlv.ac.uk)

This paper analyses the patterns and extent of state power in the war on terror. The paper argues that the War on Terror has seen important extensions in state power, which pose challenges not only for globalisation theorists and advocates of international law, but also theorists of the managerial or limited state, or those who see the state as over-determined in various ways by societal mechanisms or actors. Recent analyses, prompted by events in the War on Terror, have begun to focus on the extent of state power, rather than its perceived fundamental limits in late modern society. This reflects a need to analyse the politics and processes of national security. Having made this point, extensions in state power must be viewed in context and dynamically with regard to their effect on civil liberties, necessary to avoid a ‘flattened’ a-historical approach to state power and civil society. The problem of state power will be examined with regard to the UK and USA. The UK and the USA represent different constitutional arrangements, jurisdictions, legal and administrative intelligence and law enforcement powers, systems of accountability and political cultures. However as late modern liberal democracies they also display remarkable similarities and stand as illuminating examples to contrast structural patterns of state power, politics and civil society.¹ They have also been identified as representing the evolution of the limited late modern state.

State power in context

The War on Terror provides an interesting context in which to situate debates on state power, particularly in the light of globalisation theory. Globalisation theory, in its ‘hard’ form prevalent in the mid 1990s to the turn of the century postulated that the solidity of the nation state was being overwhelmed by a series of economic, political, legal and technological developments. State power, once construed as the ability of the nation state to order societal relations within a juridically mapped territory, was being fragmented or even dissolved by the development of the global economy following the fall of

communism. The prime organisational representations of this movement were transnational corporations, able to play off nation states against one another to secure a receptive environment for their operations.² In political terms states were being subsumed in the development of regional blocs, which promoted co-operation in trade (EU, NAFTA, APEC).³ Indeed, in legal terms the development of international economic agreements in these regions was contemporaneous with international agreements on trade, aid and investment spurred on by multilateral bodies such as the IMF, World Bank, OECD and WTO.⁴ The first Gulf War in 1990 was held to herald the development of a more rigorous international law with the International Criminal Tribunals in the former Yugoslavia and Rwanda establishing the principle of supranational criminal accountability.⁵

These developments ran parallel with, or indeed, reinforced, other perceived developments – indeed internal contradictions – within the nation state. From the 1970s theorists had posited a decline in state legitimacy,⁶ followed by a retreat of the state from the economic sphere as New Right governments across the OECD instituted programmes of privatisation and deregulation, particularly in the area of capital controls.⁷ States now promised less to their citizens, particularly as the jurisdiction of the state could not ‘catch up’ with the mobility of industrial – but particularly financial – capital. State power was further eroded in practical and ideological terms by the development of civil society. New Social Movements campaigned on a variety of areas from the environment to gay and lesbian rights to animal welfare, and states responded sluggishly to the new social forces, forces which often mirrored transnational capital and ‘went global’ in their campaigns.⁸

These developments, as theorised above, clearly affected law, criminology and criminal justice. In the field of international law it was held that states were now constrained by the developing regime to which they had signed up via treaties, but also via the developing notion of international customary law.⁹ In strictly domestic terms, influenced by the post-structuralism of Foucault (and postmodernism) much theory concentrated on the changing notion of state power and legitimacy in the field of law, public order and crime. ‘Governmentality’ was highly influential, centering on ‘the fragmentation and diffusion of power, the emergence of new sites of social authority, the deployment of new technologies and rationalities of rule.’¹⁰ States retained power (to a greater or lesser extent depending on the theorist) but they ‘governed at a distance.’ Elsewhere, in a major analysis, as politicians promised to control crime, and instituted tough punishments for criminals and the maintenance of public order and associated values they increasingly retreated directly from the sphere of criminal justice, ‘farming out’ services to the private sector in areas such as security, prisons and the management of post-release offenders, encouraging

citizens to take control of their own crime prevention (the 'responsibilisation' strategy) and subjecting law enforcement apparatus to businesslike reforms.¹¹

These strands were subject to critique before 9/11. For example, in terms of economic globalisation, counter examples argued that the nation state was far from dead, and was in fact a vital matrix without which the internationalisation of economic activity was impossible.¹² In the field of politics the great movement towards regionalised blocs stuttered and decelerated in the EU, NAFTA and particularly APEC.¹³ In the field of international law the morass in the former Yugoslavia undermined the idea of a rigorous structure which could prevent the escalation of conflicts which clearly breached international legal norms.¹⁴ In the field of domestic criminal justice critiques were evident with regard to the extent of change within the state, particularly when examined contextually and comparatively.¹⁵ In the field of national security and intelligence studies, scholars engaged with state theory but were implicitly and explicitly more constrained in the idea of a weakening of the state, or subsuming it within the notion of 'governmentality.'¹⁶

However, the events of the post 9/11 period have seen the UK and the USA extend state power domestically in ways which would have been viewed as inconceivable by many social theorists even a few years previously. Powers of stop, search, surveillance, arrest, detention and charge have been strengthened or extended, often beyond Cold War parameters. Data collection and exchange has been expanded. The Terrorism Act 2000, The Anti-Terrorism Crime and Security Act 2001 and the Prevention of Terrorism Act 2005 in the UK and the USA Patriot Act 2001 represent important extensions of state power. Further the US has extended its power internationally by a combination of hard and soft techniques¹⁷ both via international agreement (the UN sanction of the bombing of Afghanistan, the development of extradition agreements) but also in contrast to international regime agreement and allegedly in violation of international law. The invasion of Iraq is the stark example of hard power, but this is also seen in the process of 'extraordinary rendition.' This context has led to an academic concern with state power rather than its fundamental (and paradigmatic) dispersal or dissolution.¹⁸ The subsequent sections expand on these and other themes in the comparative areas dealing with intelligence and investigation, accountability and non-citizens. These processes demonstrate the need to 'bring the state back in'¹⁹ and also to re-conceptualise the nature of state power. The current exercise of state power cannot be captured by theorists of the distanced or limited state since although these approaches do certainly conceive of a notion of state power, it is often over-determined by societal forms and influences, in practice subject to fuzziness as to its presence, or insufficiently tied to the exercise of political imperatives and processes, in this case the politics of national security.

The state and civil society

Whilst there has been an extension of state power in the UK and US it would be misleading to view this in isolation: the exercise of state power remains contested ground.²⁰ The use of Patriot Act powers in the US remains relatively constrained. In the UK the Human Rights Act 1998 has provided an important platform from which the judiciary declared certain anti-terror legislation in conflict with human rights principles. The critical opposition has not been restricted to professional groups such as the American Bar Association, the Law Society and the judiciary. Civil society groups have mobilised to place anti terror legislation and other state practice under forensic analysis. After a period the media has also moved to critically examine state actions after 9/11. Rather than being in a zero-sum relationship, extensions of state power may actually mobilise civil society in response, creating new networks. Therefore although this article will argue that state power has been evident following 9/11, this should not be taken to replace one narrative with another: of unlimited state power. The exercise of state power remains constrained, contradictory and often ineffective.

Law, state power and counter terror policy in the USA

State power has been evident in the use of executive power, new legislation and expanded intelligence agency operations. In terms of the first, following the 9/11 attacks Congress passed the Authorisation for Use of Military Force, vesting powers in the President to prevent attacks on the United States. Under this authority the National Security Agency's (NSA) terrorist surveillance program intercepted 'international communications where experienced intelligence experts have reason to believe that at least one party to the communication is a member of Al Qaeda or a terrorist organisation affiliated with Al Qaeda.' The program has been reauthorised by the President every 45 days. US citizens are also legally available for detention by executive order (exemplified by the detention of Yasser Hamdi, a US citizen captured in Afghanistan).²¹

This was followed by the passing of the USA Patriot Act 2001²² which had three main functions: (1) 'revised counterproductive legal restraints that impaired law enforcement's ability to gather, analyse and share critical terrorism-related intelligence information' (2) update Federal law (3) alter criminal law relating to terrorist offences.²³ All these processes have engendered extensive debate.

