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The Resurgence of the State
Civil Liberties & the Struggle against Terrorism in Comparative Perspective

September 11 & the Resurgence of the State

The forcefulness of response to the attacks of September 11 in law and policy was not merely an American phenomenon. Around the world we have seen a resurgence of the state, expressed through creation and implementation of antiterrorism legislation and policy in the wake of the September 11 attacks. Of course these reactions have taken different forms in various countries, but in many countries they share a basic characteristic: the state is reasserting itself, extending the reach of its powers in the name of national security and antiterrorism, and provoking varieties of opposition. Governmental responses have often been more pronounced—and perhaps more justified—in nations in which terrorist attacks of various kinds are a continuing issue rather than a new problem. This chapter discusses the resurgence of the state in antiterrorist policy in three key countries that pride themselves on their democratic heritage and principles:

- the United Kingdom, which has had a long history of terrorism and antiterrorism efforts;
- Australia, which did not have any significant history of terrorism or antiterrorism efforts but implemented new regulations after September 11; and
- India, a developing country with a long and complex tradition of antiterrorist legislation and enforcement that was vigorously reinforced after the September 11 events.

Although each of these countries responded in somewhat different ways to the September 11 events, there are certain important commonalities in their responses. First, each moved with urgency to strengthen state capacity to investigate, detain, charge, and punish a more broadly defined range of terrorist or terrorist support activities, often including aspects of domestic political dissent, through the enactment or amendment of antiterrorist legislation. In each case states sought to forestall and preempt debate and opposition through extraordinarily rapid adoption of new or strengthened laws in the postattack era.

The modes of that resurgence of state power have had certain commonalities as well: each of these countries has sought to expand the definitions of antistate (terrorist or treasonous) activities; relax requirements for detention of a broadened range of suspects; expand the availability of wiretaps and electronic surveillance; tighten restrictions on terrorist financing through charities; detain, often incommunicado, suspected terrorists or political dissidents; deport terror suspects; strengthen screening of air and other transport passengers; and increase surveillance of suspected terrorist and dissident groups. In most of these states the expansion of "terrorist" related crimes was so broad that it implied the criminalization (or recriminalization) of sedition by another name, in some cases long after the offense of sedition had been removed from the laws or substantially limited in practice.

Finally, each of these nations has followed initial legislation and enforcement with a second wave of new, even tougher, antiterrorism proposals that would further restrict privacy and broaden the reach of the state. In the calmer atmosphere of 2002 and 2003, this second wave of antiterrorism law and policy elicited stronger, broader, and better organized opposition from an expanding alliance of skeptics in Britain, Australia, and India, just as it has in the United States.[1]

The United Kingdom

The British scholar Paul Wilkinson has clearly pointed out the potential contradictions between civil liberty and antiterrorism legislation. He notes that "the primary objective of any counter-terrorist strategy must be the protection and maintenance of liberal democracy . . . [but] it cannot be sufficiently stressed that this aim overrides in importance even the objective of eliminating terrorism and political violence as such."[2] This balancing is as important in the United Kingdom as in the United States, and coming to that balance is proving to be as difficult and controversial a task across the Atlantic as in our own country.

The United Kingdom has long had more draconian antiterrorist legislation in place than the United States and other countries, largely as a result of the wars in Northern Ireland and the violence they spawned within England and other parts of the United Kingdom. Earlier antiterrorist regulations were often provisional in nature, but in many cases they were made permanent by the Terrorism Act (2000), which predated the September 11 attacks. The Terrorism Act outlawed twenty-five terrorist organizations; provided law enforcement with stop and search powers and detention authority for up to seven days; and defined new criminal offenses tied to terrorism,

including "inciting terrorist acts," "seeking or providing training for terrorist purposes at home or overseas," and "providing instruction or training in the use of firearms, explosives or chemical, biological or nuclear weapons."[3]

After September 11, the government of Prime Minister Tony Blair quickly pushed through new legislation—the Anti-Terrorism, Crime and Security Act of 2001—to expand antiterrorism provisions and fill gaps in existing law, at least as perceived by the government. The 2001 Anti-Terrorism Act permitted the government to detain foreign citizens "suspected of involvement in international terrorism but who cannot be immediately removed from the UK"—in effect providing the power to detain foreign citizens incommunicado for long periods. When it adopted that provision, the United Kingdom withdrew from the obligation not to detain individuals without trial that it had undertaken under the European Convention on Human Rights. That derogation from European law has been roundly criticized in Europe and around the world, as critics point out that of all the countries in Europe—including many others threatened by terrorism—only the United Kingdom has felt it necessary to derogate from the treaty principle against detention without trial. The 2001 act also sought to enhance the security of aviation and nuclear and scientific sites and laboratories, increased penalties for "crimes aggravated by racial or religious hatred" and for terrorist hoaxes, and allowed the freezing of assets that might be used by terrorists at the very start of investigations.[4]