The Patriot Act clearly aims to facilitate intelligence sharing between law enforcement and national security/intelligence agencies. This distinction had developed in the 1970s and 1980s significantly as a result of the abuses that were discovered during those decades involving intelligence and FBI operatives.²⁴ The Foreign Intelligence Surveillance Act (FISA) 1978 introduced the 'primary purpose' standard which stipulated that the collection of intelligence via electronic (surveillance) or physical (search) means had to be for foreign intelligence purposes rather than to uncover evidence of a specific crime²⁵ and that thus this evidence could not be shared with law enforcement agencies who had to conduct their own surveillance. The FISA court regulated this. However, sections 203, 218, 504 and 905 of the Act 'bring down the wall' between intelligence gathered as part of a national security operation and intelligence/evidence gathered as part of a criminal investigation.²⁶ A number of provisions expand the powers of state agencies to gain data during an investigation: ss507/508 permit, after a court order, access to educational records if they contain information related to a terrorist investigation; s210 allows 'administrative and grand jury subpoenas to obtain information about temporarily assigned network addresses and user billing records from electronic service providers' without a court order.²⁷ Though with this the individuals are of course aware of the request and can challenge it. Section 206 permits roving wiretaps i.e. attached to a person rather than a specific number;²⁸ s211 allows cable companies to be subject to search warrants, court orders and subpoenas, whilst section 213 allows 'sneak and peak' (i.e. delayed notice) searches; and s215 allows FISA access to business and other records. The Act also strengthens criminal law. For example under s805 in the definition of material support to individuals organisations committing terrorist crimes and in s373 which strengthens the reverse burden of proof already applied to individuals accused of supplying funds to terrorists.²⁹

The scope of intelligence gathering has been expanded by other means than legislative change. A new interagency body, the Terrorist Threat Integration Centre facilitates information sharing between law enforcement and intelligence, including the CIA, FBI and Departments of Homeland Security, State and Defense. Dataveillance in the form of the CAPPS Computer Assisted Passenger Screening System uses personal information in government and commercial databases to identify airline passengers likely to have terrorist links, and runs with other data gathering programmes. In terms of strictly domestic political intelligence gathering, the FBI was restricted by post-Watergate guidelines which stipulated that the FBI could only spy where there was evidence of potential Federal criminal activity. These guidelines were loosened by William French Smith and Louis Freeh in 1983 and 1995 respectively but John Ashcroft in 2002 amended them further to allow the

FBI to monitor public gatherings, websites, electronic bulletin boards and obtain information from commercial data mining services without the belief that there is potential for Federal criminal activity taking place.³⁰

Legislative and administrative change was accompanied by organisational change, centrally via The Department of Homeland Security and shifting responsibilities between the CIA and FBI.³¹ In terms of agency operations the CIA and FBI are working more closely together and have expanded budgets and scope. The expansion of state power has continued beyond these core organisations. Agencies such as the National Parks Service and the Transportation Security Administration have been provided with new powers or have expanded their existing activities, often supported by mainstream Federal agencies in their operations.³² This is part of the process of creating 'joined up thinking' which has been evident in both the USA and UK particularly following 9/11, as Doig discusses in this volume.

Analysing the scope of state power in the USA

Overall it appears that the post 9/11 period has seen a major extension in state power. In terms of executive power, the legality of this power is evidently an issue since it has no specific authorisation. The Bush administration's legal argument claims this is implied by the 'Authorisation for Use of Military Force' by which Congress effectively accepted that the US was in a wartime situation and that the President could employ extraordinary powers to prevent an attack on US soil.³³ Not only have powers been employed against US citizens in the area of surveillance, extraordinary measures have authorised the detention of foreign nationals and subjected them to military tribunals.³⁴ The fact that the US is seen as being in an effective wartime situation for the foreseeable future is an evident and remarkable extension of state power, since most other jurisdictions would regard the 9/11 attacks, however appalling, as not constituting an act of war, nor requiring any permanent wartime style exercise of powers. For example when the British Cabinet narrowly escaped being blown up by a Provisional Irish Republican Army (PIRA) bomb during the Conservative Party conference of 1984 the Government did not declare the PIRA 'unlawful combatants' and declare a state of emergency invoking Civil Defence powers. The exercise of this executive power clearly forces us to rethink the nature of sovereignty and state power.³⁵

The specific legislative changes in the Patriot Act which 'bring down the wall' and loosen controls on intelligence operations present a risk:

Intelligence investigations are special, in ways that make them preferable to the government, but also in ways that make them more dangerous to liberty than criminal investigations. First, intelligence investigations are broader. They are not limited by the criminal code. They can investigate legal activity. In the case of foreign nationals in the United States, they can focus solely on First Amendment activities. Even in the case of US persons they can collect information about First Amendment activities. In this context, the concept of 'relevance' has little meaning.³⁶

The lack of this distinction was, it has been argued, one reason permitting the abuses of the 1950s to the 1970s which culminated in Watergate³⁷ and critics argue that Ashcroft's revised guidelines allowing the FBI to conduct domestic political surveillance of domestic groups engaged in lawful activity constitutes a partial return to this tactic.³⁸ This fuzziness is apparent at the state level also.³⁹

However these changes must be disaggregated and examined. A number of these developments are in fact clearing up and codifying the legal coverage on a rational basis. For example roving wiretaps are necessary when individuals change mobiles rapidly, and cable companies are merely being brought into line with other service providers⁴⁰ 'Sneak and peak' searches were already used in organised crime, drugs and child pornography cases.⁴¹ Thus terrorism is being brought in line with other areas of specialist investigation which, since the 1960s, have been subject to change in surveillance and criminal investigation.⁴² In this respect it is also important to examine the operation of the legislation in practice. From 2001 to mid-2005 there were 49 orders under s206 authorising roving surveillance, and 35 court orders under s215 to obtain the business or other records of persons related to an ongoing national security (intelligence or international terrorism) investigation (which in the case of US citizens cannot be related to First Amendment activities).⁴³ In 2004 1,758 applications for surveillance under FISA were filed (all approved) compared to 1,012 in 2000.⁴⁴ One question is the extent to which informal powers are being used, or co-operation sought, which does not require legislative authority. According to the Justice Department in 2005, section 215 powers had not been invoked to obtain library records,⁴⁵ but a University of Illinois study found that 178 public libraries had received visits from the FBI⁴⁶ but presumably none on a specific statutory basis. Although the FISA Court has not refused any requests for surveillance the case might be different if the number of requests rose markedly.