The British post–September 11 legislation, like the Patriot Act, is subject to a range of interpretation. For some British observers, the act "contains a number of reasonable provisions dealing with important security safeguards."[5] In terms similar to those used by defenders of the Patriot Act, the British defenders of the 2001 Anti-Terrorism Act call many of its pro-

visions uncontroversial, a mere updating and gap filling of previous law intended to respond to new technologies and, it is readily admitted, the resurgent threats of terrorism. For the British civil liberties community, the 2001 act only exacerbated the excesses of the 2000 Terrorism Act and increased government power unnecessarily, "the most draconian legislation Parliament has passed in peacetime in over a century."[6] Along with liberal legislators, the liberal press, and others, Britain's largest civil liberties organization, Liberty, has particularly fought against two significant features of the 2001 Anti-Terrorism Act, both at the enactment stage and in their implementation.

The first is the 2001 act's vigorous and inflexible provisions for arbitrary detention, what British civil libertarians called the "power to intern [foreigners in the United Kingdom] on the basis of suspicion, not [of] what a person has done but what an intelligence expert thinks they might do." And the British government put the detention provision to work immediately. The day after the 2001 Anti-Terrorism Act was passed, ten foreign nationals in Britain were taken from their homes to prison, where most remained several years later. In 2004, a total of fourteen were in custody in Belmarsh Prison under the act.

The British press was prohibited from naming most of these detainees, so we only know about a few. One was Mamoud Abu Rideh, whom one lawyer calls "a highly eccentric and damaged individual, albeit one with a burning commitment to helping others, in particular fundraising for charities in Afghanistan." In solitary confinement in Belmarsh Prison, he "deteriorated into a life-threatening state . . . unable to eat and too weak to be out of a wheelchair."[7] Another was Haydar Abu Doha, who was awaiting extradition to the United States on assertions that he collaborated in terrorist attacks on the United States and whose case might be considered even

more serious by the British civil liberties community if either the U.K. or American governments were willing to release any substantial information about him.[8]

Under the 2001 act, none of the Belmarsh detainees was guaranteed the right to a trial. The act does provide for closed hearings on the sufficiency of the evidence against them, and several such hearings have been held. The government calls these closed hearings a necessity to prevent the leakage of information valuable to terrorists. Critics call them shams that are bolstered by mere assertions of links with terrorists rather than the presentation of hard evidence, assertions based partly on information obtained by mistreatment and torture of prisoners in foreign countries. The Belmarsh detentions, in a high security facility and with no hearings scheduled, prompted a visit by investigators from the Council of Europe to England in February 2002. That visit prompted John Wadham, at the time director of Liberty, the most prominent British civil liberties organization, to note "how out of step we are with the rest of Europe in terms of protecting people's rights while still tackling terrorism."[9] Later in 2002, the Council of Europe's Human Rights commissioner denounced both the detentions and the detention power.

There is an appeals process against these detentions, but Britain's civil libertarians charge that there are numerous flaws in that process. The presumption of innocence does not apply to hearings on these detentions. Detainees and their lawyers are not guaranteed access to all the evidence and other materials—including materials from foreign governments—that have formed the suspicion under which they are being detained. Detainees are, in fact, removed from hearings on their own detention when such secret evidence is heard, as are their lawyers.[10] Wadham and other British civil libertarians have complained that these broad provisions are unmatched any-

where else in Europe, including in countries with terrorist threats as direct as in the United Kingdom, and they have continued to call for the Belmarsh detainees to be either released or charged with crimes.

Like their U.S. counterparts, the Liberty group used litigation as well as publicity to make their case against detentions without trial. Liberty represented the detainees before the Special Immigration Appeals Commission in the summer of 2002 and won a ruling that called the detentions unlawful and discriminatory because the new powers applied only to foreign nationals. For a short time it appeared that the detention policy might be weakened or even undone. But in October 2002, the British Home Office won an appeal from the commission's ruling. The Court of Appeal ruled that the detention policy and the section of the 2001 Anti-Terrorism Act authorizing it were not discriminatory, overturning the commission's initial ruling and reinstating the validity of the detentions.[11]

The second major civil libertarian objection to the 2001 act mirrored developments in the United States, though the argument certainly did not originate in the United States. In the words of Liberty, "[O]ther measures have been smuggled into this bill which have nothing to do with terrorism or the events of September 11" but which represented an opportunity for government to incorporate long-sought powers in a situation of perceived emergency. In Wadham's view, these "smuggled" provisions include "allow[ing] the police to take identity photographs by force," "allow[ing] personal and private information to be obtained by the police and others without any controls, checks or safeguards," and "stor[ing] communications data of millions of innocent users, including email and the internet, on the off-chance that it might be of use in the future."[12]

The 2000 and 2001 acts have also led to increasingly

assertive behavior by government officials. The civil liberties lawyer Gareth Pierce described this in chilling terms in a 2003 lecture at the London School of Economics: "[A] knock on the door, an approach in the street, an obstruction in the aisle at Tescos [supermarket], from an individual saying that he was from the Security Services and wanted to obtain . . . information . . . as to whether there was a threat from terrorism and that in exchange considerable help could be given to the obtaining of British citizenship or regularising of immigration status."[13] And a report by several British nongovernmental organizations documented harassment, repeated searches, mass detention of peaceful protestors, prevention of lawful protest, and other measures used against antiwar protestors in 2002 and 2003.[14]

After several years of detention of foreign nationals and debate over the 2001 Anti-Terrorism Act, a parliamentary committee comprised of elected legislators and peers recommended removing the arbitrary detention provisions in a late 2003 report. The committee agreed that some antiterrorist measures would be needed for "some time to come" and warned that finding an appropriate balance between "providing effective powers . . . while protecting individual rights can be difficult." Yet on the question of arbitrary detention the committee was united, recommending that a new way be found to deal with necessary detentions that "does not require the UK to derogate from the right to liberty under the European Convention on Human Rights."[15] In late 2003 the archbishop of Canterbury sharply criticized the detention policy,[16] and by early 2004 there was renewed discussion of deporting some of the fourteen detainees held at Belmarsh or employing a form of "suspended detention" involving "restrictions and intensive surveillance" rather than additional months or years in Belmarsh Prison. By no means were all the evaluations entirely

negative. A parliamentarian named by the home secretary to review the detentions said that he was "'entirely satisfied' the home secretary was right to certify each as suspected international terrorists." But at the same time he also criticized the use of Belmarsh and some of the conditions in which the detainees are held.[17]

Much of this criticism did not seem to faze the Blair government, already under withering attack for allegedly amending and overstating intelligence estimates before the Iraq war. In late 2003, while facing increasing criticism for detentions under the 2001 Anti-Terrorism Act, the Blair government again sought to add to governmental powers, sparking a broader and even more vociferous level of opposition than arose when the 2001 Anti-Terrorism Act was proposed shortly after the September 11 attacks. The government proposed a "civil contingencies" bill that would replace outmoded legislation from the 1940s and 1950s dealing with civil emergencies. The civil contingencies law would confer the power to restrict civil liberties and impose widespread emergency powers, including curfews, prohibiting public meetings and peaceful protest, seizure of property without compensation, forced evacuations, forced quarantines, and forcible control of financial institutions, all on the say-so of the national government.

The bill's broad definition of such an "emergency" originally included events that threaten the "political, administrative or economic stability" of the nation, prompting fear and criticism that a government might employ that definition to protect its own power. British civil libertarians led by Liberty voiced strong criticism: "Everyone accepts that in the event of a major terrorist attack or a natural disaster, the police and armed forces will need to act quickly. . . . But that is no reason for granting the Government a blank check to designate as an emergency anything they deem to be such. . . . [T]his measure

could be used to suppress or curb any demonstration or protest. It could . . . be used against countryside alliance supporters marching on London or students protesting top-up [increases in tuition] fees."[18]

A parliamentary committee warned that the broad original wording might allow a government to declare an emergency just "to protect its own existence." After extensive discussions with Liberty and parliamentarians, the government agreed to revise the definition of "emergency" and several other checks so that the government could not use its newly granted powers to respond to political events.[19] Toward the end of this consultative process, the new director of Liberty, Shami Chakrabarti, noted that the "initial proposals were quite terrifying."[20] But she also praised the government, noting that while civil libertarians still objected to some elements of the bill, "there has been a real listening and very detailed engagement." Another civil liberties group, Statewatch, continued to criticize the bill, calling it "truly draconian."[21]

In February 2004, yet another government proposal surfaced that would further strengthen the government's hand in dealing with suspected terrorists. Under this plan, secret trials of suspected terrorists could be held without the presence of a jury, with the burdens of proof reduced from "beyond reasonable doubt" to guilt "on a balance of probabilities." Under this proposal, judges and lawyers would be "vetted" by security agencies, and some evidence would remain unavailable to defendants and their lawyers. A few days later, Prime Minister Blair appeared to give some support to the notion of reducing the standard of proof against alleged terrorists.[22] Understandably, these government discussions drew sharp condemnation from a growing coalition of British civil liberties groups, lawyers, newspapers, and some members of Parliament. Liberty compared these procedures to trials under the communist

governments of Eastern Europe and in Saddam Hussein's Iraq.[23]

The United Kingdom has also tried to deal harshly with government employees acting as whistleblowers on classified matters relating to terrorism and war-related intelligence. A translator at the Government Communications Headquarters (GCHQ), one of Britain's intelligence agencies, was charged in 2003 with violations of the British Official Secrets Act for disclosing before the Iraq war that the U.S. National Security Agency had sought the cooperation of British counterparts in eavesdropping on six foreign Security Council delegations before important council deliberations on the Iraq war. The charges against the intelligence analyst, Katherine Gun, were dropped in February 2004.[24] The British government has also sought to close charities linked to terrorist groups, and to extradite one significant individual involved in one of those charities to the United States on terrorism-related charges. Those developments are discussed in chapter 5.