Not only has the Patriot Act been used less than promiscuously, even this has often been for non-terrorist investigations. The Department of Justice has produced (unconvincing) public evidence concerning the practical operation

of the Patriot Act: a number of its examples centre on the way in which the Act has assisted in investigations into drug trafficking, organised crime and child pornography. Further, where the argument does centre on terrorism investigations it is unclear how the Act has actually facilitated investigations beyond the previous system,⁴⁷ particularly as critics have pointed out it had more leeway than the proponents of the Act claim. For example it appeared that under the Clinton administration the Department of Justice and FBI misled the FISA court 'as to the actual existence of the firewall: information gathered from intelligence taps was used freely in bringing criminal charges.'⁴⁸

Thus the Patriot Act is conforming to a pattern, in that the expansion of state power in the anti-terrorist domain matches other areas which had already seen the state take specialist powers.⁴⁹ Whilst specific legislative powers have been used relatively sparingly, they represent a reservoir of state capability. Where state power is evident in wider terms is in the area of surveillance, particularly in terms of general rather than targeted surveillance i.e. done in volume and not connected to any specific criminal investigation. As mentioned, FBI domestic 'eyeball' political surveillance has increased as has 'technical' surveillance/dataveillance in the form of data gathering and mining. For example, although some technical surveillance programs have been halted by civil society and Congressional opposition (see below), the US has apparently continued to develop data mining capacity through the NSA via keyword, link and other methodologies,⁵⁰ and major telephone companies have apparently been providing private phone records to the NSA.⁵¹ Elsewhere, the Customs Service has access to volume passenger airline data from foreign carriers under the Aviation and Transportation Security Act 2001.⁵² Thus state 'penetration' i.e. developing information gathering and security policies⁵³ has increased.

Law, state power and counter terror policy in the UK

This section does not go into detail, since the UK experience has been dealt with in detail elsewhere in this volume (see Walker, Phythian, Doig and Sproat). The UK is not a presidential system; powers not have been extended via executive authority. Rather, the police have been provided with more power under the relevant legislation, the Terrorism Act 2000, the Anti-Terrorism Crime and Security Act 2001, the Prevention of Terrorism Act 2005 and the Serious Organised Crime and Police Act 2005. Further, despite calls, the UK has not undergone substantial organisational change via a new department. Organisational change was already under way before 9/11 in the areas of criminal justice (primarily in the form of the creation of the Serious

and Organised Crime Agency) and national security (better intelligence exchange), and this has promoted more joint working rather than radical change, although this may change in future (see Doig this volume).⁵⁴ As in the USA a major increase in surveillance and data sharing has taken place, involving the *de facto* creation of a DNA database over the long term and the introduction of ID cards.

Analysing the scope of state power in the UK

What is interesting for an analysis of state power is that the UK had expanded anti-terror powers before the 9/11 attacks. What one might term the ‘Hillyard model’ argues that terror legislation pioneered in Northern Ireland ‘ratcheted up’ normal criminal law.⁵⁵ However the security situation in Northern Ireland improved markedly with the Belfast Agreement which institutionalised a peace process in 1998 and was followed by a drop in mainstream paramilitary activity. Remarkably in this context the government passed the Terrorism Act 2000, which expanded the definition of terrorism, increased police powers in the areas of stop and search, detention, introduced offences such as supporting terrorism, wearing or displaying pro-terrorist articles, asset seizure, created a reverse burden of proof in financial offences and permanently expanded coverage across the mainland.⁵⁶

In terms of the legislation employed, s44 of the Terrorism Act provides wider grounds for stop and search. The rate for the Black/Asian population was two to three times higher than for whites. However, numerically the figures show that under 3,668 Asians were stopped and searched across the UK in 2003–04 falling to 3494 in 2004–05. Black people were still more likely to be disproportionately stopped/searched⁵⁷ What received less attention but is more pathbreaking in terms of civil liberties is the zoning of whole areas under s45 of the Act – within which the s44 stop and search is carried out – and the inappropriate use of the powers. From 2001–2003 there was no part of London which had not been zoned for s44/45 searches. At Heathrow Airport the majority of searches have been under s44/45. The police used s44/45 powers on mainstream protesters at RAF Fairford and at Docklands. Subsequently 144 individuals were arrested, of these 2 were under the Terrorism Act. On appeal the High Court argued that police use of stop and search powers was lawful, since there was a threat of terrorism/to national security at that time. However the judgement indicated that the decision had been ‘a close call,’⁵⁸ and there have been other cases where Terrorism powers have been used inappropriately on other protestors.

Few stops/searches have led to an arrest, and few arrests have led to conviction. However, as with the Patriot Act, it does need to be appreciated that the law is one part of any anti-terror strategy and cannot be evaluated by convictions alone. For example, investigations under the Terrorism Act have not provided evidence for charges but have uncovered evidence of 'standard' criminal offences which offer a better chance of conviction. Further, the police have also employed the Act as a disruption tactic rather than to ensure criminal convictions. Finally, those cases which have been brought under the Terrorism Act have been treated with suspicion by the courts.⁵⁹ However one would expect that if the Act is to be seen as effective it should be responsible for a substantial number of charges/convictions which would otherwise not have taken place.

Subsequent legislation such as the Prevention of Terrorism Act 2005 provided the state with remarkable powers. In addition, the Government campaign (supported by a clearly political intervention by the higher echelons of the Metropolitan Police) to extend pre-charge detention for those suspected of terrorist offences to 90 days was an example of the state accruing power to itself without specifying how this would actually facilitate an increase in terrorism convictions. Whilst the 90 day limit was rejected, the 28 day limit was secured in the Terrorism Act 2006.⁶⁰ A fundamental change in terms of policing was apparently, importantly, taken without any rigorous (public) consultation. An innocent Brazilian, Jean Charles de Menezes, was shot by anti-terrorist operatives in the London Underground shortly after the 7/7 London bombings. The operatives suspected de Menezes was a suicide bomber, mistaking him for a terrorist suspect who lived in the same flats. This led to the revelation that a 'shoot to kill' policy apparently more stringent than that in Northern Ireland or Israel (on which the policy was based) is now in operation across the UK, having been altered under Operation Kratos.⁶¹

In terms of surveillance, as with the Patriot Act this *appears* limited. In England, Wales and Scotland, 1,983 warrants were issued in 2003⁶² a figure including serious crime as well as national security. RIPA made provision for oversight in the form of reports from an Interception of Communications Commissioner and Intelligence Services Commissioner. However the reports will not specify for national security reasons the use of warrants for surveillance issued in terms of foreign intelligence or in Northern Ireland.⁶³ Further, although surveillance warrants can be issued by the Home Secretary, non warrant interceptions can be authorised by senior police officers⁶⁴ and these are not specified in terms of numbers. Nor is the use of covert human intelligence sources. In terms of data storage and exchange, some of this is covered under RIPA 2000, and whilst the Anti-Terrorism Crime and Security Act 2001 provided for the retention of data, much exchange of information has taken

place under existing arrangements or via new Memoranda of Understanding between agencies. The extent of this is simply not known. However in terms of 'dataveillance',⁶⁵ the UK is experiencing a marked advance in state power in the form of the proposed introduction of ID cards, unsuccessfully opposed by the House of Lords and the *de facto* creation of a national DNA database. Under the Anti Terrorism Crime and Security Act 2001, terrorist suspects arrested were liable to have their DNA taken and stored whether they were subsequently charged or not. This was subsequently brought into 'normal' criminal law. Following the Serious Organised Crime and Police Act 2005 all offences are arrestable offences, and thus the DNA database is likely to rapidly expand over the next decade.