The British debate over antiterrorism policy—and the strength of opposition to Blair government policies—has of course emerged from a different dynamic than in the United States, where close to three thousand people were killed on September 11. British constituencies seeking to slow and constrain British government responses to terrorism have been able to use European Union law as a legal and rhetorical benchmark to constrain the extension of British antiterrorism law and policy. This has become a common tactic in the British debate, one intended partly to broaden an opposition coalition beyond those focused on civil liberties to others concerned with Britain's place in Europe. As John Wadham of Liberty argued in March 2002, for example, against the arbitrary detention provisions in the 2001 Anti-Terrorism Act: "[S]everal European countries have faced direct terrorist threats; several have

troops in Afghanistan. Why did only the UK, of the 40-plus countries signed up to the [European] Convention [on Human Rights], deem such extreme measures essential?"[25]

On the other hand, English opponents of severe antiterrorism legislation seem to have been hampered by the difficulties in forming an effective alliance between liberal and conservative activists (of the kind that has been established so effectively on a range of issues in the United States). And, both traditionally and in the current crisis, Britain's committed civil libertarians have perhaps not had the access to resources or legislators that their American colleagues have enjoyed.

In order to resolve the judicial challenges to the detentions under the earlier Anti-Terrorism Act, the government replaced those detentions with "control orders" in the Prevention of Terrorism Act 2005. These broad control orders may limit physical movement or communications or impose other restrictions. Control orders may be issued without a judge's order in emergency cases, but those orders and normal control orders require later judicial assent.[26]

The Terrorism Act 2006 was later adopted to add to the measures already available to the U.K. government under the 2005 Prevention of Terrorism Act and earlier statutes. The Terrorism Act 2006 provides for new offenses to punish "acts preparatory to terrorism"; acts that "directly or indirectly incite or encourage others to commit acts of terrorism," including "glorification of terrorism, where this may be understood as encouraging the emulation of terrorism"; "dissemination of terrorist publications," including by loan as well as by sale and including "publications that encourage terrorism, and those that provide assistance to terrorists"; as well as "terrorist training offences," including "attendance at a place of terrorist training" without undergoing training. The new act also

expands police search warrant power against terrorist suspects, lengthens detention periods to a maximum of twenty-eight days (with a judge's approval required for detention over two days), and provide "increased flexibility of the proscription regime, including the power to proscribe groups that glorify terrorism."[27]

Most of these measures have been opposed by the U.K.'s civil liberties community as an attempt to circumvent the legal requirements for charging and trying suspects, because they are overly broad, and because in many cases they criminalize per se violations and do not require legal intent in order for criminal liability to attach.[28]

Australia

In sharp contrast with the United Kingdom, Australia had "little or no experience of terrorism" before September 2001 and thus had little law on the issue.[29] But the Australian state has been resurgent even without legislation specifically on terrorism, as measured by wiretaps and electronic surveillance of its citizens. Mail investigations took place on more than seventeen thousand Australians in 2002, with requests from nearly sixty government institutions. There were over twenty-five hundred court orders for telephone wiretaps, and government investigation of 733,000 telephone bills.[30]

The immediate Australian state response to the September attacks was to tighten domestic surveillance of suspected terrorists and to introduce a "suite" of antiterrorism legislation in the Australian parliament that enhanced state antiterrorist powers and vested additional discretion and power in the Australian federal attorney general. That suite of legislation

included the Security Legislation Amendment (Terrorism) Bill, Suppression of the Financing of Terrorism Bill, Criminal Code Amendment (Suppression of Terrorist Bombings) Bill, Border Security Legislation Amendment Bill, and Telecommunications Interception Legislation Amendment Bill, all introduced in 2002.[31] The Australian government's view, expressed through an attorney general whose role would be strengthened under the new laws, was that "the community is prepared to take some modest sacrifices of human rights and civil liberties in order to give the government the tools that will . . . assure the public that [it is] protected appropriately.[32] Of all of these proposals, the Security Legislation Amendment (Terrorism) Bill, with provisions to expand government authority, elicited the most opposition within Australia.[33]

Even treason was broadened by the proposed Australian act, consistent with an international trend to expand the definitions of terrorism and terrorist activity to encompass elements of sedition or treason. According to Australian civil liberties groups, the government sought to "politicise" the process of bringing treason charges by requiring direct attorney general intervention, and it sought to criminalize failure "to inform the authorities of a possible act of treason." Such a provision, one civil liberties organization pointed out, could lead to the prosecution of Australians acting to negotiate peaceful resolutions of other nations' civil disputes, as occurred in Sri Lanka.[34] The draft bill also reversed, for terrorism cases, the presumption of innocence.

Despite the attorney general's confidence that these measures would pass, opposition within Australia was immediate and broad. Opponents spanned a broad range of political and legal views, but one unifying position was that new legislation was simply unnecessary and was disproportionate to the terror-

ist threats to Australia. The president of one of Australia's largest civil liberties groups put it clearly: "The proposed anti-terror laws are founded on a fallacy, a verbal trick. The Government asserts that 'terrorism' is some new species of human malefaction, having its own legal and moral qualities. . . . In fact, 'terrorism' is only another name for serious criminal activity. All that distinguishes a 'terrorist' act from any other criminal act [is] its scale and its political motivation. There is no need for a new offence of terrorism. Our criminal law already provides heavy penalties for the crimes in question—murder and conspiracy to murder in particular."[35]

Opponents forced some changes in the legislation, which finally passed. For example, the very broad definition of "terrorist act" in the government's initial proposal was narrowed to require some element of intentional intimidation or coercion. And the government's reversal of the traditional presumption of innocence in terrorism cases—which would have required detainees to prove that they were not terrorists—was undone under a raft of criticism.[36] Australia's civil libertarians, like those in some other countries, took to attacking draft legislation because it went further than the Patriot Act and Britain's 2001 Anti-Terrorism Act. "The FBI, CIA and MI5 don't have any laws of this sort and haven't asked for any. If this sort of law does not exist in the US and UK, and they don't want it, why are we enacting it, with all the civil liberties downsides?"[37]

In Australia, as in the United States and the United Kingdom, initial government efforts have been followed by a second wave of proposed antiterrorism law and enforcement. In Australia this "second cornerstone of Australia's new anti-terrorism laws," the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003 (ASIO Act), was primarily intended to enable the Australian security organizations

to detain a range of terrorism suspects or persons who might have some knowledge of potential terrorist activities and to criminalize "withholding of information regarding terrorism."[38] The ASIO Act, tabled in March 2002, elicited vituperative opposition from a range of legislators, civil liberties and human rights organizations, and others throughout Australia,[39] resulting in a delay of more than a year before passage.[40] The final bill was softened to "better protect the human rights of children, including limitations on the periods during which a person can be questioned, and . . . access to a legal representative." And the detention provisions were enacted with a sunset clause. Yet the final bill continued to allow for detention of children between sixteen and eighteen for up to seven days, and Australia's civil libertarians vowed to try to further weaken it.[41]

Until October 2002, Australians were perhaps confident in their sense that they had not yet been directly touched by large-scale terrorism. Australia was affected by the tragedy of September 11, but its own version of September 11 occurred a year later, when a terrorist bombing in Bali, Indonesia, killed eighty-eight Australians.[42] The Bali bombing may have softened the environment for adopting tougher new antiterrorism legislation in Australia, though the passage of time after September 11, as in the United States and the United Kingdom, made it easier to resist such proposals as well.

Australian judges, like their English counterparts on the Court of Appeal and a number of American federal judges in the cases that have come into the U.S. courts since late 2001, have been concerned with aspects of the U.S. response to September 11, particularly the Guantanamo detentions, which included several Australian citizens.[43] As Justice Derrington of the Queensland Supreme Court noted: "Certainly the perpetrators should be pursued and punished with the full force of

the law, and all proper preventative measures against further attack should be employed. But the rule of law must not be broken or bent in the process. It must be preserved in its letter and spirit. If law is observed and exalted only when it does not matter, it is a sham. Its need becomes greatest in times when it is under challenge or when there are strong sentiments of revenge and fear. Then, it is wrong to assert that the laws should be suspended or watered down to meet current convenience."[44]

Australian scholars and activists have raised serious questions as to whether Australia's post–September 11 antiterrorism legislation comports with Australia's commitments in international law, just as British and American activists and intellectuals have raised similar questions in their countries. That Australians have been imprisoned at Guantanamo has only fueled these fires. But more important than the challenges under international law have been the dignified and spirited challenges to uphold Australia's traditional vision of the rule of law. Justice Michael Kirby put it well, in a widely read and widely cited speech to the Australian bar, in words that echo usefully in the United States, Britain, and India as well as in Australia.