Finally, and linked to the above, as in the US, the UK has seen a dissolving of the intelligence/investigation divide, for example in the form of Control Orders (see Walker, this volume). These are applied to individuals on the basis of intelligence presented to special tribunals rather than via a standard judicial process. Thus, if a person is designated as being involved in terrorism related activity s/he may be subjected to a non-derogating control order (applied on the judgement of the Secretary of State) and a more severe derogating control order (applied by the court following application by the Secretary of State). Control orders may involve a range of restrictions such as wearing an electronic tag, refraining from contact with specified individuals or movement outside a demarcated area, being subject to curfews, house arrest, having no access to communications, state personnel having access to the person's residence at any time and so forth.⁶⁶ Following the House of Lords judgement of November 2004, this is now applicable to citizens as well as non citizens. Whether employed or not (only 18 persons in total including one citizen have been subjected to control orders) this is a remarkable power for the state to accrue to itself in peacetime.⁶⁷

State power and accountability in the USA

Efforts to secure the accountability of agencies involved in the war on terror have come from a combination of Congress, courts, civil society and the media. The balance between these actors has varied widely at different times (and in comparison to the UK). Congress has taken a role in restricting the executive. The Total Information Awareness program was to be run via the Department of Defense, and aimed to establish 'a massive system that is able to scan, compile and process personal data of all people within and outside of the US in order to establish patterns, generate hypotheses, reporting and alerting, and to detect facts and events.'⁶⁸ This programme was restricted

by Congress from using information on US citizens, and its lesser putative successor Terrorism Information Awareness had its funding cut by Congress in 2003 until proper accountability systems were introduced.⁶⁹ Further, the uncritical attitude which extended to the war on terror abroad has not been extended to domestic national security policies. As Cole points out Congress and civil society protest have prevented the state power which has been applied to foreign nationals extending to US citizens.⁷⁰ However, although Congress has stymied intrusive programs such as the TIA, without civil society groups and the media the role of Congress might have been more desultory, and the post 9/11 period does not appear to have broken the historical mould identified by Loch Johnson with regard to intelligence: 'Mostly, however, intelligence oversight since 1975 has been a story of discontinuous motivation, *ad hoc* responses to scandals, and reliance on the initiative of just a few members of Congress' in other words an absence of 'a comprehensive approach to intelligence review.'⁷¹ Indeed, subsequent to the Supreme Court's decision (itself relatively limited) to allow *habeas corpus* applications for prisoners at Guantanamo, Congress has passed the Detainee Treatment Act under which the executive has dismissed all such cases,⁷² and the Patriot Act has been reapproved, with 14 of its 16 'sunset' clauses now permanent.

Civil society has provided an important bulwark, particularly as groups from across the political spectrum have criticised executive authority and the provisions of the Patriot Act. In contrast to previous episodes where legislation and policy was over-determined by national security, the internet has been the site of a forensic analysis of law, state investigative practices and surveillance. This to some extent links in with groups who (as in Western Europe and Australasia) were already campaigning against the development of surveillance.⁷³ The campaigns by these groups were important in shelving some legislative provisions such as The Total Information Awareness program. Similarly media and civil society campaigns stymied the implementation of a more robust airline passenger screening program CAPPS II (although others are underway).⁷⁴

With regard to the judicial branch, the judgement of Cole (regarding the Supreme Court's view of citizenship rights in the Hamdi case) was that it exercised 'an undertheorised and undefended emphasis.' This can be applied to Supreme Court judgements generally and the circuit courts (with certain notable exceptions) have deferred to the executive, accepting either overtly or implicitly the 'war footing' context of the issue at hand.⁷⁵ In terms of criminal investigation, structures of accountability centre on the courts where warrant notification is required for covert activity. Despite 'sneak and peek' provisions the subject has to be notified at some point and where s/he is notified as a matter of course this can be challenged in the courts.

State power and accountability in the UK

If the USA has seen civil society groups take the lead in propelling other organs to ensure accountability, in the UK the (higher) courts have assumed a prominent and proactive role; to critics this appears to confirm the 'nightmare' of an active judiciary interfering in political matters via the 'Trojan horse' of the Human Rights Act 1998. The House of Lords in particular has mounted a robust critique of government policy in decisions on the indefinite detention of foreign terrorist suspects and the admissibility of evidence gained via torture in hearings regarding foreign nationals suspected of being terrorists. These decisions have relied not only on common law but heavily on the Human Rights Act 1998,⁷⁶ and it is an interesting conjecture as to what the situation would have been in the absence of the Act.

Parliament has played a role in blocking proposals for 90 days' detention for persons detained for suspected terrorist offences, although has deferred to the executive in other areas. The media and civil society groups such as Liberty have played a relatively muted role relative to these actors.

As with the USA a main issue is state surveillance. Prior to the peace process in Northern Ireland a system of governance was being introduced to regulate human and electronic surveillance.⁷⁷ The Police Act 1997 was followed by the comprehensive Regulation of Investigatory Powers Act 2000, which governs such surveillance. Whilst state surveillance expanded it was more regulated than previously when security services were not even acknowledged in law as existing and surveillance operations were not regulated⁷⁸ However although now surveillance is undertaken on a statutory basis, 'the RIPA 2000 does not provide for a notification procedure whereby subjects are notified following completion of the surveillance activity which inevitably impacts on the effectiveness of any accountability structure'⁷⁹ and in terms of regulation this is done via bureaucratic rather than legislative accountability via government appointed Intelligence and Surveillance Commissioners. Public information on the full extent of surveillance is not available (see above). With regard to data surveillance, despite the Data Protection Acts this form of 'net widening'⁸⁰ is expanding rapidly and without public debate, continuing a process already well established, since for example the UK is covered by CCTV to a greater extent than any nation in Western Europe and North America. A *de facto* national DNA database is being developed and the government will be accessing private sector database information. Overall there appears less scrutiny of surveillance than in USA which may be connected to the more deferential and limited oversight of intelligence generally.

State power and non-citizens in the USA

State power has historically been focused more intensely on foreign nationals, a pattern evident after 9/11. Foreign nationals entering the USA from selected countries were required to register and have fingerprints and photographs, extended to male foreign nationals already residing in the USA.⁸¹ The Patriot Act provides a wider definition of terrorist activity for non citizens and prohibits non-citizen support of a generously defined terrorist organisation.⁸² Under executive authority the system designating foreign individuals (and US citizens) as unlawful combatants was followed by interrogation and seemingly indefinite incarceration at Guantánamo. Following the decision in *Rasul v Bush* 2004, Congress passed the Detainee Treatment Act, mentioned above, neutralising *habeas corpus* claims by non citizen prisoners at Guantánamo. The practice of extraordinary rendition has seen foreign individuals transferred without proper legal process to third countries, allegedly for the purpose of coercive interrogation.⁸³ These actions require a clear conceptualisation of state power: ‘Arguing against Guantánamo on the grounds of domestic law or international obligations is like fighting against a naked tyrant by threatening to remove his clothes.’ Indeed, actions such as Guantánamo demonstrate the need not to rethink the nature of state power and international law but perhaps to ‘think’ it in its original form. As Ross argues: ‘the real and true meaning of law is as protection of the people. . .the citizens of the United States’ undertaken by the sovereign, ‘the embodiment of this mixture of fact and right’ that is law.⁸⁴

State power and non-citizens in the UK

Whilst non-citizens have not been subject to arrest, detention and questioning in the numbers seen in the USA, those persons deemed by the executive to be international terrorists and unable to be deported were, under Part 4 of the Anti Terrorism Crime and Security Act 2001, held in indefinite detention. The main form of accountability with regard to this ATCSA system was through the Special Immigration Appeals Commission (SIAC) which ruled whether detention was fair or whether bail should be granted. The split between intelligence and evidence was blurred (see Walker’s paper in this volume): hearings were secret and employed special intelligence which could not be properly examined by the accused individual or his security cleared counsel. The system of accountability was confused. Lord Carlisle, the independent reviewer, certified detentions as correct shortly before the Home Secretary himself decided to release one individual and SIAC ruled to release another

(see the cases of *D* and *M*⁸⁵). Most importantly, the detention applied to foreign individuals was discriminatory – the House of Lords decided that either no-one should be indefinitely detained or all UK citizens should be open to it, leading to the replacement of indefinite detention by stringent house arrest under the Prevention of Terrorism Act 2005, a process approved by a judge but largely based on intelligence (see Walker). Where possible those under Control Orders are to be deported providing the receiving countries have signed Memoranda of Understanding that these individuals will not be ill-treated, a subject of some controversy. Elsewhere, the Extradition Act 2003 provides for speedier extradition of suspects (including terrorists) and other powers provide for the removal of citizenship (e.g from cleric Abu Hamza in 2004).