> The countries that have done best against terrorism are those that have kept their priorities, retained a sense of proportion, questioned and addressed the causes of terrorism, and adhered steadfastly to constitutionalism and the rule of law. . . . Keeping proportion. Adhering to the ways of democracy. Upholding constitutionalism and the rule of law. Defending, even under assault, and even for the feared and hated, the legal rights of suspects. These are the ways to maintain the support and confidence of the people over the long haul. . . . Every erosion of liberty must be thoroughly justified. Some-

> times it is wise to pause before acting precipitately. If emergency powers are clearly required, it may be appropriate to subject them to a sunset clause—so that they expire when the clear and present danger passes. . . .
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> In the course of the century of the Australian Commonwealth, we . . . have made many errors. We have sometimes laughed at and belittled citizens who, appearing for themselves, fumbled and could not reach justice. We have sometimes gone along with unjust laws and procedures. We have occasionally been instruments of discrimination and it is still there in our law books. We have not done enough for law reform or legal aid. We have not cared enough for justice. We have just been too busy to repair the wrongs that we saw. Yet at critical moments in our nation's story, lawyers have upheld the best values of our pluralist democracy. In the future, we must do so more wholeheartedly. To preserve liberty, we must preserve the rule of law. The rule of law is the alternative model to the rule of terror, the rule of money and the rule of brute power. That is our justification as a profession. It is our continuing challenge after 11 September 2001.[45]

By mid-2004 there was increasing Australian concern about David Hicks, an Australian held at Guantanamo and charged with conspiracy, attempted murder, and aiding the enemy. The United States planned to try him before a military tribunal, prompting stronger calls in Australia for Hicks's case to be adjudicated—as *The Age* (Melbourne) put it—"under Australian law or before a properly constituted international tribunal, not by the U.S. military."[46] In 2006, Hicks was still held at Guantanamo, pending trial under the new military commission statute adopted by the U.S. Congress in fall 2006. An Australian citizen went on trial in Perth in 2004 for allegedly conspiring to bomb the Israeli Embassy in Canberra and reports emerged from that trial about attacks planned earlier against the Sydney Olympics and Australia's Jewish community.[47] In addition, new governmental proposals for closed trials of defendants charged with crimes involving national security

prompted concern from some lawyers groups, including the Law Council of Australia, as well as the Australian civil liberties community and the press. The proposed National Security Information (Criminal Proceedings) Bill would require clearances of lawyers and limit media coverage and public access to certain trials. The government continued to press for changes to the Commonwealth Crimes Act that would prevent terrorism suspects from being granted bail and allow police to hold detainees for terrorism-related questioning for twenty-four hours, up from the four hours under current law.[48]

In 2005 the Australian government proposed new and tougher antiterrorism legislation that would expand the definition of terrorist organizations to include advocacy within the proscribable range, expand the government's powers to use "control orders" or preventive detention against a widened range of suspects, and strengthen the crime of sedition.[49] The proposed expansion in government powers was severely criticized by civil liberties groups.[50]

India

In India, political violence has been present since the founding of the republic. Separatist groups continue to dot India; Kashmir remains a major international flash point of continued conflict; terrorism and low intensity war all loom. And India and Pakistan continue to joust across a border that may be second only to the two Koreas for its danger of massive war. Nor is political violence in India limited to separatists, Kashmir, and the Indo-Pakistani conflict: the Indian state itself has committed violence against political opponents, Muslims, and others on a regular basis and has ignored or deemphasized violence committed by its conservative Hindu backers.

It is in that complex environment that the Indian govern-

ment dominated by the conservative Bharatiya Janata Party responded to the September 11 attacks. The government's immediate response was to criminalize conduct that could be construed as terrorism through a new executive mandate, the Prevention of Terrorism Ordinance, in order to counter what it claimed to be "an upsurge of terrorist activities, intensification of cross border terrorism, and insurgent groups in different parts of the country."[51]

The Prevention of Terrorism Ordinance was drafted quickly and introduced rapidly after the attacks in the United States. It was directly based on earlier, draconian antiterrorist legislation under which thousands had been detained. That earlier legislation, the Terrorist and Disruptive Activities Prevention Act (TADA), had lapsed in the Indian parliament in 1995 when concerned legislators refused to renew it, after a campaign that brought together rights activists, liberal intellectuals, and some parliamentarians. Indian public interest and human rights groups had charged that, under TADA, over sixty-seven thousand persons had been detained and over fifty-nine thousand of those had never had a judicial case brought against them. The greatest number of TADA arrests had been in areas undergoing ethnic, religious, and political conflict—not in the hotbed of Indian terrorist activities, places such as Jammu and Kashmir. One civil liberties group charged that of the more than nineteen thousand detained in Gujarat, for example, a majority were innocent members of non-Hindu religious minority groups.[52]

Following the failures of the TADA law, the government had failed to win adoption of a new Prevention of Terrorism Bill in 2000 under withering criticism from civil liberties groups, the Indian National Human Rights Commission, intellectuals, and opposition political parties. But September 11 provided exactly the spur needed, and the Prevention of

Terrorism Ordinance was enacted in late October 2001. In drafting what immediately became known in India as "POTO," the Indian government drew upon new antiterrorism legislation in the United States and Britain to justify the new Indian law, in some cases actually referring to the American and British statutes, as well as to earlier Indian legislation and the failed 2000 terrorism bill.

But the Indian Prevention of Terrorism Ordinance in many ways went further than the initial American and British responses to the crisis. This was quickly noted and emphasized by the government's critics. Without irony—for irony with respect to the Patriot Act and the 2001 U.K. Anti-Terrorism Act can perhaps be only homegrown—this emerging Indian coalition of rights activists, opposition legislators, parts of the media, ethnic and minority activists, and others relied partly on the new American and British legislation to argue for a more relaxed approach in India. Even the Patriot Act, noted Ravi Nair, a prominent Indian human rights activist, did "not alter the [domestic] criminal trial process for terrorism cases, nor does it accord the Executive powers immunised from meaningful judicial review."[53] And while the new Indian legislation allowed for detention of up to half a year, the new British legislation only provided for considerably shorter extensions of arrests of citizens (though, of course, indefinite and incommunicado detention for noncitizen terrorist suspects).

If even the American and British legislation was this limited, the argument went, why was the Indian legislation so stringent? This argument revealed the weaknesses of the Indian opponents of antiterrorism legislation: about the best they could do was to rely upon post–September 11 American and British statutes. Thus it was with no irony that Nair and other opponents of the Indian legislation argued, futilely, that the Prevention of Terrorism Ordinance "must contain a limited

and specific definition of terrorism, such as that contained in the Prevention of Terrorism Act of the United Kingdom."[54]

India's opponents of new antiterrorism legislation, much like their colleagues in the United States, Britain, and Australia, were unable to stem the immediate onslaught of post–September 11 legislation. But in India, in contrast at least to the situation in Australia, it was also difficult to slow the juggernaut even briefly or to fight for softening amendments. The Indian Prevention of Terrorism Ordinance was enacted in late 2001, largely in the severe form drafted by the government. It provided broad new definitions of "terrorist acts," mandated the death penalty or life imprisonment for such acts, and permitted sentences of life imprisonment for a range of lesser terrorism-related crimes. Membership in "an organisation . . . concerned with or involved in terrorism" was deemed punishable by life imprisonment, even if the organization was political and nonviolent and even if an individual's membership was unrelated to terrorist operations.

Persons accused under the ordinance could be detained for up to 180 days. The ordinance shifted burdens of proof of innocence to the accused, rather than maintaining the government's traditional burden to prove guilt. The ordinance also allowed the government to maintain the secrecy of witnesses' identities, relaxed rules on admissibility of forced confessions made to police, allowed prosecutors to deny bail, appointed special courts to hear terrorist-related charges, and denied judges most discretion in sentencing. As enacted, the new ordinance was not reviewable for five years, or until 2006.[55]

Public opposition to POTO faded somewhat late in 2001, after a terrorist attack on the Indian Parliament in New Delhi killed nine police and Parliament staff. In the understated words of one Indian civil liberties organization, the December

2001 attack on Parliament "served to blunt . . . opposition to the ordinance."[56]

Although the Prevention of Terrorism Ordinance was valid for five years, it was enacted as a government decree rather than through statutory adoption by Parliament and was thus subject to political attack on that ground. In early 2002, after the terrorist attack on Parliament in Delhi, the government sought to convert the ordinance into a full Prevention of Terrorism Act (POTA) that would incorporate many of the same provisions as the 2001 ordinance but also have the formal endorsement of the national legislature. Despite the attack on Parliament, the first introduction of the Prevention of Terrorism Act failed in the upper house of the Indian parliament because of strong concerns about executive power and distrust of the ruling coalition. Facing increasing opposition, the government was forced to convene a rare joint session of Parliament, only the third since the founding of the republic, as "the only way the government could muster the majority required." After intensive debate and strong opposition from human rights organizations, intellectuals, opposition political parties, and others, the Prevention of Terrorism Act was adopted in March 2002.[57]

The Prevention of Terrorism Act incorporated many of the provisions of the earlier ordinance: an expanded, broad definition of terrorism as well as extension of the act's provisions to murder, robbery, and other crimes if the authorities alleged that the crimes were terrorism related; and criminalization of any association or communication with a suspected or designated terrorist organization or individuals. The act permits the authorities to hold suspects for up to 180 days and to deny bail and then to refuse to provide a jailed defendant with any information as to his or her alleged crime. It allows the

government to keep witnesses' identities secret, dangerously increasing the possibility of inappropriate police activity. Much of the act provides criminal sanctions for acts already considered criminal under the Indian Penal Code and other Indian statutes—including murder and other crimes, such as weapons and explosives possession. The act includes mandatory minimum sentencing, severely reducing the role of judges in the sentencing process; allows the police to seize terrorist-related property at their discretion; criminalizes the refusal or unwillingness of government officials or businesspeople to provide information requested by the authorities (with no limits or process on authorities' requests); allows designation of a terrorist organization without providing evidence; and criminalizes the undefined act of providing "support" to a terrorist group.[58]

Confessions made to police under the act are admissible in court, even where they are provided under torture or the threat of mistreatment, without any countervailing pressure upon the police to refrain from torture or other mistreatment. POTA allows wiretapping and other surveillance results to be used against defendants without any approval requirements for the underlying surveillance activities. The act also reconfirms the establishment of special courts to try terrorism-related crimes. These special courts may hold trials in secret and are allowed to diverge from the traditional presumption of innocence in treatment of defendants.