Conclusion

A comparative analysis of the post 9/11 period has demonstrated the varieties of political, social and technical expressions of state power which exist, varieties which cannot be fully captured by globalisation or international regime theory, or on the state level by the framework of the shift from ‘sovereignty’ identified in late 1990s. Indeed, in the last year or so academics have begun to clearly express concerns about the extent of state power, not its diffusion.⁸⁶ In policy circles, there has always been a limit to calls for the retreat of the state in security as opposed to the economic sphere. However the stress is clear: according to one analysis, ‘today, state and local law enforcement, public health and emergency response personnel are on the front lines of detecting and responding to terrorist threats, corporate managers are responsible for securing key infrastructure such as energy supplies, chemical plants, and telecommunications, and workers and neighborhood residents may hold information that can help prevent attacks’⁸⁷ Similarly, ‘the formal hierarchical, compartmentalised information strategies of the past need to be replaced with a new architecture featuring flexible, decentralised networks of public and private information providers, analysts and users.’⁸⁸ These nebulous statements symbolise the un-meetable demands that state authorities are expected to satisfy. For these quotes to have any real world meaning, the United States would have to be a permanent Panopticon, its citizens micropoints via which surveillance is conducted, exchanged, analysed and acted on to prevent attack. However, in practical terms, in the post 9/11 landscape in which the UK and USA traverse, the state has clearly extended its power, and the prevailing policy and political cycle calls for extensions of state power whether or not more attacks take place.

State power and accountability

In practical terms state power has expanded, as evidenced in new legislation, bureaucratic expansion, surveillance capacity and data collection, policies towards non-citizens residing in state territory, and especially the US case, hard and soft power as applied to the citizens of other states territories. It appears that the development of policies regarding intelligence and investigation constitutes a setback when compared to the situation from the 1970s, which saw an increase in democratic accountability regarding state surveillance.⁸⁹ However the USA has not been sucked back into a Hoover-Nixon dimension; the expansion of state power since 9/11 has been subjected to democratic debate and constraint by media and civil society groups and Congress. In the UK democratic oversight of intelligence did not occur meaningfully until the 1990s and remains characterised by bureaucratic oversight (see Phythian, this volume). However the UK courts appear more activist than in the USA, effectively hobbling certain parts of the government's anti terror policy and Parliament has proved vigorous at points. As Waddington points out, an expansion of state power does not represent in zero sum form a commensurate loss in civil liberties i.e. that 'the only fate that beckons is the slippery slope into the abyss of authoritarian repression.'⁹⁰ Whilst national security and serious crimes function as constant exceptions to the legislative instruments which contain citizens' basic rights, the breadth of that exception is contested ground.⁹¹ Further, the war on terror is subject to structures of accountability in both nations which vary in vigour but they do constrain the state in the sense that they require it to justify and rationalise its actions and provide scope for civil society groups to critique state actions. Waddington is right to call for a more nuanced account. However (1) civil society itself has varying effects depending upon the strength of the effective 'coalition' of which it may be a part (e.g. the capacity of civil society groups themselves and whether they can influence parliament/Congress) and 2) following 9/11 civil society is reacting to state proactivity.

Surveillance and state power

When examined numerically the numbers of citizens actually affected by the exercise of state power appears to spread out in concentric circles; warrants issued under the Patriot Act do not amount to over 50 in four years and 350 or so individuals have been charged with terrorist related offences; in the UK, 895 people have been charged with Terrorism Act offences with 23 convictions so far; applications for surveillance are limited; although hundreds have been affected by Terrorism Act stop and search powers used in demonstrations

particularly. The stop and search of individuals of Asian appearance increased in percentage terms but this amounted to less than 4,000 people across the United Kingdom in 2003–04 with around 30,000 stopped overall. These are not insignificant figures. However, even during the war on terror the citizen in the UK or USA does not face state power to the physical or temporal extent that citizens in Singapore or Japan do in their normal daily lives for example.⁹² However two things are also clear: the state in the USA and UK has created strong legislative controls which provide a deep reservoir of *potential* power which might yet expand; and in the area of surveillance state power already appears to be encroaching significantly on large numbers of citizens.

Surveillance is not constant, nor is it uniformly efficient. The 9/11 attacks demonstrate that surveillance/intelligence is not the panacea for the control of deviance (the expansion of CCTV has not performed this role in the UK. Evidence on its effectiveness is conflicting and there are innumerable ways in which individuals and groups can subvert it). Surveillance brings with it information overloads, and the reality that information is not seen as significant at the time. Even the Department of Justice's argument that intelligence sharing needs to be facilitated in order to create a 'mosaic' on which the face of the putative terrorist may be 'seen' does not convince when information may not be shared properly, or recognised as important or not stored properly. The image is not Orwell or the Panopticon; but one of bureaucratic sluggishness and bounded capacity. However, this is not to argue that surveillance does not constitute an increase in state power; rather that it must be grounded in empirical analysis.⁹³ Civil liberties groups such as the ACLU, EPIC, State-watch, Liberty and Privacy International cogently argue that the expansion of surveillance chills the activity of individuals through self censorship and expands the perspective via which the state can decree certain activities as suspicious or deviant. Citizens are placed under the constant gaze of technological apparatuses. The notion of algorithmic CCTV surveillance in which faces are stored as individuals live their daily lives and processed via software represents 'silent technology' – embedded and flexible and potentially more intrusive.⁹⁴ It may well be the case that innocent citizens are increasingly brought into the web of state monitoring⁹⁵ and the collection of ever greater circles of data on individuals constitutes an important extension of state power and constriction in individual autonomy. UK or US citizens as mentioned, may not come into contact with intrusive state power on a regular basis but dataveillance clearly constitutes 'net widening'.⁹⁶ Interestingly a threat to civil liberties may also be the information gathered by private sector organisations (for marketing, consumer analysis and insurance purposes) rather than the state *per se*,⁹⁷ and net widening may be more sinister if the

state requires access to this data. As mentioned, this is already occurring in both jurisdictions.

State power and non-citizens

However in terms of non-citizens, not only do the numbers affected increase but so does the intensity; in the UK under twenty individuals indefinitely detained or under house arrest; others deported; approximately 5000 foreign citizens in the US detained⁹⁸ and over 650 detained at Guantánamo; many of the 33,638 civilians reported killed since the Iraq war.⁹⁹ Cole's universalist argument calls for an equality of rights between citizens and non-citizens, but this analysis fails to take into account the well grounded historical development of state power and citizenship:¹⁰⁰ as states have expanded their power, citizens rights and claims have expanded also, and states are more wary of excessive interventions towards citizens. Non-citizens have faced clear expressions of state power which have not been particularly bounded by international regimes.

More state or less?

The manifestation of state power which has been evident following 9/11 in the UK and USA forces us to rethink notions of democracy and sovereignty and the fundamental nature of state power in the modern world.¹⁰¹ A recent article on terrorism and criminology implies that current social theory in the form of 'risk' or 'governmentality' cannot fully capture the post 9/11 landscape,¹⁰² arguing for example that Foucault places too much focus on social structures of discipline rather than agent centered explanations. But the critique can be rewound further: Foucault's view of the state is insufficiently centralised; this is of course the nature of Foucault's work since he believes 'power is never in anybody's hands, never appropriated as a commodity or a piece of wealth.'¹⁰³ However the result is that Foucault's 'disciplinary society' under-determines the heuristic principle of state power and politics, including the juridical core of the nation state and the influence of national security. The historically specific processes of the terminus of communism, the rise of 'globalisation' and the rise of consumerism, 'play' and the marketisation of life provided fertile ground for the spread of poststructuralist ideas and the notion of 'the weak state' or the 'distanced state' often as one disciplinary motor amongst others or as itself dispersed. Central authority appeared to have lost its importance in the life and identity of the citizen, generalised notions of risk and insecurity were evident but to an extent 'de-anchored' from politics and

security in the traditional sense. However historical time can move rapidly;¹⁰⁴ in the period since 9/11 what appeared like archaic debates about state power, civil liberties and the discourse and politics of national security are back on the agenda.

Notes

1. See the comparative analysis in D. Garland, *The Culture of Control* (Oxford: Oxford University Press, 2001).
2. K. Ohmae, *The End of the Nation State* (New York: Free Press, 1995); T. Friedman, *The Lexus and the Olive Tree: Understanding Globalisation* (New York, Anchor: 2000); A. Giddens, *Runaway World* (London/New York: Routledge, 2003); S. Gill and D. Law, "Global Hegemony and the Structural Power of Capital," *International Studies Quarterly*, 1989 (33:4), 475–499.
3. S. Gill, "Globalisation, market civilisation and disciplinary neoliberalism," *Millennium*, 1995 (24:3), 399–423.
4. P. Sands, *Lawless World. America and the Making and Breaking of Global Rules* (London: Penguin, 2005).
5. G. Werle, *Principles of International Criminal Law* (The Hague: Asser Press, 2006).
6. C. Offe, *Contradictions of the Welfare State* (London: Hutchinson, 1984); J. Habermas, *Legitimation Crisis* (Cambridge: Polity, 1988); see also P. Cerny, *The Changing Architecture of Politics: Structure, Agency and the Future of the State* (London: Sage, 1990).
7. J. Frieden, "Invested interests: the politics of national economic policies in a world of globalisation" *International Organisation*, 1991 (45:4).
8. S. Buechler, "New Social Movement Theories," *The Sociological Quarterly*, 1995 (36:3), 441–460; S. Buechler, *Social Movements in Advanced Capitalism* (Oxford: Oxford University Press, 2000); N. Klein, *No Logo* (London: Flamingo, 2000).
9. Sands, *Lawless World*; Werle, *Principles of International Criminal Law*.
10. I. Loader and R. Sparks, "Contemporary Landscapes of Crime, Order and Control," in M. Maguire, et al. (eds.) *The Oxford Handbook of Criminology* (Oxford: Oxford University Press, 2002), 87.
11. D. Garland *The Culture of Control* (Oxford: Oxford University Press, 2001). Garland does not see the state from a limiting perspective. Indeed, the 'Culture of Control' might involve instituting more state controls and harsh penalties on selected deviant groups. However Garland is also arguably fuzzy on the nature of state power, and this paper argues that state power in the war on terror is an example of direct state application, and reflects an unmediated actual or potential power over the lives of citizens generally.
12. P. Hirst and G. Thompson, *Globalisation in Question: The International Economy and the Possibilities of Governance* 2nd edition (London: Polity, 1999); M. Bernard "Regions in the Global Political Economy," *New Political Economy*, 1996 (1:3), 335–353; L. Weiss (ed.), *States in the Global Economy* (Cambridge: Cambridge University Press, 2003); L. Weiss, "The State-Augmenting Effects of Globalisation," *New Political Economy*, 2005 (10:3), 345–353. From a theoretical perspective see J. Rosenberg, *The Follies of Globalisation* (London: Verso, 2002) and B. Michael, "Theorising the Politics of Globalisation: A Critique of Held et al's 'Transformationalism' " *Journal of Economic and Social Research*, 2003 (5:1), 3–17.

13. P. Hirst and G. Thompson, *Globalisation in Question: The International Economy and the Possibilities of Governance* 2nd edition (London: Polity, 1999).
14. B. Simms, *Unfinest Hour: Britain and the Destruction of Bosnia* (London: Penguin, 2001).
15. T. Jones and T. Newburn "The Transformation of Policing?" *British Journal of Criminology*, 2002 (42) 129–146; J. Ferret, "The State, Policing and "Old Continental Europe": Managing the Local/National Tension," *Policing and Society*, 2004 (14:1), 49–63.
16. National security politics is not amenable to the idea of governing at a distance. See for example the journal *Intelligence and National Security*.
17. J. Nye, *Soft Power* (USA: Public Affairs, 2004); S. Smith and M. Hollis, *Explaining and Understanding International Relations* (Oxford: Clarendon Press, 1990).
18. J. McCulloch, S. Pickering, "Suppressing the financing of terrorism Proliferating State Crime, Eroding Censure and Extending Neo-colonialism," *British Journal of Criminology*, 2005 (45:4), 470–486; G. Mythen and S. Walklate, "Criminology and Terrorism," *British Journal of Criminology* advanced access July 28th 2005 <http://bjc.oxfordjournals.org/cgi/rapidpdf/azi074v1>; Mark Curtis, *Web of Deceit* (London: Vintage, 2003).
19. P. Evans, D. Rusechemeyer and T. Skocpol (eds.) *Bringing the State Back In* (Cambridge: Cambridge University Press, 1985).
20. P. Waddington "Slippery Slopes and Civil Libertarian Pessimism," *Policing and Society*, 2005 (15:3), 353–375
21. For the defence of such executive power see: Attorney General Alberto Gonzales, *Intercepting Al Qaeda: A Lawful and Necessary Tool for Protecting America* given at the Georgetown University Law Center, Washington, D.C. 24 Jan. 2006, <http://usinfo.state.gov/is/Archive/2006/Jan/25-234752.html>.
22. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act.
23. Department of Justice, *Report from the Field: The USA Patriot Act at Work* (2004) July, 1, <http://www.fas.org/irp/agency/doj/patriot0704.pdf> The Act alters more than 15 Federal statutes. The Century Foundation, *The USA Patriot Act: A Guide to the Issues* (New York: Century Foundation, 2004), 8.
24. R. Jeffreys-Jones, *The CIA and American Democracy* 2nd edition (London: Yale University Press, 1998), ch.12.
25. Department of Justice, *Report from the Field: The USA Patriot Act at Work* (2004) July, 3 <http://www.fas.org/irp/agency/doj/patriot0704.pdf>.
26. Ibid.
27. Ibid. 18.
28. Ibid. 22–23.
29. Ibid. 9–10.
30. D. Cole, *Enemy Aliens* (New York: The New Press, 2005), 79–80.
31. P. Gill, "Securing the Globe: Intelligence and the Post-9/11 Shift from 'Liddism' to 'Drainism'" *Intelligence and National Security*, 2004 (19:3), 474–476.
32. M. Scarborough, "The Security Pretext. An Examination of the Growth of Federal Police Agencies" *CATO Briefing Paper* 2005 (No.94, June).
33. Gonzales *Intercepting Al Qaeda*
34. Cole, *Enemy Aliens*, 39–46.
35. See D. Ross, *Violent Democracy* (Cambridge: Cambridge University Press, 2004).