In the words of one Indian civil liberties group: "POTA fails to offer the most basic safeguards for a fair trial and due process of law. The grim tradition of national security legislation in India has revealed that such laws result in maximum human rights violations, for minimum convictions."[59] Those fears were especially heightened in 2002 and 2003, after communal violence devastated the western state of Gujarat. In the

wake of the Gujarat violence, which shocked much of India and the world, human rights groups charged that the authorities came down squarely on the side of militant Hindus and that one of the means of isolating and detaining Muslims was the Prevention of Terrorism Act.[60]

All along, the great fear of the Indian liberal opposition was that the Prevention of Terrorism Ordinance and Act would be "used for preventive detention of . . . peaceful dissenters [rather] than for tackling terrorism."[61] By 2003, even beyond Gujarat, there were strong indications that those fears were being realized. In February 2003, for example, the *Times of India* reported that hundreds of citizens (including some as young as ten years old and as old as eighty-one) had been arrested in the eastern Indian state of Jharkhand on charges of terrorism, in what one nongovernmental organization called "indiscriminate" application of the Prevention of Terrorism Act against indigenous peoples, minority castes, and the political opposition.[62] A total of thirty-two hundred had been named in the state's "first information reports," the precursor to formal criminal charges.[63] In late 2003, the Indian government moved to amend POTA to centralize more power in order to control inconsistent application at state and local levels, but the amendments were greeted with wide mistrust by activists and intellectuals.[64]

By June 2004, the Indian government had reported hundreds of arrests under the Prevention of Terrorism Act, including 234 official arrests in the eastern state of Jharkhand, among them a twelve-year old and an eighty-one-year old who were both released by the new Congress-led government. Significant numbers of arrests were also reported in Jammu and Kashmir, where terrorist attacks have been frequent, and in Gujarat, New Delhi, and other jurisdictions. Human rights groups continued to charge that government arrest reports

significantly undercounted the actual use of the act in states throughout India.[65]

The situation became considerably more confused in May 2004, when the Indian Congress Party and its allies scored a stunning upset victory over the BJP in national elections. Congress Party leaders had long expressed doubt over both POTA's severity and its implementation. As Congress leaders Sonia Gandhi and Manmohan Singh formed a new government with Singh as prime minister, the Congress-led coalition announced in early June that the Prevention of Terrorism Act would be "'scrapped' even before it expired" in October, and would not be renewed because "the government was already armed with other Acts to effectively deal with terrorists and infiltrators [and] it had become 'obvious' that certain States . . . were 'misusing'" the act.[66] But in several key states, parties supporting the Prevention of Terrorism Act began enacting new statewide legislation that would mirror the act and allow detentions and other POTA provisions to remain in effect at the state level.[67]

In India, as in the United Kingdom and Australia, the struggle against severe antiterrorism measures in 2003 and 2004 had turned from attempting to ameliorate statutes on initial passage (or even oppose them outright) to tracking their implementation, pointing out violations of basic rights, and seeking to broaden coalitions that might eventually attempt to refuse extensions of the laws or try to constrict their scope. In India, the very informal alliance of human rights and public interest law groups, opposition legislators, nongovernmental organizations, and even the national Human Rights Commission had few firm results to show from its opposition given the power of the Indian state and the ruling coalition, but it could claim to be a visible source of alternative perspectives and constant opposition. In the United Kingdom, civil liberties forces and

their allies were arguably stronger, keeping close track of their governments as the governments attempted both to enforce and to expand the antiterrorism laws and policies put into place after September 11.

In India, use of the Prevention of Terrorism Act 2002 continued until its mandated expiration in late 2004, and the constitutionality of the act was upheld by the Indian Supreme Court in December 2003.[68] In 2004, before POTA was set to expire, the Indian government replaced it with the Unlawful Activities Prevention Ordinance 2004, which reestablished certain rights and the presumption of innocence for terrorism suspects but also continued to define terrorism in very broad ways and continued to provide for sanctions against associations and other groups without substantial proof.[69] The Asian Centre for Human Rights reviewed the situation in its 2005 report on human rights in India: "Though about 145 POTA detainees involved in 59 cases were released in June 2004 in Jharkhand because of the lack of evidence, many of the released POTA detainees continued to remain in prison under various offences filed under the Criminal Procedure Code and Indian Penal Code. Many are too poor to pay the bail bond money and have little access to legal aid. However, those police personnel who have knowingly abused POTA have been given complete impunity. . . . About 15 States in India face internal armed conflict and human rights violations in these States remain a serious issue of concern. . . . What is most disconcerting is that the government also justifies impunity for human rights violations by the security forces in these armed conflict situations."[70]