36. Statement of James X. Dempsey, Executive Director, Center for Democracy and Technology before the Senate Select Committee on Intelligence, 24 May 2005, 2 <http://www.cdt.org/testimony/20050524dempsey.pdf>.
37. Jeffreys-Jones, *The CIA and American Democracy*, ch.10.
38. E. Lichtblau, "FBI scrutinised antiwar rallies," *New York Times* 23 Nov. 2003.
39. The distinction between intelligence and evidence also appears to have become blurred in the area of state policing. In New York the erosion of the reasonable basis for a warrant is evident in terror investigations, since under the doctrine of 'totality of circumstances' the credibility of intelligence (including informant information) is less of an issue. J. Skolnick 'Terror, Risk and Order: Policing the NYPD after 9/11' paper presented to the Law and Society Annual Conference, "Rivers of Law," Pittsburgh, June, 2003.
40. Department of Justice, *Report from the Field*, 23.
41. Department of Justice, *Dispelling the Myths*, http://www.lifeandliberty.gov/subs/_myths.htm
42. For the rise of specialist powers in these areas such as the Racketeering and Corrupt Influenced Organisations Act 1970 and the Bank Secrecy Act 1970 see S. Walther, "Forfeiture and money laundering laws in the United States," *Crime, Law and Social Change*, 1994 (21); see also M. Levi and A. Smith, "A Comparative Analysis of Organised Crime Conspiracy Legislation," *Home Office OnLine Report 2002* (17/02) <http://www.homeoffice.gov.uk/rds/pdfs2/rdsolr1702.pdf>
43. Statement of James A. Baker, Counsel for Intelligence Policy, Office of Intelligence Policy and Review, US Department of Justice before the Subcommittee of Crime, Terrorism and Homeland Security, Committee on the Judiciary, House of Representatives, Concerning the FISA Part II (USA Patriot Act s206and 215) April 28th 2005, 2–3 <http://www.lifeandliberty.gov/subs/testimony/042805-oipr-baker.pdf>.
44. Statement of Alberto R. Gonzales, Attorney General and Robert S. Mueller III, Director, FBI, before the Select Committee on Intelligence, United States Senate Concerning the History and Application of the Patriot Act and the Importance of the FISA, presented on April 27th 2005, 1, <http://www.lifeandliberty.gov/subs/testimony/042705-ag-gonzalesfbi-mueller.pdf> There were 1228 in 2002 and 1727 in 2003. The Century Foundation, *The USA Patriot Act: A Guide to the Issues* (New York: Century Foundation, 2004), 12, though it should be pointed out that a surveillance warrant will necessarily cover more than one person since it covers all the persons communicated with; thus in terms of 'normal' criminal federal and state wiretaps 1,710 were authorised in 2004 but an average of 126 persons had their communications intercepted per wiretap order. See: Administrative Office of the United States Court, *2004 Wiretap Report*, 5, <http://www.uscourts.gov/wiretap04/contents.html>.
45. Statement of Gonzales and Mueller, 27 Apr. 2005, 5.
46. The Century Foundation, *The USA Patriot Act: A Guide to the Issues* (New York: Century Foundation, 2004), 17.
47. For example official sources state that 113 individuals in 25 judicial districts have been charged with *terrorist financing related* crimes with 57 convictions and 401 persons have been criminally charged in *terrorism related investigations* with 212 convicted. Department of Justice, *How we are waging the war on terrorism* http://www.lifeandliberty.gov/subs/a_terr.htm. This information is fuzzy as to the actual content of these 'terrorist related' charges, and critics argue that in fact 361 cases were terrorism investigations with 39 convictions. ACLU, *Myths and Realities about the Patriot Act* <http://action.aclu.org/reformthepatriotact/facts.html#five> Although the law is

- one part of any anti-terror strategy and cannot be evaluated by convictions alone, one would expect that if the Act is to be seen as effective it should be responsible for a substantial number of charges/convictions which would otherwise not have taken place.
48. Gill, "Securing the Globe", 472.
 49. Asset recovery is another such area, since it developed as a response to the problem of drug trafficking and organised crime. The state took the power to deprive individuals of possessions on the evidence of a criminal conviction but using the 'gross worth' and 'relaxation of proof' principles a large amount of an individual's property is forfeit; or via a civil route to recovery with a lower burden of proof. See S. Walther, "Forfeiture and Money Laundering Laws in the United States," *Crime, Law and Social Change*, 1994 (21), 3–4. Now with regard to terrorism the powers are evident.
 50. ACLU, *Eavesdropping 101: What Can the NSA Do?* (1/31/2006) <http://www.aclu.org/safefree/nsaspying/23989res20060131.html>.
 51. R. Cornwell, "New Phone Tap Row Threatens President's Nominee for CIA," *The Independent* 12th May 2006.
 52. Privacy International, *Terrorism Profile – US* [http://www.privacyinternational.org/article.shtml?cmd\[347\]=x-347-508361&als\[theme\]=Anti%20Terrorism](http://www.privacyinternational.org/article.shtml?cmd[347]=x-347-508361&als[theme]=Anti%20Terrorism).
 53. Gill, "Securing the Globe", 468.
 54. See also C. Walker, "Terrorism and Criminal Justice: Past Present and Future," *Criminal Law Review*, 2004 (May), 321–322.
 55. P. Hillyard, "The Normalisation of Special Powers: from Northern Ireland to Britain" in P. Scraton (ed.) *Law, Order and the Authoritarian State* (Milton Keynes: Open University, 1987).
 56. Special powers had largely been confined to Northern Ireland via the Emergency Provisions Act and where they did apply to the UK in the form of the Prevention of Terrorism Act, had to be renewed by parliament. G. Hogan and C. Walker, *Political Violence and the Law in Ireland* (Manchester: Manchester University Press, 1989).
 57. Home Office, *Statistics on race and the criminal justice system – 2005* (Home Office: 2006); K. Malik, "What Hate?" *The Guardian* 7 Jan. 2005. Stops and searches reflected existing practice under PACE and are subject to the same types of debates concerning the actual extent of discrimination once stops/search is controlled for temporal, geographical and contextual variables. See P. Waddington, K. Stenson and D. Don, "In proportion: race, and police stop and search," *British Journal of Criminology* 2004 (44), 889–914.
 58. R. Allison, "Police can use terror powers on protestors" *The Guardian* 1 Nov. 2003; Lord Carlisle, *Report on the Operation in 2002 and 2003 of the Terrorism Act 2000* (London, 2004), 15–16.
 59. For example in 2003, two individuals were convicted under the Terrorism Act of providing funding support for terrorist purposes. However many charges were dropped following successful defence challenges. The charge of al Qaeda membership was dropped because a workable definition of al Qaeda could not be supplied by the Crown Prosecution Service (CPS) "Jury overcomes fear to jail terror pair," *Daily Telegraph*, 2 Apr. 2003. In 2004 a case brought under the Terrorism Act 2000 against six activists for the Turkish organisation DHKC was halted in pre-trial hearings effectively for abuse of process. According to the judge: 'Were this prosecution to continue it would bring the administration of justice into disrepute amongst right thinking people and offend this court's propriety of justice' C. Dyer, "£ 1m terrorism case is thrown out by judge," *The Guardian* 2 Mar. 2004. The so called 'ricin trial' in which seven suspects were charged with various offences connected to a flat where ricin was to be manufactured were all acquitted apart

- from Kamel Bourgass. See Dispatches, *Spinning Terror*, Channel 4 Television 20 Feb. 2006.
60. Metropolitan Police Service Anti-Terrorist Branch, *Three Month Pre-Charge Detention* submitted to the Government on 6 Oct. 2005 <http://www.security.homeoffice.gov.uk/news-and-publications/publication.search/legislation-publications/met-letter?view=Binary> (this has now been removed).
 61. Panorama, *Countdown to a Killing* BBC 1, 8 Mar. 2006.
 62. *Report of the Interception of Communications Commissioner for 2003* (London: The Stationery Office, 2004), 11.
 63. Further, modifications to existing warrants (if the subject changed numbers or moved address) can be made by a senior official on grounds of national security (in criminal matters a new warrant needs to be issued) and thus the 'real' number of warrants was in the order of 2729. *Report of the Interception of Communications Commissioner for 2003* (London: The Stationery Office, 2004), 11. Further, the simplified warrant procedure (placed against an individual and covering all his/her communications) meant the number of warrants should theoretically have declined but have not. But the overall number of still minimal and does not represent 'a major conspiracy.' Statewatch, *Surveillance of communications goes through the roof* <http://www.poptel.org.uk/statewatch/news/index.html>.
 64. Q. Whitaker, "The Interception of Communications" in K. Starmer et al. (eds.) *Criminal Justice, Police Powers and Human Rights* (London: Blackstone, 2001); D. Ormerod and S. McKay, "Telephone Intercepts and their Admissibility," *Criminal Law Review*, 2004 (Jan.), 15–38.
 65. The gathering and processing of data to monitor individuals' activities. See: <http://www.anu.edu.au/people/Roger.Clarke/DV/RogersBibl.html>.
 66. Lord Carlile, *First Report of the Independent Reviewer Pursuant to Section 14 (3) of the Prevention of Terrorism Act 2005 February 2006* (London: The Stationery Office, 2006).
 67. The UK state has also increased its powers of asset seizure via criminal and civil confiscation under the Proceeds of Crime Act. Major cases are carried out by a dedicated body, the Assets Recovery Agency. The POCA has been used extensively against paramilitaries in Northern Ireland, a source of controversy and challenge under the Human Rights Act, as yet unsuccessful.
 68. Privacy International, *Terrorism Profile – US* [http://www.privacyinternational.org/article.shtml?cmd\[347\]=x-347-508361&als\[theme\]=Anti%20Terrorism](http://www.privacyinternational.org/article.shtml?cmd[347]=x-347-508361&als[theme]=Anti%20Terrorism); P. Gill, "Securing the Globe: Intelligence and the Post-9/11 Shift from 'Liddism' to 'Drainism'" *Intelligence and National Security*, 2004 (19:3), 476.
 69. D. Cole, *Enemy Aliens* (New York: The New Press, 2005), 74; Privacy International, *Terrorism Profile - US* [http://www.privacyinternational.org/article.shtml?cmd\[347\]=x-347-508361&als\[theme\]=Anti%20Terrorism](http://www.privacyinternational.org/article.shtml?cmd[347]=x-347-508361&als[theme]=Anti%20Terrorism); Gill, "Securing the Globe", 476.
 70. Cole, *Enemy Aliens*, xxviii.
 71. L. K. Johnson, "Governing in the Absence of Angels: On the Practice of Intelligence Accountability in the United States," paper presented to the workshop, *Making Intelligence Accountable* Oslo, Norway, September 2003 (Geneva, Centre for the Democratic Control of Armed Forces/Human Rights Centre, University of Durham), 36.
 72. G. Mickum, "MI5, Camp Delta, and the Story That Shames Britain," *The Independent* 16 Mar. 2006.
 73. For example the New York Civil Liberties Union and the ACLU mapped out the 2,300 cameras of the CCTV network in Manhattan with the data regularly updated by the public,

- and privacy organisations established their own websites to counter surveillance. *Spy TV* Channel 4 Television 25 May 2000.
74. Privacy International, *Terrorism Profile – US* [http://www.privacyinternational.org/article.shtml?cmd\[347\]=x-347-508361&als\[theme\]=Anti%20Terrorism](http://www.privacyinternational.org/article.shtml?cmd[347]=x-347-508361&als[theme]=Anti%20Terrorism) A similar program, Secure Flight, is subject to criticism: see: <http://www.aclu.org/privacy/spying/15311res20050324.html>.
 75. Cole, *Enemy Aliens*, xxv–xxvi; Sands, *Lawless World*, ch.7; Ross, *Violent Democracy*, 158.
 76. See the cases of *A and others v Secretary of State for the Home Department* UKHL 56 2004; *A and others v Secretary of State for the Home Department* UKHL 71 2005.
 77. Some of this change was influenced by adverse rulings in the European Court of Human Rights. See T. John and M. Maguire, “Police Surveillance and its Regulation in England and Wales,” in S. Field and C. Pelsner (eds.) *Invading the Private?* (Dartmouth: England, 1998).
 78. L. Lustgarten and I. Leigh, *In From the Cold: National Security and Parliamentary Democracy* (Oxford: Oxford University Press, 1994).
 79. Q. Whitaker, “The Interception of Communications” in K. Starmer et al. (eds.) *Criminal Justice, Police Powers and Human Rights* (London: Blackstone, 2001), 62.
 80. S. Cohen, *Visions of Social Control* (Cambridge: Polity, 1985).
 81. Cole, *Enemy Aliens*, 50.
 82. *Ibid.* 57–61.
 83. World Organisation for Human Rights USA, “Torture by the United States,” *Report for submission to the United Nations Committee Against Torture*, 2005 (January) available at <http://www.humanrightsusa.org>.
 84. Ross, *Violent Democracy*, both quotes from 143–144.
 85. R. Verkaik, “Freeing of suspect deals blow to terror laws,” *The Independent* 19th March 2004; J. Bennetto and N. Morris, “Suspect Meld at ‘mini-Guantánamo’ for Three Years Released by Blunkett,” *The Independent* 21 Sep. 2004.
 86. See note 18.
 87. J. Steinberg (et al.), “Building Intelligence to Fight Terrorism,” *Brookings Institution Policy Brief* 2003 (125), 1.
 88. J. Steinberg (et al.), “Building Intelligence to Fight Terrorism,” 2003 (125), 2.
 89. P. Gill, “Democratic and Parliamentary Accountability of Intelligence Services After September 11th” *Centre for the Democratic Control of Armed Forces Working Paper* 2003 (103).
 90. P. Waddington “Slippery Slopes and Civil Libertarian Pessimism,” *Policing and Society*, 2005 (15:3), 371.
 91. ‘Penalising antiwar speech or association *per se* is now plainly off limits in the war on terrorism, largely because of Supreme Court doctrine.’ Cole, *Enemy Aliens*, 230.
 92. C. Tremewan, *The Political Economy of Social Control in Singapore* (London: Macmillan, 1994); R. Mouer and Y. Sugimoto, *Images of Japanese Society* (London: Kegan Paul, 1986).
 93. D. Lyon, “Surveillance After September 11, 2001” *Sociological Research Online* 2001 (6:3) <http://www.socresonline.org.uk/6/3/lyon.html>.
 94. See L. Introna and D. Wood, “Picturing Algorithmic Surveillance: The Politics of Facial Recognition Systems,” *Surveillance and Society* 2004 (2: 2–3), 177–198.
 95. See Dispatches, *Stealing Freedom* Channel 4 Television 27th February 2006.
 96. S. Cohen, *Visions of Social Control* (Cambridge: Polity, 1985).

97. D. Rushkoff, *Coercion* (Little Brown, 2000).
98. Cole, *Enemy Aliens*, 25.
99. See <http://www.iraqbodycount.org> (figure as on 17th March 2006).
100. A. Marwick, *Britain in the Century of Total War* (Suffolk: Pelican, 1970); C. Dandeker, *Surveillance, Power and Modernity* (London: Polity, 1990).
101. For a perceptive wider discussion of issues of democracy, state power and citizenship see D. Ross, *Violent Democracy* (Cambridge: Cambridge University Press, 2004).
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